Case No. 09-17195

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

KENNETH J. SCHMIER,
Plaintiff and Appellant,

vs.

JUSTICES OF THE CALIFORNIA SUPREME COURT, et al.,
Defendants and Respondents.

MOTION FOR DISQUALIFICATION

On Appeal from a Judgment following denial of
Plaintiff's application for a preliminary injunction
by the United States District Court
for the Northern District of California
Case No. C 09-02740 WHA
The Honorable William Alsup, District Judge

Aaron D. Aftergood (SBN 239853)
The Aftergood Law Firm
1875 Century Park East, Suite 2230
Los Angeles, California 90067
310.551.5221
aaron@aftergoodesq.com

TO THE HONORABLE CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 455(a) Appellant KENNETH J. SCHMIER moves the Court for an order disqualifying all Circuit Judges of the Ninth Circuit Court of Appeals from hearing and considering his appeal in the instant matter. There is clear precedent. In [*Michael*] *Schmier v. United States Court of Appeals for Ninth Circuit*, 279 F.3d 817, 825 (9th Cir. 2002), a case seeking injunction against application of the Ninth Circuit Court of Appeals Rule 36-3, all members of the Ninth Circuit Court of Appeals recused themselves.[1] Appellant makes this motion because the interests of the Ninth Circuit are equally adverse to his claim as they were to the claims of his brother in *Schmier*. Only the same recusal and designation can eliminate the question of impartiality.

The federal disqualification statute, 28 U.S.C. § 455(a), provides that, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[2]

The Ninth Circuit's Local Rule 36-3 is analogous to California Rule of Court 8.1115.[3] Therefore a decision striking down California Rule of Court 8.1115 necessarily impugns the Ninth Circuit's own rule. Many Ninth Circuit judges have previously publicly expressed their

[1] "All members of the Ninth Circuit having recused themselves from this case, all the Judges on this panel are sitting by designation: Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit; Daniel M. Friedman, Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit; and Norman C. Roettger, Jr., Senior District Judge for the United States District Court for the Southern District of Florida." *Schmier v. United States Court of Appeals for Ninth Circuit*, 279 F.3d 817, 819, note ** (9th Cir. 2002).

[2] *Cf. Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (holding that recusal can be effected even if not ordered by the disqualified judge in order to accord due process and its appearance.)

[3] "Circuit rule 36-3, like California Rules of Court, rule 977 [renumbered rule 8.1115 in 2007], provides that dispositions other than opinions and orders designated for publication are not precedent and may not be cited except as relevant to law of the case, res judicata or collateral estoppel" *Schmier v. Supreme Court of California (2000) 78 Cal.App.4th 700 cert. denied, 531 U.S. 958.*

views of so called no-citation rules including observations of fact. Moreover, Ninth Circuit members have been outspoken in opposing abrogation of the circuit's no-citation rule. Prior to the U.S. Supreme Court's adoption of new Federal Rule of Appellate Procedure 32.1, many judges of the Ninth Circuit wrote their written objections to the proposed new rule, most prominently Chief Judge Alex Kozinski. Indeed, Judge A. Wallace Tashima, acknowledged that a letter-writing campaign opposing the new F.R.A.P. 32.1 had sprung up amongst the Circuit Judges. See A. Wallace Tashima, *Letter to the Alito Committee re: Proposed Appellate Rule 32.1*, February 6, 2004, avail. www.nonpublication.com/tashima.pdf, attached hereto as Attachment A. Now U.S. District Judge Patrick J. Schiltz, reporter for the Federal Appellate Rules Committee, referred to by Judge Tashima as the "Alito Committee," noted that this letter writing campaign included the extreme measure of solicitation of private attorneys to write letters of opposition.[4] The Tashima letter indicates that judges of the Ninth Circuit are closely split on the adoption of Rule 32.1.

---

[4] Schiltz wrote:

"About 75 percent of all comments (pro and con) regarding Rule 32.1 — and about 80 percent of the comments opposing Rule 32.1 — came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit.[1] It appears that many of the commentators from outside of the Ninth Circuit were also former Ninth Circuit law clerks or were inspired to write because of Ninth Circuit connections.

"[T]he vast majority of the comments on Rule 32.1 — about 90 percent — took the same position: They opposed adopting the rule. Finally, the comments regarding Rule 32.1 were extremely repetitive. Many repeated — word-for-word — the same basic "talking points" distributed by opponents of the rule,[2] and many letters were identical or nearly identical copies of each other.[3]

[1] These estimates are likely low, as some of those writing from outside of the Ninth Circuit had Ninth Circuit connections that were not readily apparent. For example, a check of law school websites revealed that almost all of the 21 law professors who wrote to oppose Rule 32.1 had clerked for Ninth Circuit judges

[2] A copy of the most commonly incorporated "talking points" is attached to 03-AP-025.

It is the practice of the Ninth Circuit to circulate opinions to all judges before the opinion is finalized. See Alex Kozinski and Stephen Reinhardt, *Please Don't Cite This,* California Lawyer Magazine, June 2000. Therefore, even if a panel is selected from judges that have not taken a public position on no-citation rules, the decision on this case can be expected to be influenced, or even determined, by those that have taken public positions. Members of the Ninth Circuit appear as both too collegial and too close to this issue, and have too many of their own findings of necessity of no-citation rules to the operation of the Ninth Circuit to render an impartial judgment.[5] In fact, as of the time of filing of the instant motion, Judge Kozinski is scheduled, in

---

[3] For example, 9 of the 10 private practitioners from Florida who opposed Rule 32.1 sent essentially identical letters — and their letters were essentially identical to a letter sent previously by a Ninth Circuit attorney (03-AP-234).

Patrick J. Schiltz, *Memorandum to Advisory Committee on Appellate Rules Re: Proposed Amendments to Federal Rules of Appellate Procedure Published for Comment in August 2003*, pp. 1-2, avail. http://nonpublication.com/schiltz.pdf.

[5] The potential for such bias became obvious in the California court system in *Schmier v. Supreme Court of California (2000) 78 Cal.App.4th 700 cert. denied, 531 U.S. 95,* where the following recitation of facts was made by the appellate judges of their own "knowledge." These "facts" were not in the record nor briefed by any party's attorney. Responding to the Court's assertion "Appellant fails to explain how or why such opinions contribute to the corpus juris" is simple. He was given no opportunity to do so. Refutation might have included that these examples do not describe the complete set of unpublished opinions which contain many instances of first impression, a point obviously overlooked by the court. Such an error is the result of facts being offered by the Court itself. Impartial judges often determine a litigant can do things that litigant has argued can't be done. The situation is no different here.

It is clear that the Court was not judging, but arguing on its own behalf:

> "Appellant either misunderstands or ignores the realities of the intermediate appellate process. If appellant's view prevailed, the Court of Appeal would be required to publish all *Wende* opinions. As every criminal lawyer knows, a *Wende* case is one in which appellate counsel in a criminal appeal advises the court that no arguable appellate issues can be found, thereby invoking the obligation of the Court of Appeal to conduct an independent review of the record. A typical *Wende* opinion merely recites that the court's independent review has revealed no arguable issues. We have appeals from criminal defendants who enter into plea bargains in which they agree, for example, to accept the midterm as their sentence, and then appeal contending the court abused its discretion by sending them to prison. We also have appeals in criminal cases which challenge the constitutionality of the reasonable doubt instruction, in spite of the fact that every appellate court which has ruled thereon has found it to pass constitutional muster. (See, e.g., *People* v. *Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287; *People* v. *Aguilar* (1997) 58 Cal.App.4th 1196, 1207-

Spring 2010, to debate Professor Joseph Grodin on the issue of unpublished opinions and no-citation rules at U.C. Hastings College of the Law.

So that the important issue presented here can be satisfactorily resolved, the judges who are to determine it should come to this matter with no preconceived notions of the need for no-citation rules. Only they can fairly balance Appellant's constitutional rights and the needs of his clients for exonerating appellate authority, as well as alternatives to no-citation rules, against any justifications offered by Respondents.

Accordingly, Appellant requests that pursuant to *Schmier v. United States Court of Appeals for Ninth Circuit*, this matter be determined by designated judges from appellate circuits that operate without a no-citation rule.

Respectfully Submitted,

THE AFTERGOOD LAW FIRM

By: _____
AARON D. AFTERGOOD,
Attorneys for Appellant.

1209.) We have appeals in family law cases where the trial court has divided the community assets equally, as it is required to do; but one of the parties nevertheless appeals for reasons having nothing to do with the law or the facts, conceding the equal division, but contending he or she failed to receive one of the assets that party wanted. We have appeals from parties seeking relief based on matters outside the appellate record, which we cannot review. We have appeals from nonlawyers appearing in propria persona, filing incomprehensible briefs with no understanding of the rules of appellate review, urging us to reweigh the evidence and reject, for example, the testimony of the six witnesses who said the traffic signal was red rather than green when appellant drove through it and struck the pedestrian in the crosswalk. Our typical opinions in such cases add nothing to the body of stare decisis, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent. Appellant fails to explain how or why such opinions contribute to the corpus juris."

ATTACHMENT A

2/9/04

03-AP-288

In Chambers
JUDGE A. WALLACE TASHIMA
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
P.O. BOX 91510
PASADENA, CA 91109-1510

TEL: (626) 229-7373
Fax: (626) 229-7457

February 6, 2004

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Appellate Rule 32.1

Dear Mr. McCabe:

I write concerning proposed new Rule 32.1 of the Federal Rules of Appellate Procedure. My views on Rule 32.1 are known to the Standing Committee because, as a member of the Committee during the earlier stages of consideration of the rule, I supported Rule 32.1. I adhere to those views and continue to support the proposed rule and don't intend to reargue the merits here. I write now only to counterbalance a letter-writing campaign by opponents of the rule.

Earlier, as the Committee is probably aware, a letter-writing campaign was mounted among the lawyers in the Ninth Circuit to oppose the new rule. Now, apparently, that campaign has shifted to the judges of the Ninth Circuit and several–perhaps as many as a half-dozen–have written in opposition to the rule. I ask the Committee not to be misled by this into believing that there is overwhelming, or even majority, opposition to the new rule in the Ninth Circuit. (Remember that our Circuit has 26 active and 22 senior judges.) From my experience and observation both as a judge of the Ninth Circuit and as a member of the Circuit's Local Rules Committee for the past six years (ending in Oct. 2003), it is my opinion that the great majority of lawyers who engage in federal practice favor the new rule and that the judges of the Ninth Circuit are closely split on the issue. Although it cannot be definitively determined without a vote (and there has been none), my guess is that a slight majority favor proposed new Rule 32.1.

Sincerely yours,

A. Wallace Tashima

cc: All Ninth Circuit Judges

9th Circuit Case Number(s) 09-17195

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) January 29, 2010 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /Aaron D. Aftergood/

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)