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Via Federal Express

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

Re: *Proposed Rule of Appellate Procedure 32.1*

Dear Mr. McCabe:

I write to express my strong opposition to proposed Federal Rule of Appellate Procedure 32.1. I have been an appellate practitioner for more than 30 years, and I presently pursue an active state and federal appellate practice. I am a Fellow of the American Academy of Appellate Lawyers and a member and former President of the California Academy of Appellate Lawyers; I have practiced both civil and criminal appellate law, the latter both as a prosecutor and as a public defender; I have taught a law school course in appellate practice and have written and lectured extensively about appellate issues; I worked as a staff attorney at an appellate court and am a founding partner of one of the two largest appellate law firms in California. I have been counsel of record in hundreds of appeals and therefore the recipient of hundreds of opinions, both published and unpublished. As senior staff attorney for former Presiding Justice Otto Kaus of the California Court of Appeal, I was intimately involved in the preparation of numerous published and unpublished opinions.

My lifelong experience with the appellate process convinces me that the reform embodied in proposed Federal Rule of Appellate Procedure 32.1 would be a grave mistake. Permitting the citation of unpublished opinions—even with the understanding that such opinions would not necessarily be binding precedent—would be wasteful and, potentially, downright dangerous. The advantages identified by proponents of this reform would be illusory.

My concerns stem from the unique nature of unpublished opinions. Unpublished opinions perform a sharply circumscribed role in the appellate process. In as efficient a manner as possible, they inform the parties—who are already familiar with the facts and legal arguments in the case—of the appellate court's decision in the appeal. Form follows function. In the typical unpublished opinion, the recitation of facts is sketchy, the law is set forth in summary fashion, and legal analysis is abbreviated. In other words, because the unpublished opinion is meant for an audience already familiar with the case, it is typically drawn with the boldest strokes, omitting all detail, subtlety and nuance.

Such skeletal opinions perform no useful function as even nonbinding authority. If, as is usually true, the opinion applies settled authority to unremarkable facts, citation of the opinion adds nothing of substance to the legal discussion. If, however, a clever lawyer is able to demonstrate that the unpublished opinion adds some new wrinkle to the law, then the opinion's omission of a full discussion of the facts and law can be positively misleading. In short, citation of unpublished opinions is at best useless and at worst could lead to real mischief.

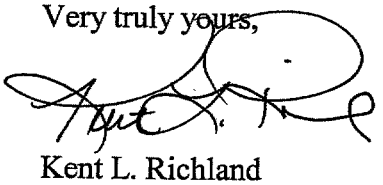
Moreover, the private and institutional costs involved in the proposed new regime would be significant. Appellate counsel would certainly feel obliged to expand his or her normal research of published opinions to include the far greater universe of unpublished cases. And, of course, judges and their staff would have to spend time reading and analyzing these cases. It is hard to imagine a less productive expenditure of already scarce resources.

Proponents of the new rule invoke the fundamental principle of freedom of speech and point to the apparent irony of a system that permits the citation of aphorisms from Lewis Carroll but prohibits informing an appellate court of decisions that it itself has made. But literary quotations don't pretend to have a significance beyond the force of their own eloquence, while the significance of the citation of an earlier opinion is precisely that it *is* an earlier opinion. The problem is that, given the characteristically sparse nature of such opinions, the mere fact that the issue was decided before is not very meaningful.

While the free speech argument has some emotional appeal, it is way off base. There are plenty of things that, for policy reasons, are not permitted to be said in an opening brief. For example, although arguably potentially significant, appellate briefs generally are not permitted to advert to evidence that was not offered at trial or to comment on the demeanor of witnesses. As with these examples, the role played by unpublished opinions in the legal scheme makes them inappropriate for citation. They simply don't provide any information that would be helpful to resolution of the appeal.

Permitting the citation of unpublished opinions would place a significant increased burden and expense upon the federal courts and the parties with no concomitant return. For this reason, I strongly oppose proposed Rule 32.1.

Very truly yours,



Kent L. Richland

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