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Appellate Courts Committee Of The Los Angles County Bar Association

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Comments:

We on the Appellate Courts Committee of the Los Angeles County Bar Association have studied and debated the Proposed Amendments. The following comments represent the considered opinion of the full committee. We first address those rules supported by the Committee in full or supported with proposed changes. They are Rules 4, 27, 28.1 and 35. (We have no comment on Rules 26 and 45—the holiday date issue.) We then address Rule 32.1 which is opposed.

Rule 4--Supported

We support the proposed amendment to Rule 4 which makes clear that the time to reopen the filing of a notice of appeal is triggered by written notice. Only written notice provides clear assurance of time in which the parties learn of the entry of judgment. Extending written notice to observation on the Internet is certainly appropriate.

Rule 27—Supported

The Committee supports the proposed rule that will require the same type face and style for motions as required on briefs.

Rule 28.1—Supported With Requested Modification

The Committee supports the proposal to add Rule 28.1 to standardize the briefing schedule for cases involving cross-appeals. The establishment of standardized dates for the filing of briefs provides necessary guidance for the courts and

counsel.

We urge the Committee on Rules to modify the word count for the (1) appellee principal brief and (2) the appellant response and reply brief. Cross-appeals often involve very different issues. Frequently, one party is concerned with interim orders that affected the trial, while the other party is not. On other occasions, one party may be concerned that a form of damages, such as punitive damages, was precluded at trial, raising significant and distinct issues from the "lead" appeal.

In many instances, the "cross-appellant" may have issues that are as, or more, significant than the issues presented by the appellant. Consequently, the appellee principal and response brief often requires significantly more words than 16,500. Similarly, since the appellee principal and response brief may raise significant issues on appeal, the appellant should be allowed sufficient words in the response and reply brief to address all issues.

We urge the Committee on Rules to modify proposed Rule 28.1(e)(2) to read as follows:

(2) Type-Volume Limitation.

(A) The appellant's principal brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 28,000 words; or

(ii) it uses a monospaced face and contains no more than 2,600 lines of text.

(C) The appellant's response and reply brief is acceptable if:

(i) it contains no more than 21,000 words; or

(ii) it uses a monospaced face and contains no more than 1,950 lines of text.

(D) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(C).

Rule 35—Supported

We support the proposed amendment to Rule 35. It is sensible to standardize the en banc procedure to exclude from the count those judges who are disqualified on the case.

Rule 32.1—Opposed

For the reasons discussed in detail below, the Committee with only one dissenting vote, respectfully opposes the adoption of Proposed Rule 32.1. Rule 32.1 is vaguely written but will apparently allow the citation of all opinions, state and federal. Consequently, Rule 32.1 as proposed has a direct impact on California State courts, attorneys and their clients in California, even if they never set foot in any federal court. Judges must fundamentally change the manner in which opinions are researched, written and presented. The state courts must now be concerned about their words, research and reasoning in cases not intended by those courts to be citable. Attorneys must now be concerned that unpublished cases may find there way into California jurisprudence via federal court citation of them. The cost to the courts, attorneys and clients in additional research time will be enormous. There are additional consequences beyond the cost factors that will adversely affect the state and federal justice systems and jurisprudence.

Analysis

A. Proposed Rule 32.1 impacts both state and federal appellate courts.

Proposed Rule 32.1 makes no distinction between state and federal courts respecting the judicial opinions, orders, judgments or other written dispositions. The federal appellate courts will be permitted to cite all unpublished opinions, even those of the State of California that are denied precedential value in the State courts. California Rules Of Court, Rule 977 expressly states: "An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b) [res judicata or collateral circumstances]." In addition, Rule 976(c) permits the California Supreme Court to de-publish a case, rendering it uncitable in California.

Proposed Rule 32.1 provides:

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written

dispositions that have been designated as "unpublished," "not for FEDERAL RULES OF APPELLATE PROCEDURE publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions. [Emphasis added.]

The underscored provision is unclear. It appears to state that California's rules rendering unpublished opinions not citable will be inapplicable in the federal courts. As a result, unpublished opinions that were not written as precedential value may through the backdoor become precedent. Given diversity and supplemental jurisdiction, the federal courts often use and apply state law. Unpublished cases, even cases decertified for publication by the California Supreme Court, could be utilized to decide cases and change the jurisprudence of this State. For example, an unpublished opinion decided on facts parallel to those in a federal court case may be used by the federal court judge to decide a significant issue in the case, even though the unpublished opinion is actually contrary to California Supreme Court precedent. California law in the federal and state courts could diverge on various points of law based on unpublished opinions. The cost to litigants and the courts, discussed more fully below will be enormous.

B. Proposed Rule 32.1 is costly.

1. Proposed Rule 32.1 will drastically increase the cost of preparing appellate opinions.

Proposed Rule 32.1 will greatly increase the workload of courts, generating significant cost at a time when they are attempting to operate within constraints imposed by dramatic budget reductions in response to an unprecedented fiscal crisis. The process of preparing an opinion that is suitable for citation as precedent is a much more time-consuming (hence, costlier) process than is the process of preparing a nonpublished opinion. A non-published opinion is directed to a limited audience: the parties and their attorneys, all of whom are familiar with the record in the case. Consequently, courts preparing opinions not intended for publication frequently write succinct opinions focusing directly on the legal issues in the cases before them. This is especially appropriate in the great many routine appeals raising only issues governed by settled law.

Opinions to be cited as precedent, in contrast, require considerably more time and effort because they include considerably more background facts and procedure to make them meaningful to third parties who know nothing more about the record than appears from the face of the opinion. (See Hart v. Massanari (9th Cir. 2001) 266 F.3d 1155, 1178 (Hart) ["the judicial time and effort essential for the development of an opinion that is to be published for posterity and widely

distributed is necessarily greater than that sufficient to enable [the court] to provide a statement so that the parties can understand the reasons for the decision"].) Additionally, courts frequently present a more detailed analysis of the legal principles and background of the development of the law to thoroughly explain the holding to the public.

Making all opinions citable as precedent will also induce the writing of more concurring and dissenting opinions, as justices seek to limit the stare decisis effect of portions of opinions with which they disagree. (See Hart, supra, 266 F.3d at p. 1178 ["Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases," and hence "[u]npublished concurrences and dissents would become much more common" were all opinions citable as precedent].)

Additionally, appellate courts are justifiably more concerned about matters of style when preparing an opinion that will be quoted and have precedential effect.

For all the foregoing reasons, proposed Rule 32.1 will require appellate courts to devote significantly more time and effort to the task of drafting opinions that will not be deemed suitable for publication under current standards established by California Rules of Court, Rule 976.

2. Proposed Rule 32.1 will increase the cost of research for courts and other public entities.

A tremendous additional research burden will arise from allowing citation of all opinions. The research burden on the Courts will be significant, because appellate panels are not bound to follow other panels' decisions. In the absence of a dispositive Supreme Court decision, all decisions are merely persuasive authority. Accordingly, if all unpublished opinions may be cited, there will be no practical difference between a published opinion and a "non-published" opinion that may be cited with the same effect as an opinion published in the official reports. The unavoidable result will be that since any unpublished decision may be "persuasive," all unpublished decisions will have to be researched by litigants and court staff. Researching a case will therefore require wading through libraries that, over time, will become increasingly larger. The research burden will be all the greater because the cases citable, but not published in the official reports, will have much less sophisticated search tools than those available for published opinions (e.g., there may be no reliable publisher's headnotes, digests, or other cross-indexing).

The Courts will not be alone in bearing the additional research burden of proposed Rule 32.1. Courts at all levels,

whether a trial court attempting to resolve a demurrer or the California Supreme Court attempting to resolve an important issue of law, will have to read and analyze significantly more appellate opinions than they currently do.

Proposed Rule 32.1 will also inevitably impact every state and local agency, commission, and department - civil and criminal. In every case in which a public entity is a party, the attorneys representing the public entity, whether they are state employees or retained counsel, will face a greater research burden. The number of new opinions issued each year that could impact the outcome of each case will increase by a factor of more than fifteen. These same attorneys will likewise be required to spend a much greater portion of their day monitoring new cases, to keep abreast of new developments in the law.

The additional research burden attributable to Rule 32.1 extends beyond litigation. All public entities must monitor case developments on an on-going basis to assure compliance with existing laws. The amount of time required by attorneys for such activities arising from citation of all opinions is incalculable, but it will no doubt be significant, like all other costs attributable to Rule 32.1.

3. Proposed Rule 32.1's costs for private entities is also staggering.

Parties will also bear additional cost from the proposed rule. Countless hours will be wasted as private parties spend money researching and monitoring thousands of new appellate opinions. Attorneys will not be able to write briefs without undergoing the time consuming effort of researching unpublished cases for fear of missing key cases that might be utilized by the court or adverse parties, raising the specter of legal malpractice.

Likewise, attorneys charged with assuring their clients' compliance with state law will face an inordinate amount of additional research if proposed Rule 32.1 is adopted. (See Hart, supra, 266 F.3d at p. 1179 [once cases are citable "they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason"].) The consequence of the rising cost of appellate representation on litigants with relatively small disputes and limited resources will be most devastating. These litigants will be least able to pay for appellate counsel to sift through the chaff of opinions that the authoring justices do not deem worthy of standing as precedent.

C. Apart from enormous costs, proposed Rule 32.1 will have numerous adverse consequences.

There are many other

negative effects from proposed Rule 32.1, in addition to its fiscal impact:

1. One of the first casualties of proposed Rule 32.1 will no doubt be the quality of the appellate court opinions. Because the appellate justices will, upon adoption of proposed Rule 32.1, be preparing more opinions suitable for citation, the result will inevitably be that the courts will have less time to devote to those opinions that are deserving of publication under the criteria set forth in Rule 976. (See Hart, supra, 266 F.3d at p. 1179 ["Maintaining a coherent, consistent and intelligible body of case law is not served by writing more opinions; it is served by taking the time to make the precedential opinions we do write as lucid and consistent as humanly possible"].)

2. Allowing citation of all opinions will lead to a profusion of "bad law." There is truth in the adage, "bad facts make bad law." Cases with "bad facts" are prime candidates for disposition by unpublished opinion. The "bad law" in such an opinion - i.e., a result that is correct on the unique facts of the case, but should not be extended to other cases - should remain uncitable. (See Hart, supra, 266 F.3d at p. 1179 ["Judges have a responsibility to keep the body of law 'cohesive and understandable, and not muddy [ ] the water with a needless torrent of published opinions.'" (Citation.)].)

3. In other cases deemed inappropriate for publication, the appellate justices may recognize that a limited factual record, lack of input from affected parties, or low quality of briefing, deprives the court of sufficient opportunity to explore the complexities of an important issue. Such limitations will not appear on the face of the opinion, but the author who is aware of such circumstances should retain discretion to determine that, for one reason or another, the opinion should not be given any persuasive value beyond the effect on the parties to the particular case.

4. Given that proposed Rule 32.1 will add greatly to the time involved in the resolution of cases, it will also result in tremendous delays in the processing of appeals. This will affect not only the courts, but the rights of the litigants who are awaiting resolution of cases. In some courts, parties already wait years between the filing of the notice of appeal is filed and the rendition of the opinion. By increasing the time that the courts will devote to opinion preparation and research in each case before it, proposed Rule 32.1 can only further delay the time for resolution of appeals.

5. Rule 32.1 will result in an explosion in the volume of paper filed in trial and appellate courts. There is already too much paper and too little place to store the briefs, motions and other papers in the courts. (See analogously Schmier, supra, 78 Cal.App.4th

at p. 712 [allowing citation to all opinions "would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein"].)

6. In California, "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Const., art. VI, § 14.) But not all written decisions must be "complete" opinions. Standards of Judicial Administration § 6 provides for the use of memorandum opinions or decisions. The justices of the California Court of Appeal have not embraced the use of the memorandum opinion. Perhaps, it is understood that summary disposition quite simply leaves a bad impression on the parties, counsel and public for the lack of appearance of a full hearing. It suggests quick, not the considered judgment that comes with a full opinion. (See, e.g. James B. v. Superior Court (1995) 35 Cal.App.4th 1014, 1018, fn. 3 [court reacting to the criticism of the Bar regarding summary denial of writ petitions].) Yet, if all unpublished opinions in California become citable, courts may begin to issue memorandum opinions to the detriment of the parties and their counsel. In those cases deemed inappropriate for publication, the Court of Appeal may well use the memorandum opinion to avoid the potential precedential or even persuasive effect of "bad law". The memorandum opinion does not, however, give the parties enough information to determine if the court has decided the case on a misapprehension of the facts or even the law. Rehearing or higher review is virtually impossible from a memorandum opinion.

In the federal circuits, there is no constitutional requirement for a writing with reasons stated. Many federal appellate districts allow the use of summary disposition. In this regard, the courts decide cases usually with the one word statement, "affirmed." There is much criticism of this form of decision-making. (See for example, Haworh, Screening and Summary Procedures in the United States Courts of Appeals, 1973, Wash U. L. Q. 257 [the appearance of a lack of justice flows from summary disposition]; Baker, Intramural Reforms: How the U.S. Courts of Appeals have Helped Themselves, 22 Fla. St. U.L.Rev 913, 925-926 [cases that were once considered worthy of full review are being disposed of by summary disposition].) Once again, if all opinions will be citable, the use of summary dispositions may increase to avoid the "bad law" from becoming precedent. Summary disposition simply does not inspire confidence that justice has been served.

Conclusion

We applaud the efforts to standardize the varying approaches now taken among the 13 Circuits. Our Committee members handle matters across jurisdictional lines. Consistency in the rules not only makes practice in the varying courts more convenient but saves both time and money for clients. Further, where there is consistency,

there is less need for motions for relief from counsel who are unaware of the differing rules.

We do recommend that the briefing limits in "cross-appeal" circumstances be increased. Further, we cannot support a standardized rule permitting citation of unpublished opinions. The adverse consequences to the courts, attorneys and parties arising from the citation to all opinions are far more deleterious than any benefits expressed by the supporters of Rule 32.1. The justice system simply cannot afford Rule 32.1.

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