UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 193939
95 SEVENTH STREET
SAN FRANCISCO, CA 94119-3939
TEL (415) 556-9941
FAX (415) 556-9628

CHAMBERS OF
WILLIAM A. FLETCHER
CIRCUIT JUDGE

December 12, 2003

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 F.R.A.P. 32.1

Dear Mr. McCabe:

I write to oppose proposed F.R.A.P. 32.1, which would allow citation of unpublished decisions by the court of appeals. I am a late-coming opponent of the proposed rule. When I first came on the court of appeals almost five years ago, I thought the debate over the citability of unpublished opinions to be a relatively non-consequential matter; and I thought, on balance, that there would be little harm, and perhaps some good, that could come of allowing citation of unpublished decisions. I have now come to the conclusion that the matter is important, and that I incorrectly assessed the balance of potential harm and benefit from a rule allowing citation.

You have already read a number of articles, comments and letters addressed to the wisdom and practicality of allowing citation to unpublished decisions. I will not repeat in detail their arguments. I will say only that if the proposed rule is adopted:

(1) More judicial time may be required for the preparation of unpublished decisions, given that they will now be citable. This time will unavoidably be taken away from other important judicial tasks, including the writing of opinions in cases in which there are genuinely novel or perplexing questions.

(2) The current practice in many circuits, including the Ninth Circuit, of writing reasons for unpublished decisions may change. At the moment, judges on this circuit (and several others) write out their reasons in unpublished decisions. Sometimes they do it in a page or two; sometimes they write at greater length. I view this practice as very useful. It allows litigants in the particular case to understand why the judges decided as they did, and thus shows them that we considered and rejected (or accepted) their arguments. It also gives litigants a basis from which to argue in a petition for rehearing that we misunderstood their case.

If unpublished opinions are citable, the response of many judges will be to shorten, or eliminate entirely, their statement of reasons. As you know, some circuits already simply write "affirmed," or occasionally "reversed," with no accompanying reasons. I view this practice as harmful, both to the litigants' sense that they have had their day in court, and to their ability to point out mistakes, real or perceived.

(3) Poor litigants, or litigants with low-value cases, will be even more disadvantaged than they are now. Legal research takes time and money. To the extent that unpublished decisions are citable, a conscientious lawyer will have to add a layer of research that has previously been unnecessary. Well-heeled litigants will be able to afford it; others often will not.

* * *

In addition to these familiar arguments, made at greater length and more capably by others, I add an historical argument that is generally not made. While I was an academic, I read widely in early American legal materials. Of particular relevance here, I read all of the published opinions of the following courts from the beginning of the republic until 1845: the United States Supreme Court; the United States Circuit Courts (then primarily courts of original diversity jurisdiction); the United States District Courts (then primarily courts of original admiralty jurisdiction); the State Supreme Courts of New York, Massachusetts, Pennsylvania, Virginia, Maryland, South Carolina, and Connecticut (ordering the states from most to fewest published opinions). I also read most of the treatises and other legal publications available to lawyers during this period. (Results of

this reading appear in Fletcher, "The General Common Law and Section of 34 of the Judiciary Act of 1789," 97 Harv. L.Rev. 1513 (1984); and "A Historical Interpretation of the Eleventh Amendment," 35 Stan.L.Rev. 1033 (1983).)

I know of nothing in our early practice that requires us, as a matter of historical custom, to publish or allow citation of all judicial decisions. During this early period, significant numbers of cases were not reported, and most of those cases were accordingly lost from the system of precedent. I know of no complaint during this period that the failure to publish all opinions either resulted in injustice to those whose cases were decided without published opinions, or resulted in diminished respect for the rule of law. In the early 1800s, publication in formal case reports was pursued, particularly in the large wealthy states, in order to create a system of coherent precedent; but publication was not pursued as a matter of judicial administration beyond the need to create that system.

In sum, the practices of our early history do not tell us that we must make publicly available all our decided cases; nor do they tell us that, even if available, citation of all cases is a necessary concomitant to the proper exercise of judicial power.

* * *

The wise and practical course today is, of course, open for debate. I do not regard the argument as open and shut in either direction. But I believe that, on balance, a rule that allows citation to all decided cases of the courts of appeals, whether officially published or not, is likely to create more problems than it resolves.

Sincerely,

William A. Fletcher