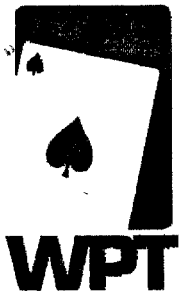

03-AP-440

February 16, 2004

Sent by Fax – Original by US Mail

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am an attorney in Southern California who previously worked in the litigation department at Sonnenschein, Nath & Rosenthal and now I represent an independent television production company in Los Angeles. I am writing because I am deeply concerned about the proposed Fed. R. App. P. 32.1 that would bar restrictions on the citation of unpublished judicial dispositions. The proposed rule, if passed, would effectively preempt a Ninth Circuit Rule prohibiting the citation of unpublished decisions throughout the Circuit. Having worked under the Ninth Circuit restrictions, I believe these restrictions have had a positive effect on making case law more accessible to disadvantaged litigants. Additionally, I can attest to the effectiveness of these restrictions in the promotion perspicuous case law. Consequently, I am convinced that Fed. R. App. P 32.1 could have only deleterious results.

Fed. R. App. P 32.1 would extinguish the popular and well-tailored Ninth Circuit Rule 36-3 prohibiting the citation of dispositions that the Circuit has deemed unworthy of publication. In effect, the rule filters out inconsistencies, ambiguities and anomalies that might otherwise impede the proper evaluation of legal precedent. Without such a narrowing procedure, litigants would be forced to spend valuable resources evaluating

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and responding to cases that, in many instances, have no intrinsic value. This has particularly harmful effect on small concerns such as the production I represent. Like other similarly situated independent productions, we do not have the advantage of large legal teams with the time to review and analyze endless cases. Indeed, as the sole in-house attorney I often must triage and search out merely those cases I know have the Circuit's stamp of approval. In other words, we neither have the time or the money to be sidetracked by confusing case law and misguided reasoning. To widen the scope of citable case law would not only present a burden, it would prove a significant disadvantage should we need to litigate against a large studio or conglomerate. As many independent production companies will confess, the cost of one protracted and wasteful appeal could be fatal to the company's bottom line.

Furthermore, when it comes to the protection of intellectual property, the value of receiving access to the courts and timely decisions on matters of law cannot be overstated. A good part of my job is responding to infringements upon proprietary trademarks, patents and copyrights. Timely access to the courts and appeals where necessary is critical in a competitive creative marketplace. However, Fed. R. App. P. 32.1 would almost certainly congest the court dockets more than they currently are. Dilution of judicial resources in order to accommodate the thousands of cases that would find their way into briefs and motions seems particularly inane especially after a court has deemed a case unfit for publication. Likewise, additional wasteful hours will inevitably be spent by lawyers' reading and responding to tangential, poorly drafted case law.

Finally, I am also conscious of the perverse incentive Fed. R. App. P. 32.1 would create. While the proposed rule speaks strictly to the citation of an unpublished decision and does not purport to define its value as precedent, in reality, lawyers cite case law precisely for the precedent value. Newspapers articles, law reviews, and advertisements are simply not analogous to unpublished opinions because there is no presumption that these items speak for the court. Certainly, there are times when any desperate lawyer could benefit from the citation of a case that appears to rule in his favor. However, the results of legal fishing expeditions are likely to just result in additional confusion and waste.

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Admittedly, other circuits may be better positioned for rules allowing citation of all or some unpublished decisions. However, the attorneys I have spoken to recognize that that this model simply does not comport the realities of our Circuit. Additionally, the suggestion that the inconsistency of the circuits create hardship lacks veracity. As attorneys we are used to operating under different rules for both State and Federal court. The inconsistency of the Circuits is neither a unique or overwhelming burden. On the other hand, the negative effects of Fed. R. App. P. 32.1 could be immeasurable.

In summary, Fed. R. App. P. 32.1 will at best promote confusion and inconsistency and at worst result in costly delays and an uneven playing field among litigants. I truly feel that history has demonstrated that the decision to allow or disallow citation of unpublished decisions is best left in the hands of each particular Circuit. Consequently, I urge you not to "fix" a system that is not broken.

Thank you for the opportunity to comment on this matter. If I may be of any assistance or may be helpful in clarifying my position, please do not hesitate to contact me.

Very truly yours,

Adam J. Pliska
Director of Business & Legal Affairs

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