03-AP-067 (12/24/03)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBERS OF
THOMAS G. NELSON
SENIOR CIRCUIT JUDGE

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December 18, 2003

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

RE: ***Proposed FRAP Rule 32.1***

Dear Mr. McCabe:

I wish to comment on the proposed revision of FRAP Rule 32.1.

Looking at the Numbers

When I was appointed to the Ninth Circuit Court of Appeals in 1990, 6,729 appeals were filed with the court. In 2003, more than 12,000 appeals were filed. From 1990 to 2002, the court published 10,134 opinions and issued 47,970 "unpublished" dispositions.[1] (I use the term in the same sense in which it is used in the Committee Note.) In those thirteen years, no new judgeships were authorized.

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[1] "Annual Report of the Director of the Administrative Office of the United States Courts," 1990-1994, and "Judicial Business of the United States Courts," 1995-2002.

Is it Difficult to Justify Non-Citation?

The Committee Note to proposed Rule 32.1 says, in several places, that it is difficult to justify the non-citation rule. This is not an accurate statement. One justification is, and has been, that the "unpublished" dispositions are generated in such a fashion that their quality is not equal to that of a "published" disposition and that they are not worthy of being treated as having precedential value. Their only function is to tell the parties who won and, briefly, why. In short, if a disposition has no precedential value, there is no reason to permit it to be cited.

The Comment's response to this reality from today's world of appellate decision making is to say that everything else can be cited, so why not unpublished dispositions? This ignores the distinction between something which is precedential and something which is only persuasive. Courts are bound by precedent; they may be swayed on an open question by something persuasive.

The Comment uses the examples of the citability of opinions of state courts, federal district courts, law review articles, treatises, and newspaper columns, among others. The short answer to this assertion is that publication of those matters is voluntary. Presumably, the author does not publish unless he or she believes the article, column or opinion is of a quality to be worthy of publication. Federal appellate courts do not have the luxury of not writing something to decide a case. But under current practice, they can decide whether the disposition is worthy of being played back as precedent. Under the proposed rule, this sorting of wheat and chaff by those most knowledgeable won't be possible. Just as a newspaper reporter and his or her editor can decide whether an article should be published, so too should the authors of appellate court decisions.

Uniform Citation Rules

The Comment also mentions a supposed hardship on practitioners faced with different citation rules in different circuits. This hurdle doesn't require much effort to step over. In this computer-driven age, the rules of court are readily available. It doesn't take a lot of effort to develop a list of practice differences among the circuits. An administrative assistant or paralegal can easily do it, and it is now being done.

Further, even if the citation rules among the circuits were uniform, many lawyers practice in both state and federal courts. This proposed rule does not, and cannot, address this fact of multi-state law practice. Lawyers will still have to do what they have always done: comply with the rules of the jurisdiction in which they are practicing at the moment. All lawyers practicing before the federal courts of appeals will face the disadvantages imposed by the proposed rule, but only a few practice in more than one circuit.

Burden on Practicing Lawyers

A further reason to reject the proposed rule is the additional burden it would put on practicing lawyers. Several years ago, I was on the court of appeals' Advisory Rules Committee. We toured the circuit talking to lawyers about appellate practice. The non-citation rule came up for discussion. A lawyer rose to defend the rule, explaining that if the hundreds of unpublished dispositions were citable, he would be required to spend his time and his client's money to research them, to no ultimate benefit, in his view. The very real foundation for his concern was pointed out above. The universe of potentially citable Ninth Circuit dispositions would expand by 48,000 cases just from 1990 to 2002 if the rule is adopted. The real disadvantage would be imposed on pro se litigants and lawyers representing shallow-pocketed clients, which would include federal defenders' offices.

This effect of the proposed rule was not discussed in the Comment, but it is a very real fact of life. Any objective reader of unpublished dispositions would agree that the huge majority would add nothing to the analysis of any issue in any case. Yet the proposed rule would force lawyers to wade through these meaningless dispositions to guard against the very faint possibility that there would be something useful buried in the pile. It would also force the courts of appeals to read the fruitless efforts of lawyers to breathe life into lifeless unpublished dispositions.

Summary

Contrary to the statement in the Note that there are no compelling reasons to treat unpublished dispositions differently than anything else which can be cited,

there are valid and very compelling reasons to permit the court to prohibit citation of unpublished dispositions. The adverse impact on the courts of appeals and the profession is more than enough reason to reject proposed Rule 32.1, and no countervailing advantages have been offered.

Very truly yours,

THOMAS G. NELSON

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