THE STATE BAR OF CALIFORNIA

RECEIVED 2/14/04

PAST PRESIDENT
ANDREW J. GUILFORD

650 TOWN CENTER DRIVE, 4th FLOOR, COSTA MESA, CA 92626-1925 TEL: (714) 513-5100 FAX: (714) 513-5130
E-mail: aguilford@smrh.com

February 12, 2004

03-AP-387

VIA FACSIMILE (202) 502-1755 AND FIRST CLASS MAIL

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 write to express my strongest opposition to Proposed Federal Rule of Appellate Procedure 32.1.

Throughout most of my career, I have been very involved in working to improve our system of justice. Much of that work has occurred through the State Bar of California which has almost 200,000 members, and which I recently served as President. I am a past president of the Orange County Bar Association. The Judicial Council of California, which administers California courts, recognized my contributions to the justice system by awarding me its Bernard E. Witkin Amicus Curiae Award in 2001.

I am now the President of the Public Law Center, which is the primary provider of pro bono legal services to the indigent of Orange County. This makes me acutely aware of the problems of access to justice, and the negative effects of FRAP 32.1 on fairness and access described below.

My career as a litigator and counselor for over 25 years gives me an understanding of the real-life challenges facing lawyers these days. My area of emphasis in legal malpractice defense provides me with dramatic examples of the consequences to lawyers who fall short of our standards, or are accused of falling short, and the unfair harm FRAP 32.1 would cause to lawyers facing malpractice claims, as described below. Thus, I write as an individual.

FRAP 32.1 has many faults, most of them often noted and which include the following:

- Increasing the burden on appellate judges by requiring that *every* opinion meet the high standards necessary for opinions that become part of our law.
- Possibly forcing cautious appellate judges to provide minimal information in their previously uncitable opinions, thus seeking to avoid improper precedential value.
- Increasing the burden on practitioners researching the law, thus increasing malpractice exposure.
- Making the law less certain by flooding practitioners with cases, many of which will not be properly reviewed by judges.
- Denying the possibility of *regional* variations in the rules responding to *regional* concerns.

Behind some of these bullet points are subtler issues, not often noted, going to core principles of our legal system. I believe we have too much law. In California, a very active legislature has given us almost unending volumes of statutory law bursting the bookshelves of most practitioners. These are then supplemented by California's extensive regulatory law. In the same way, a very active United States Congress has bestowed the voluminous United States Code upon us, likewise supplemented by the Code of Federal Regulations.

Our common law system then layers on top of all of this more law, found in the innumerable volumes of case law. This case law, in moderation, provides the great benefit of defining and refining our law. But the benefit becomes an unbearable burden when opinions spew forth excessively. Case law is somewhat like water, which is a necessary part of sustaining life when we drink it in moderation, but which becomes unusable and destructive when forced to drink it from a fire hose, particularly when its quality is not tested. Rules prohibiting citation are a reasonable effort to limit the law that comes streaming at us, and to assure the quality of the law we receive.

The burden of seeking unpublished opinions that are citable and thus precedential goes beyond merely the pages of an opinion. Each page of opinion spawns many multiple extra pages of summaries and digests in a vast paper chase. Digital information has reduced the number of hard copies for some, but not all, leaving the fear that the world will end not with a bang, nor a whimper, but with the soft flutter of additional case law floating down with summaries and digests to crush us. The wealthy may use electronics and other methods to

escape this plight. The poor will simply be buried. Thus, the proposal raises serious challenges to core principles of fairness and access to justice.

FRAP 32.1 puts another core principle at risk. Most of the discussion concerning unpublished opinions falsely focuses only on lawyers who go to court. In fact the biggest negative effect may be upon practitioners who simply seek to advise citizens of our democracy about the law applicable to them. The importance of this function is obvious. The danger of excessive and unclear law interfering with the counseling function threatens core democratic ideals. The law must be clear and predictable.

As often noted, FRAP 32.1 threatens the quality of our case law by giving precedential value to opinions not thoroughly reviewed and refined by their authors. FRAP 32.1 confuses the *law-making* function of appellate courts with the *error-correcting* function. In all events, we should be especially concerned that many judges who make the law say the law they make under FRAP 32.1 will be suspect!

And the confusion of FRAP 32.1 would go even deeper because of the *uncertain* nature of the precedential value of cases cited. Proponents of FRAP 32.1 find comfort in the fact that FRAP 32.1 leaves open the question of how strong a precedent will be set by an unpublished opinion. Rather than finding comfort here, I find only unsettling disruption because the uncertain nature of the precedential value *will leave the law more uncertain*. Lawyers will have no choice but to search for unpublished cases, review them, and cite then. The failure to do so would raise malpractice exposure. And we lawyers in the trenches will then be left to analyze and opine about whether a published opinion might be trumped by three or nine or five unpublished opinions. Thus, there would be more uncertainty, more troubling malpractice exposure, and more unfairness.

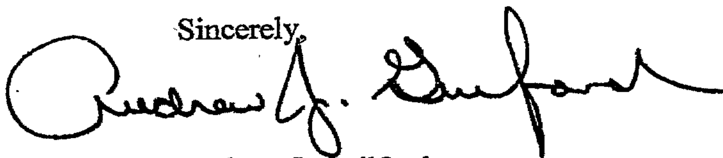
Still another reason why more is not best when it comes to making clear case law is that higher courts become swamped with such case law, and thus unable to properly perform their function of assuring quality and uniformity. I am sure the United States Supreme Court would not like a vast increase in *citable* opinions spewing forth from the Ninth Circuit potentially awaiting Supreme Court review. I know the California Supreme Court has solved this dilemma through the California rule prohibiting the citation of unpublished decisions found at California Rule of Court 977.

As a practitioner in California, I am convinced that California has been particularly fecund in producing law of all kinds. Like an overabundance of grapes on the vine, our California law sits there in excess, threatening to intoxicate us into a stupor. Our vast number of California Court of Appeal decisions seem no longer to clarify the law, but to cloud it with too many nuances, distinctions, and variations. This partly explains why California state courts have a firm rule forbidding the citation of unpublished opinions. (Cal. Rule Ct. 977.) This rule works well in California, and has become part of our regional legal culture.

Which raises a final objections to proposed FRAP 32.1: It would disrupt regional legal cultures which work well, and it would tear asunder uniformity between state and federal practice. Our present system in California, which aligns state and federal practice, is not broken, and does not need to be fixed. It responds to our need to limit case law, a need particularly acute in California. This need will probably be reflected in the increased level of opposition to FRAP 32.1 from judges and lawyers in the Ninth Circuit. We should be heard. We only ask for the freedom to define our own regional rules that are particularly adapted to our regional situation and concerns, and that we preserve core principles.

I urge the rejection of FRAP 32.1.

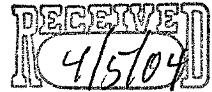
Sincerely,



Andrew J. Guilford

W02-OC:NC7\41346871.1

03-AP-387 Addendum



SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

4th Floor | 650 Town Center Drive | Costa Mesa, CA 92626-1993
714-513-5100 *office* | 714-513-5130 *fax* | ***www.sheppardmullin.com***

Writer's Direct Line: 714-424-2827
aguilford@sheppardmullin.com

March 24, 2004

VIA FACSIMILE (202) 502-1755 AND FIRST CLASS MAIL

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: FRAP 32.1 Follow-up

Dear Mr. McCabe:

Enclosed is a letter I have written to a newspaper about the enclosed column by Justice William Rylaarsdam concerning proposed FRAP 32.1.

Both Justice Rylaarsdeam and I have expressed our opposition to proposed FRAP 32.1.

Sincerely,

Andrew J. Guilford

W02-OC:NC7\41353256.1
cc: Hon. William Rylaarsdam

4th Floor | 650 Town Center Drive | Costa Mesa, CA 92626-1993
714-513-5100 *office* | 714-513-5130 *fax* | ***www.sheppardmullin.com***

Andrew J. Guilford
Direct Line: (714)-424-2827
Facsimile: (714) 513-5130
aguilford@sheppardmullin.com

March 23, 2004

Editor
Los Angeles Daily Journal
Post Office Box 54026
Los Angeles, CA 90054

Re: Stephen Barnett Article on Citing Unpublished Opinions

Dear Editor:

Professor Stephen Barnett provides an academic's response to the views of Justice William Rylaarsdam against permitting the citation of unpublished opinions. The professor makes unfair attacks on Justice Rylaarsdam and other jurists who face the *real world* challenge of creating our common law. Here, I give the perspective of a practicing attorney who faces the *real world* challenge of advising clients about what the law is, and presenting the law to courts.

Professors have the luxury of toiling in the vineyards of the law oblivious to the constant ticking of the billable hour clock. For professors, more case law must always be better than less case law. For me, a practicing lawyer, our California law sometimes seems like an over abundance of grapes on the vine, sitting there in excess, threatening to intoxicate us into a stupor. The sheer volume of statutory, regulatory, and case law in California sometimes seems no longer to clarify the law, but rather to cloud it with too many nuances, distinctions, and variations. Professors make their living exploring such nuances. Citizens of our democracy need quick answers at low cost. And in the real world, there is the risk of malpractice when an attorney in the trenches misses a nuanced legal point buried in the vast array of cases to be harvested.

The difference between an academic's view and the real world view is revealed in the points Professor Barnett attempts to make. Professor Barnett asks "should an attorney be prohibited from telling a court how another court has ruled in a prior case involving similar facts?" Absolutely! I hope Professor Barnett would agree that we can properly prohibit the citation of *trial court* decisions. Surely in our democracy, we should have the ability to define our law by determining which decisions are citable and therefore precedential in our common law.

Professor Barnett unfairly suggests that cases are not citable so that "judges wield judicial power largely free of accountability." This is insulting and absurd. Unpublished opinions are available for review by the public, *and by professors*. Rather than defame our judiciary with unfounded charges, Professor Barnett should spend his time scouring unpublished decisions to find support

for his claim of "untrammeled power free of accountability." Surely such accountability could be achieved with a law review article by Professor Barnett himself criticizing the holdings of any unpublished opinion he chooses to review! No prohibition prevents that accountability.

Professor Barnett finds comfort in the fact that the vast array of opinions he would make citable would have an unknown precedential value short of being controlling. Again, a professor may find comfort in that. I find more obscurity and uncertainty. Should I cite unpublished opinions to Justice Rylaarsdam, who would have every right to ignore the citations?

Professor Barnett scoffs at Justice Rylaarsdam's fear of "a tenfold increase in the database." The professor's solution is computers. As President of the Public Law Center and as a member of the Self-Represented Litigants Task Force, I know that in the *real world*, computers are not always available to citizens of our democracy. Only an academic could think that access to justice comes to all via access to computers.

The burden of researching unpublished opinions that are citable and thus precedential goes beyond merely the pages of an opinion. Each page of an opinion spawns many multiple extra pages of summaries and digests in a vast paper chase. Perhaps the world will end not with a bang, nor a whimper, but with the soft flutter of additional case law floating down with summaries and digests to crush us. The wealthy may use electronics to escape this plight. The poor will simply be buried.

Professor Barnett argues that since his proposal seems to work in other jurisdictions, California should fall in line. But California has an abundance of law which provides a unique justification for limiting the sources of our law. Case law is somewhat like water, which is necessary part of sustaining life when we drink it in moderation, but which becomes unusable and destructive when forced to drink it from a fire hose. In the *real world*, we need rules prohibiting citation as a reasonable effort to limit the law that comes streaming at us.

Sincerely,

Andrew J. Guilford

(I previously served as President of the State Bar of California)

W02-OC:NC7\41352948.1

cc: Pamela Peery, Forum Editor
The Los Angeles Daily Journal
915 E. First Street
Los Angeles, CA 90012

Daily Journal Print Publications
http://www.dailyjournal.com
© 2004 The Daily Journal Corporation. All rights reserved.

• select Print from the File menu above

Daily Journal - Mar 3, 2004

Lawmakers Must Resist Movement to Cite Unpublished Opinions

Forum Column

By William Rylaarsdam

California Rules of Court Rule 977 prohibits the citation of the "unpublished" opinions of our appellate courts. A similar rule applies in the 9th U.S. Circuit Court of Appeals and its district courts. The controversy concerning these rules continues. Each year for the last several years, bills have been introduced in the Legislature requiring courts to permit citation of so-called unpublished opinions. SB1655 (Kuehl), introduced two weeks ago, is to this effect; a similar bill passed the Legislature in 2002 but was vetoed by then-Gov. Gray Davis.

Lawsuits have been filed contending litigants have a constitutional right to cite "unpublished" opinions. Requests to change the California Rules of Court to allow such citations persist. A proposal to adopt Federal Rule of Civil Procedure, Rule 32.1, which would permit citation of all opinions in the federal courts, is currently under consideration by the Committee on Rules of Practice and Procedure of the U.S. Courts.

These attempts to change the rules to remove the distinction between published and unpublished opinions are ill-founded and, if successful, will result in much mischief in the state's judicial system.

Most appellate lawyers with whom I have discussed the issue agree that it would be a deplorable idea to permit all opinions to be cited as precedent. Yet when I raised the question with trial lawyers, I found that many of them disagree. This disagreement is frequently based on isolated instances where lawyers have persuaded themselves that, if only they would have been permitted to cite a particular unpublished opinion, they would have won their particular motion or other petition.

First a comment about the nomenclature. I use the usual term "unpublished" but suggest it is inappropriate. This unfortunate designation has enabled some opponents of the prohibition on citability to label these opinions as "secret opinions."

The debate is not whether to publish or not to publish certain opinions. All opinions are now readily available on the Internet. I do not believe anyone proposes that all appellate opinions henceforth be published in the bound volumes of the official and unofficial reporters; for one thing, the cost of maintaining libraries 10 times as large as the present ones would probably destroy the markets for these books.

The debate should, therefore, be characterized as relating to the "citability" rather than the "publication" of these opinions.

I have been an associate justice of the California Court of Appeal for more than eight years. In recent years, my chamber has prepared approximately 170 opinions per year and, in addition, I sign off on approximately double that number of opinions written in my colleagues' chambers.

We have great difficulty in keeping up with the number of appeals filed in our division, as do other divisions and districts of our appellate courts. If each of our cases required an opinion meeting the standards for published opinions, we would not come close to being able to keep current on our appeals.

The state's constitution requires full written opinions in all appellate cases whether published or not.

Our state's approximately 100 appellate justices, constantly struggling with ever increasing caseloads, issue about 15,000 opinions each year. Approximately 10 percent of these opinions are published in the official reporter and may thus be cited as precedent. This may be compared with the state Supreme Court, which must publish all its opinions, and does so at the rate of somewhere between 100 and 200 opinions per year.

If all opinions generated by our appellate courts were to be treated as worthy of equal precedential value, at least the following adverse effects would result:

• Because of concern about phrases in appellate opinions being taken out of context when applied to other facts in later litigation, great care is required in editing "published" opinions.

Thus a publication requirement would add to an already-oppressive workload for our appellate

judiciary and to further delays for impatient litigants. Although all cases are worthy of full consideration, where the sole audience of the opinion is the parties and their lawyers, substantially less time is required to fine-tune all of the language of the opinion.

• An opinion addressed solely to the parties and their lawyers need not iterate the facts and issues to the same extent as a published opinion that is addressed to future litigants.

Again, time required to be sure that readers, otherwise unfamiliar with the case, gain the necessary understanding of the facts and the issues would adversely affect the productivity of our appellate courts.

• Citability of unpublished opinions would result in a tenfold increase in the database to be searched by the conscientious California legal researcher.

As a result, the time needed for legal research and the cost of appeals, already unreasonably high, would greatly increase. This would be true both for the appellate court itself and for litigants.

As to the latter, this increased cost might well cause an economic bar to the pursuit of or resistance to appeals, resulting in effectively blocking some litigants' access to our appellate courts.

• For the same reasons, the litigants and the judges in our trial courts would also face a greatly enlarged database to be researched, resulting in greater costs and lesser access to the civil justice system and greater costs to an already severely overburdened criminal justice system.

• A rule permitting all cases to be cited confuses the error-correcting function of our appellate courts with their law-making function.

Most opinions affirm the trial court on the basis of existing legal principles, whether statutory or common law, relied on by the trial court. In the far smaller number of cases where the trial court is reversed or the judgment is revised, in most instances, the result is again compelled by existing legal principles.

California has adequate procedures to permit parties and other interested people and entities to address the issue of publication. Requests to publish unpublished opinions or depublish published opinions are frequently addressed to our appellate courts and to our Supreme Court, providing another screening mechanism to ensure that opinions worthy of publication are, in fact, published.

It is true that some decisions to publish or not to publish have been controversial. The system is not perfect. But to attempt to cure this imperfection by removing the distinction between the two types of cases would be analogous to removing all traffic signals to solve the problem of drivers who run the red light.

William F. Rylaarsdam, an associate justice in Division 3 of the 4th District Court of Appeal, has written more than 100 published opinions and dozens of law articles.