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Via U. S. Mail and Fax

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

Dear Mr. McCabe:

It is rare that I inject my opinions into a public issue. Proposed Rule 32.1 of the Federal Rules of Appellate Procedure, however, is of sufficient concern to me that I am compelled to express my objections to it.[1]

[1] Allow me to give you some of my background. I was an associate and partner in litigation at the law firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin from 1974-980. During my years in private practice, at least one-half of my work was appellate practice with the late Herman Selvin, considered one of the great appellate lawyers in California. One of the first lessons I learned in private practice when a matter I was handling was in a court other than the Ninth Circuit, was to read the local rules. It was not a burden to read or follow them. After leaving private practice, I worked at CBS as a lawyer and business affairs executive through early 1985. Part of my responsibilities during most of that period was to supervise outside counsel in the handling of litigation. Since 1985, I have been at Warner Bros., first as Vice President & Deputy General Counsel, and then (as now) Senior Vice President & Deputy General Counsel. During about one-half of my tenure at the company, I was directly in charge of supervising outside litigation counsel. Now, I am actively involved in supervising a few litigation matters each year, overseeing certain other litigation, and negotiating fees with virtually all of the outside counsel we retain around the world. From 2001-2003, I also was a Central District Lawyer Representative to the Ninth Circuit Court of Appeals Judicial Conference. During that time, I solely arranged a seminar for judges in the Central District on new technological developments in copyright, a program praised by judges as one of the best seminars in years. Finally, I have been involved on a pro bono basis with the Institute for the Study and Development of Legal Systems ("ISDLS"), an entity that has brought me into regular contact with judges in the Central District and Ninth Circuit, as well as state judges in California. ISDLS works with federal and state judges to assist foreign judicial systems in developing efficient methods of handling cases, and cutting the backlog in their legal systems.

The costs and burdens of litigation have increased substantially in the last few years, making it more and more difficult for companies such as Warner Bros. – as well as litigants generally – to resolve disputes in an efficient, expeditious and cost-effective manner. We do not subscribe to the notion of wearing down opponents by outspending them. In our opinion, such tactics are counter-productive, unethical, deleterious to the legal system and injurious to the reputation of companies. We often feel that the litigation process leaves no winners except outside counsel, and is often not in the best interest of the parties themselves.

Proposed Rule 32.1 is another step in the wrong direction. It would require the outside counsel we retain in litigation in the Ninth Circuit (where most of our federal court litigation occurs) to research myriad unpublished opinions, attempting to make clarity of decisions most often not written either with a full explanation of the facts, or the kind of reasoning that permits companies to govern their conduct without the necessity of litigation.

Moreover, Proposed Rule 32.1 would only add to the already significant burdens the legal system currently places on our judiciary. Over the last few years, I have spoken with a number of United States District and Ninth Circuit judge about their very substantial workloads; the difficulty they have in keeping up with legal developments in a wide variety of topics, especially science and technology; the significant amount of time they must devote to criminal matters; and, the need to expand programs encouraging and assisting parties to settle disputes. Proposed Rule 32.1 does not address any of these critical concerns. Rather, it enriches practitioners while creating additional work for judges by forcing them to spend more time on each individual opinion (knowing that it could be cited, as though published) rather than being able to delegate much of this work to their staff members

If Proposed Rule 32.1 were adopted, tens of thousands of unpublished appellate court opinions would become citable in the Ninth Circuit. While lawyers scour this enormous body of unpublished opinions, searching for nuggets upon which to rely, companies like Warner Bros. will be forced to evaluate many aspects of our businesses based on those same sparse opinions in order to stay out of court. Conflict and confusion will become rampant, existing cases will require much more time and money to resolve, and a torrent of additional litigation will be unleashed.

Unpublished opinions are written for, and should be used exclusively by, the parties. They do not purport to be the product of exhaustive judicial analysis, and they should not be relied upon as such. An unpublished decision is often nothing more than a succinct statement of facts, a principle of law and a decision. If a court determines that an opinion should not be published because it involves a routine matter and/or does not add to the body of existing case law, that decision should not be abrogated.

Proposed Rule 32.1 might benefit a few practitioners. But, that should not be enough to justify the added burden on the courts, as well as the harm it will create for companies and individuals attempting to govern their legal matters – including those NOT involving litigation -- in a well-reasoned manner.

Thank you for letting me participate in this process.

Sincerely,

Sheldon W. Presser