O'MELVENY & MYERS LLP

CENTURY CITY
IRVINE
NEWPORT BEACH
NEW YORK
SAN FRANCISCO
TYSONS CORNER

400 South Hope Street
Los Angeles, California 90071-2899

TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
INTERNET: www.omm.com

WASHINGTON, D.C.
HONG KONG
LONDON
SHANGHAI
TOKYO

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WRITER'S DIRECT DIAL
(213) 430-6452

WRITER'S E-MAIL ADDRESS
sikuta@omm.com

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

Re: ***Comment re Proposed FRAP 32.1***

Dear Mr. McCabe:

Thank you for the opportunity to provide comments on the proposed Rule 32.1 of the Federal Rules of Appellate Procedure. These comments reflect my own opinion, not the opinion of O'Melveny & Myers LLP.

I urge the Committee on Rules of Practice and Procedure not to implement the proposed Rule 32.1 on a national basis, because such implementation will unnecessarily burden the judges and their staffs in the Ninth Circuit and will not aid in the administration of justice. My concerns about the negative impact of the implementation of proposed Rule 32.1 stem from my experience as a law clerk both at the Court of Appeals for the Ninth Circuit and at the U.S. Supreme Court, as well as from my experience as an attorney at O'Melveny & Myers for the last 13 years.

The act of crafting a published decision is a huge effort commensurate with the enormous responsibility of developing a decision that may guide future judicial decisions for decades to come. This effort cannot be maintained for each of the nearly 4,000 memorandum dispositions issued by the Ninth Circuit each year. In assisting a judge and a justice in the opinion writing context, I was intensely aware of the importance of carefully crafting published decisions. There is intense concern for minimizing the risk that words and sentences will be taken out of context by lawyers and law professors and given unintended meanings that may ultimately lead to unintended results. Therefore, these decisions are revised and polished with extreme care. Memorandum dispositions, on the other hand, are written for the parties. Because these decisions will not be scrutinized by the legal community and analyzed for years to come, there is no need to polish such decisions to the same degree.

In practice, a rule that requires judges in the Ninth Circuit to allow memorandum dispositions to be cited in pleadings will impose an unworkable burden on the Ninth Circuit. A panel of the Ninth Circuit cannot simply disregard a memorandum decision issued by another

panel. A binding (albeit unpublished) decision by the Ninth Circuit is not equivalent to a poem, song or article that can be cited for its persuasive effect. The Ninth Circuit will inevitably give special consideration to its own resolution of a legal issue. As a result, if Rule 32.1 is promulgated, the Ninth Circuit would have to perfect each memorandum disposition as a published decision or would be put to the extra effort of developing the same understanding of the case that resulted in the issuance of the memorandum disposition as the parties for whom the memorandum disposition was written. Both of these approaches would cause an unacceptable delay and impose an unnecessary burden on the administration of justice.

The Committee Note to proposed Rule 32.1 indicates that other circuits have allowed the citation of unpublished decisions. I do not have direct experience with decision-making in those circuit. However, if a national rule is to be established, the Committee may wish to consider one that prohibits the use of unpublished opinions. Such a national rule would avoid the risk of creating two-tiers of case law--formally published and informally published decisions. Such a two-tiered approach could erode the precedential authority of the formally published decisions or result in a body of "unpublished" precedents that do not fully reflect the development of the law in that circuit.

In conclusion, I would urge the Committee on Rules of Practice and Procedure not to implement proposed Rule 32.1, and either develop a consistent national rule prohibiting the citation of unpublished decisions, or at a minimum allow each circuit to make its own decision on this important issue.

Yours very truly

Sandra S. Ikuta

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