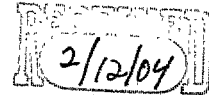


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February 12, 2004

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: Opposition to Proposed Fed. R. App. P. 32.1

To the Committee:

This letter is to encourage the Committee to reject the proposed new Rule to the Federal Rules of Appellate Procedure, Rule 32.1. This proposed rule will prohibit the various federal courts of appeals from fashioning local rules that restrict citation to unpublished opinions.

I am an appellate specialist for the Federal Public Defender for the District of Nevada. I have litigated at least forty direct appeals to the United States Court of Appeals for the Ninth Circuit.

As an experienced appellate attorney, I view the proposed Rule 32.1 with alarm. Review of the Proposed Rule 32.1 Committee Note did little to diminish this trepidation. The Note is well reasoned and persuasive from an academic standpoint. What the Note lacks is the perspective of real world practitioners.

The Committee justifies the proposed rule by averring its passage will render appellate practice more efficient. Nothing could be farther from the truth. It is relatively easy to review and follow a circuit's rule for citation to unpublished authority proscriptions.¹ It will be far more burdensome to wade through thousands of often poorly reasoned and internally inconsistent unpublished decisions.

¹ Moreover, almost all appellate practitioners write appeals to a very limited, discrete number of jurisdictions.

The financial costs of the Rule will be significant. There is no question in my mind that the Rule will increase the hours employed in writing and litigating federal criminal appeals. This will result in increased costs to the Federal Defender system, the United States Attorneys Office, and all other agencies that litigate in federal court. Of particular concern will be the impact of the Rule on Criminal Justice Act (CJA) panel attorneys. Many of these attorneys are solo practitioners that cannot absorb the increased electronic database costs that will inevitably follow passage of the proposed rule.² This development would be particularly unwelcome in the District of Nevada which has had considerable difficulty in attracting and retaining talented appellate attorneys for the local CJA panel.

The Rule will increase appellate practice costs without enhancing the quality of decisions. Contrary to the Commentary Note's predictions, the administration of justice will not be enhanced by the Rule. Even a cursory examination of Ninth Circuit unpublished memoranda decisions reveals the opinions are not a reliable source of "insight and information."

Citation to these opinions will likely mislead federal district courts that may feel compelled to follow the unpublished pronouncements, no matter how terse or undeveloped, of appellate courts. Lawyers will spend countless hours attempting to distinguish unpublished opinions that are not factually developed and often legally inaccurate.

Appellate courts will likely respond to passage of the Rule by no longer providing any reasoning for an appeal's disposition. This will impede attempts to seek rehearing or Supreme Court review. Postcard denials will be discouraging to litigants and demoralize practitioners.³ This will hardly render the process more "transparent."

I would urge the Committee to reject Proposed Rule 32.1. It will burden appellate practitioners. It will not further the administration of justice. It will increase the federal government's litigation costs. The Federal Courts of Appeals should be able to continue fashioning circuit rules for citation to unpublished authority that best serve the needs of individual courts.

Sincerely,



JASON F. CARR
Assistant Federal Public Defender

² The Committee Note commentary does not seem to appreciate that services like Westlaw and Lexis are rather expensive.

³ This will be especially true for criminal defendants. In the criminal law arena, the appearance of justice and fair process are often more important than the eventual outcome. An individual sentenced to a lengthy period of incarceration is entitled to more process and explanation than a one line disposition noting only that the defendant's conviction and sentence is "affirmed."