03-AP-356 2/13/04

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Our File Number: 000F-000013

February 13, 2004

BY FACSIMILE AND U.S. MAIL
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Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Washington Circle, N.E.
Washington, D.C. 20544

Re: Comment re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Members of the Committee:

I am against the adoption of the Proposed Rule on several grounds. I am a partner in a large metropolitan law firm, but also have represented clients in legal aid programs and pro bono matters for the 26 years of my trial and appellate practice. I was also a federal court clerk who wrote the drafts of many decisions, a few now preserved in law books.

My concerns expressed here are those of an active litigation practitioner. If all opinions are required to be published, the guidance that I have to rely upon in my work becomes enormous. And I will have no choice in how I must react. If the guidance is out there somewhere, my duty (and my malpractice insurer) urge me on to spend every effort (and every hour) that I possibly can to find some authority upon which to base any old argument that is conceivably in my client's best interest.

This means that we will be required to cull through countless numbers of cases that, by virtue of the facts and law involved, were matters where the only important objective of the opinion was to resolve the dispute among the parties. The amount of work, recriminations and nit picking amongst masses of opinions will increase enormously.

In an analogous situation, I am always happier as a trial lawyer when a judge places time limits upon each side's presentation. I am thus relieved of the demands imposed by duty and client to put on every last shred of evidence that someone believes might possibly sway a jury member. I am required to pick and choose those documents and witnesses that are important enough to take up a jury's time. I am required, like every other human being in his daily life, to pick and choose only what is most important to do within the constraints of

resources and time. The debate about the proposed rule raises the same issues of economy and choice.

And who will pay for the increased scurrying and flipping pages through largely unimportant cases? Not the lawyers. Every advance that makes it possible (nay, necessary) for a litigator to produce a work of art or protect his behind increases the cost of litigation. Giving all decisions precedential value will severely harm pro bono and public interest clients. I have at my disposal all of the computer law resources one could ever hope to rely upon. However, even I, when doing a pro bono case, must take care not to overuse computer research. Someone's paying for it. The sole practitioner and smaller firms will be faced with much more daunting research tasks if every decision by the Ninth Circuit Court of Appeals, where I practice, can be used as precedent, even if the judges who decided the case think that it was not worthy to be so cited. The rule is frequently touted as being egalitarian. I believe that it is clearly anti-egalitarian, which I say with great conviction, remembering my first legal job at Legal Aid Society of Alameda County.

It is clear in our system of precedent that not every litigated case has the same potential to be of value for future generations. Some cases are just parochial disputes. If you have ever tried to explain to a normal citizen why the United States Supreme Court and most state supreme courts do not take every case brought to them, even if the court and all of us citizens know that an injustice was done or vacuous reasoning foisted upon us, readily understands that our system demands that we be economical in using judicial resources to establish precedent.

The system as we have it now is far from perfect, but one of the main reasons that it is not perfect is that we do not have adequate public resources to make it so. I hope that you will not adopt a rule that will make litigation much more expensive and burdensome to the public while failing to improve our noble system of common law precedent synthesized from a manageable population of decisions of significance.

Very truly yours,

Gary L. Bostwick

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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