Los Angeles County
Bar Association

03-AP-347

RECEIVED 2/12/04

Litigation Section

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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: Proposed FRAP 32.1

Dear Mr. McCabe:

The Litigation Section of the Los Angeles County Bar Association has studied and debated the Proposed Amendments. We write to express our views on the proposed amendment to FRAP 32.1, which would permit citation to unpublished opinions. We oppose this amendment because we think it is impractical, costly, and ill-considered.

First, the proposed rule is impractical. It is common knowledge that the Courts of Appeals handle an overwhelming caseload and publish only a small percent of their opinions. The reason for this is simple: cases that present novel or difficult questions of law require careful exposition and painstaking effort to ensure that their contribution to the existing body of law is as clear and comprehensive as possible. Only by treating run of the mill cases as unpublished memorandum dispositions intended mainly for consumption by the affected parties can federal judges find the time to focus on the truly groundbreaking cases.

In a perfect world, we would have enough judges to devote the time and care needed to make every opinion worthy of publication. But issues that have plagued the United States Congress have delayed the appointment of nominees and the creation of much needed additional judicial positions. If all cases become citable, therefore, cases that are now treated as memorandum dispositions will either take time away from the groundbreaking cases, or, more likely, be disposed of with one word -- "affirmed" or "reversed" -- hardly a satisfactory solution for the affected parties or for anyone wishing to call an en banc court's attention to frequently recurring issues.

Second, the proposed rule will impose overwhelming costs on public and private litigants. Whether unpublished opinions are given precedential or merely persuasive value, lawyers will have to wade through the sea of unpublished

opinions relevant to their clients' cases to be sure they have "covered all the bases" and prepare for potential arguments based on loose language taken from memorandum dispositions. The hours lawyers will have to spend combing through these decisions will raise the already high price of legal representation, and put litigants with limited budgets at a decided disadvantage. And to what end? Lawyers and their clients hardly stand to gain from time spent reading and analyzing opinions that were never meant to be cited, and that were thus not crafted to ensure precision for future cases.

Finally, the reasons put forth by proponents of the rule do not outweigh the costs of implementing it. The Advisory Committee note provides only one reason for a uniform rule: namely, that "conflicting rules [regarding citation of unpublished opinions] have created a hardship for practitioners, especially those who practice in more than one circuit." Advisory Committee Note at 34. Many of us in the Litigation Section have national practices and practice in many circuits. We do not find it difficult to keep track of or follow different local rules regarding citability. Indeed, these are among the easiest to sort out, because both Westlaw and Lexis print the local rule at the top of the case.

As for free speech, an issue often raised by proponents of the rule change, nothing prevents lawyers from borrowing ideas or even copying sentences verbatim from unpublished opinions. We are merely proscribed from citing the judicial source of these words to cloak them with an aura of authority that their authors never intended to give them.

In sum, unpublished decisions are necessary to the proper functioning of the bench at this time. Making all opinions citable would not fix the problems facing our justice system and would most assuredly add to them.

Very Truly Yours,

Stephen R. English,
Chair

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