United States Court of Appeals
FOR THE NINTH CIRCUIT
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December 23, 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: Comment in Opposition to Proposed FRAP 32.1

Dear Mr. McCabe:

I write to add my voice as an active circuit judge on the Ninth Circuit Court of Appeals in opposition to the proposed Fed. R. App. P. 32.1. I joined the court in June 2000 and believe the local Rule that we currently have in place, Ninth Circuit Local Rule 36-3, precluding the use of "unpublished" decisions as authority in briefs and opinions is absolutely necessary given the volume of cases we decide on an annual basis.

The number of cases filed in my Circuit alone has increased by more than one-third since I became an appellate judge. In this past fiscal year alone, we saw 12,632 appeals filed as of September 30, 2003. Despite repeated requests of Congress for additional judicial resources, the sad truth is that we must do more with less. Like it or not, triage is a way of life on the court that handles 20% of the nation's federal appellate caseload.

The use of unpublished decisions is a necessity if we are to have any hope of issuing timely decisions to anxious litigants. In my conversations with members of the bar, and drawing upon my own experience of serving as an active litigator prior to my appointment to the bench, lawyers recognize that all cases are not equal. A reasoned explanation, even if brief, is preferable to a summary decision stating

only that the case is "affirmed" or "reversed." Often the result is important only to the litigants and not to the careful development of the law of the West. Lawyers candidly admit that for purposes of both client relations and defending against malpractice claims they often file appeals they know they cannot win. They do not expect the result to set precedent. Their clients just want to know that the court of appeals looked at their case and considered the issues raised.

I will not repeat the points that have been so effectively made by my colleagues, Judges Alex Kozinski, Stephen Reinhardt, Alfred Goodwin, and others who have urged that this proposed Rule of Appellate Procedure 32.1 not be adopted. I strongly support their views for the reasons they have articulated and by this letter I add my voice to their chorus.

The adoption of the proposed Rule will cause more problems than it will solve. Notwithstanding the Advisory Committee's protestations to the contrary, allowing litigants to cite unpublished decisions—even though the proposed Rule would give them no precedential force—will still require us to address and distinguish those decisions in our dispositions. I do not know what my colleagues will do, but, if adopted, I will urge my court to simply revert to one line results without any discussion whatsoever of the analysis which led to them. That is the only way I can conceive of avoiding the creation of a class of unpersuasive and inadequately developed "precedent" which will consume an inordinate amount of time to distinguish or discuss when making decisions in other cases. How we will handle the existing body of unpublished results is also of great concern since those dispositions were issued on the assumption that they would never be cited back to us except in very unusual circumstances. The adoption of the proposed Rule will simply cause the appellate process to succumb to the crush of its own ever-increasing weight.

For these reasons, and those articulated more fully by my colleagues, I urge the Committee to reject the proposed rule change in toto.

Sincerely yours

Richard C. Tallman

Richard C. Tallman
United States Circuit Judge

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