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03-AP-309

February 2, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I have read with great interest the proposed Federal Rule of Appellate Procedure 32.1, as well as the Advisory Committee Note. After much reflection, I feel compelled to express my personal opposition to this Rule. While I am a member of the firm of Jones Day, the opinion expressed herein is personal and does not necessarily reflect the opinion of my firm.

In my opinion, the most compelling reason for rejecting this proposed Rule is to maintain consistency of case law within a circuit. As a practitioner who has been involved with trademark and copyright law on a national basis since 1979, my greatest issue is attempting to reconcile inconsistent opinions and reasoning on the same issue within a particular circuit. While there may be multiple reasons for this phenomenon becoming more pronounced over the last 25 years, not the least of which is the increased case load of the courts, there is no doubt in my mind that it has occurred — and it has not been a positive development.

Form the standpoint of advising clients and developing legal strategies, there can be fewer things more frustrating than having a circuit court with what appears to be conflicting opinions, or in some cases decisions with similar facts that fail to mention relevant precedent in that circuit. Yet in the practice of trademark and unfair competition law, we have several circuits that have precedent on the same issues that are in conflict with no discussion of that precedent in *some* later cases.

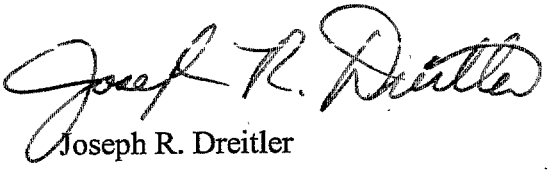
As a practitioner, rather than trying to figure out which precedent a particular panel will adopt, or what should the panel do, it would be much more preferable to have consistent decisional law. Not every case has unique facts or poses difficult legal issues that require a formal opinion. So long as every panel attempts to apply consistent circuit law in reaching its decision, the interests of the parties are served. Obviously, in cases that present unique facts or pose new or novel issues of law, guidance in the form of full legal opinions should be the rule, or at least the aspirational goal. It is my hope that by limiting the number of full opinions produced for citation, that circuit courts will have the time and resources to give the parties and litigants

clear and consistent guidance on the law in that circuit when an opinion is warranted, and establish new law (or change existing law) when so required.

The Advisory Committee Note indicates that conflicting rules create a hardship for those who practice in more than one circuit. This claim borders on the ridiculous. For example, as one who practices trademark law nationally, I am keenly aware that each circuit has its own standards and tests for evaluating and determining a likelihood of confusion in trademark (Lanham Act) cases. Anyone who practices in more than one circuit needs to be aware of the particular circuit's case law and tests in each case they are handling. There is nothing terribly difficult or in the least bit unfair about practicing law in multiple circuits with such differences. I do not accept the suggestion that somehow different circuit rules about citation of authorities will confuse lawyers who are lucky enough to practice in multiple circuits.

I hope that you will take my comments in the spirit with which they are made. We have long since passed the point where there will be adequate judges and staff to engage in the research and scholarship required to produce consistent and meaningful guidance in the form of citable opinions for each case brought to a circuit court. Rather than force courts to produce precedent that is not helpful, and in some cases not consistent with other prior panel decisions, the pragmatic approach is, in my opinion, to encourage the courts to write opinions when doing so will benefit the bar and provide guidance to future litigants. Thank you for your time and consideration.

Sincerely,



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