RECEIVED 2/3/04

**Nobody <nobody@uscbgov.ao.dcn>**
02/03/2004 02:06 AM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Submission from http://www.uscourts.gov/rules/submit.html

03-AP-239

Salutation: Mr.
First: Kenneth
MI: J
Last: Schmier
Org: Committee for the Rule of Law
MailingAddress1: 1475 Powell Street Suite 201
MailingAddress2:
City: Emeryville
State: California
ZIP: 94608
EmailAddress: KenSchmier@AOL.com
Phone: 510.652.6086
Fax:
Appellate: Yes
Comments:

Kenneth J. Schmier
1475 Powell Street
Emeryville,
CA 94608
510.652.6086
February 2, 2004

To the
Appellate Rules Committee:

I write to urge adoption of FRAP 32.1. I have previously submitted my thoughts as testimony to the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet both orally and in writing. I will only note here three areas of concern and address a fourth.

First,
Citation is necessary for the democracy to operate. It is the potential for citation that causes members of the democracy to monitor the decisions of the courts. They do so for self-protection. Any issue, no matter how small, may become a source of controversy once the judiciary determines it. The resulting constituencies, which may seem to many insignificant, not only serve to protect instant individual litigants, but advance significant issues to the consideration of appellate courts and executive or legislative branches. No-citation rules sedate the concern of these court watchers because decisions do not become law for all. Worse still, constituencies that might have rallied around an affected individual turn away lest a court's error become citeable.

Second, Citation is the method by which our judiciary, even our entire society, learns as a whole. Any person may write a comment regarding a judicial opinion.

By modern research techniques any comment containing its citation can be discovered if there is a chain of citation. If there is compelling logic in that comment, a court considering the earlier opinion may decide a new case another way. Judges accepting the new logic must criticize the old authority cited to it, underscoring the importance of such a contribution for the future. Over time we can expect our knowledge base to identify right, and clarify why error was wrong. In this way it can truly be said that any person, even long after death, can improve our law, and that our law is improved by the contributions of our entire community. In short, no-citation rules operate as a ban on enlightenment.

Here, I feel compelled to argue that no-citation rules make our national goal of Liberty and Justice for All impossible of attainment. Why? Because such a condition can only happen when all of our people come to so know and love a just law so dearly that none of us are tempted to evade it. That can only happen when we, as a community, have developed and inculcated an infinitely just and granular law. The path to that messianic condition is that law be discussed throughout the community and input regarding improvement of the law be solicited from it. Publication and citation keep that process in motion, and give us hope that we shall, one day, achieve such a high state. To the contrary, no-citation rules sedate concern about the developing law, stifling discussion and input.

Third, many comments have suggested that no citation rules benefit indigent litigants. Can it really be said that a criminal defendant is better off not being able to cite an appellate decision holding that the acts he is charged with committing do not constitute a criminal offense at the arraignment stage? Just how much time is required in most cases to isolate such a case? Is that defendant better off going through trial and trusting that at some point an appellate court might reach the same result in his appeal? Who among those suggesting that no citation rules benefit the indigent would, as the judge, feel comfortable denying a criminal defendant the opportunity to cite exculpatory appellate decisions? Wouldn't they feel that in so doing they were compromising basic American values? Is the situation any different for indigent civil litigants?

Finally, I would like to argue that no-citation rules enter the area of protected free speech such that their validity can only be determined after their purpose, the efficacy of their operation in achieving that purpose, and less burdensome alternatives are evaluated.

According to Judge Kozinski, district, bankruptcy and magistrate judges cannot be trusted to differentiate the respect to be accorded the legal reasoning of published opinions signed by three judges from legal reasoning contained in unpublished opinions signed

by three judges.

Judge Kozinski insists it is necessary to ban mention of the latter class altogether to protect the public from this presumed inability of our judges to evaluate precedent. But the broad sweep of the rule he justifies on this basis is an interference with free speech. It is viewpoint based because it bans the viewpoint of the judiciary, our law. And it is content based because it bans true attribution of reasoning, which defeats the right of litigants to argue for equal treatment. Whether or not Judge Kozinski's purpose in banning citation of unpublished rules should justify such a rule, alternatives achieving the same purpose that are less intrusive on free speech ought to be proved ineffective before such an intrusive rule is maintained.

This committee expressly determined that judges may be trusted with the authority to determine how precedent or persuasive authority is to be applied, and I strongly concur with that placement of trust. Because that trust may be placed in judges, there is at least one alternative less intrusive upon our notion of free speech than a no-citation rule. Rather than marking certain opinions as published or unpublished, or the like, judges could add a legend to the opinions. Nothing in the new rule prohibits the 9th Circuit from marking any class of opinions with a legend truthfully advising readers of the conditions under which it was made.

Were that done, I am quite sure that a heated constituency would rapidly form calling upon Congress for sufficient resources to operate our appellate courts properly.

All of this makes one point. Citation of opinions make certain that citizens carefully monitor the goings on of the Judiciary.

To conclude, even if the appellate judiciary should fail under the unproven load imposed by making all cases citeable, I would rather that consequence than to allow our system to fail because our leaders chose to abandon core values like freedom of speech, equal protection and respect for the individual at issue in this debate. March of Folly, by Barbara Tuchman, chronicles civilizations that destroyed themselves by betraying core values in the name of expediency, and I would rather the United States not join their ranks.

Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on

the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.

FRAP 32.1 is essential to preserve the integrity of not only our judicial system, but our entire system of government.

Sincerely,

Kenneth J. Schmier
Chairman
Committee for the Rule of Law
www.nonpublication.com

submit2: Submit Comment

---

HTTP Referer: http://www.uscourts.gov/rules/submit.html
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1; .NET CLR 1.0.3705)
Remote Host:
Remote Address: 10.213.201.7

---

RECEIVED 2/6/04

Nobody <nobody@uscbgov.ao.dcn>

02/05/2004 08:01 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Submission from http://www.uscourts.gov/rules/submit.html

03-AP-239 Addendum

Salutation: Mr.
First: Kenneth
MI: J.
Last: Schmier
Org:
MailingAddress1: 1475 Powell Street
MailingAddress2:
City: Emeryville
State: California
ZIP: 94608
EmailAddress: KenSchmier@AOL.com
Phone: 510.652.6086
Fax: 510.652.0929
Appellate: Yes
Comments:

Kenneth J. Schmier
1475 Powell Street
Emeryville,
CA
510.652.6086
February 5, 2004

I have written separately comments regarding FRAP 32.1 which I strongly support. I want to offer an idea that might significantly reduce appellate volume. Because volume is a purported rationale for no citation rules, I offer this suggestion to reduce volume for what it may be worth.

Indigent criminal appeals are constantly bemoaned for clogging the appellate courts. Many who describe the process seem to paraphrase the comedian Yacov Smirnoff, essentially saying that underpaid attorneys pretend to write briefs, and the court pretends to read them. There is a potential for enormous harm here that goes beyond error. When a junior law clerk decides no error is presented, it is not she but three appellate judges that sign off on the case. Then the same extraordinary respect for those three signatures that Judge Kozinski decries as unwarranted in the precedential arena attach to the court's ruling. To the public that defendant has had a full fledged appeal, and a very high barrier to further consideration is created. Given the "screening" processes of the appellate court, is it possible that a convict is better off with out such a perfunctory appeal?

Would our appellate courts be benefited and criminal defendants and wrongly incarcerated persons as well, if the government would pay a generous fee to attorneys that obtain successful appellate relief rather than small fees for filing appeals? This would create, in essence, a bounty on error in the

criminal conviction process? Wouldn't that seem appropriate in a free society?
In this way attorneys would first screen each case for appealable error, and it would be their responsibility to explain to prospective clients the absence of appealable error. If the defendant is not satisfied with any evaluation she or her attorney would be free to shop for appellate counsel who understood and believed in the issues to be raised, and whose record indicated sufficient skill to properly present those issues to an appellate court. Attorneys would not bring frivolous appeals that waste courts attention, if for no other reason than to preserve their reputations.

The filing of an appeal would then itself indicate there is a problem worthy of consideration by the justices. Routine appeals would be eliminated because attorneys and not the screening department of the court would deflect them.
To encourage the taking of marginal cases the fee could be substantial. Considering that the government now pays appellant's legal fees, respondent's legal fees, and for the court's time as well, there is much that will be saved if criminal appellate volume is reduced by a theoretically possible 95%. If that were possible the government could theoretically pay the sum of 19 times the normal appellant's fee + 19 times the costs incurred for the state's response + 19 times the average court cost to each successful appellant's attorney and still come out even.

In all of this criminal defendants with real appellate issues would come out better, because the real issues they have to present will be more powerfully presented, and their arguments will be presented to courts not insensitized by an overwhelming volume of largely meaningless appeals.

Kenneth J.
Schmier
510.652.6086

submit2: Submit Comment

---

HTTP Referer: http://www.uscourts.gov/rules/submit.html
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 6.0; AOL 9.0; Windows NT 5.1)
Remote Host:
Remote Address: 10.213.201.7

---