UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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CHAMBERS OF
MARSHA S. BERZON
UNITED STATES CIRCUIT JUDGE

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January 13, 2004

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

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I write with regard to Proposed Rule 32.1, regarding citation of unpublished decisions. I believe the current Ninth Circuit rule regarding citation of unpublished opinions to be too restrictive. Nonetheless, I oppose the proposed Rule, because I do not think a uniform national rule is desirable.

A. The Ninth Circuit has traditionally allowed citation of its "unpublished" dispositions only in very limited circumstances. Critical to my view of this prohibition is that there are, in fact, two varieties of such dispositions, although we use a single format for both varieties.

(1) Many of the unpublished dispositions are decided through our internal "screening" process, which depends heavily on central staff review and drafting. The volume of cases presented to our circuit necessitates some expedited procedure for cases not requiring placement on a regular calendar. Although the judges do in the screening process review the briefs and record and direct cases to regular calendar assignment if there is any doubt about the result, the judges do not give the reasoning in the disposition the full attention that is accorded in cases placed on regular oral argument calendars.

In this category of cases, the danger of allowing citation is not, as the comment to the proposed Rule 32.1 supposes, that judges will increase the time they devote to them. Instead, the problem is that if citation of these "screening" dispositions is permitted, we will be constrained to eliminate any explanation of our result and resort instead to "Affirmed" or "Denied." I understand that some circuits do dispose of large numbers of cases in this manner. This result would, in my view, be both inevitable and extremely unfortunate.

There is utility in providing the parties with a modicum of reasoning even for these easily decided cases, for two reasons:

First, the parties are entitled to some indication of why the court reached its decision. If that reason is erroneous, the losing party can file a petition for rehearing, which does happen with regard to the screening cases. The panel can then, with somewhat more leisure, review the case to see whether what we said stands up. We can and do change the reasoning of these decisions occasionally, even when we retain the result.

More important, however, the exercise of producing some explanation heightens the likelihood that the result is accurate. When three judges agree on a written explanation, however short, with citations, each judge focuses on that explanation and determines whether he or she agrees with it or not. Absent the constraint that we jointly explain our result, we are in danger of becoming rubber stamps rather than judicial officers.

(2) On the other hand, some of our unpublished dispositions on regular calendars follow oral argument and are the subject of memoranda and full consideration by judges, with the help of their own chambers clerks. These dispositions are, in my experience, not the hurried, ill-considered products they are sometimes represented to be, but, instead, are the result of many hours of judge time. They are not published either because they state no new law or, sometimes, because they are diversity cases in which the law involved is purely state law.

I would be comfortable having these dispositions cited for their persuasive value, albeit not as binding precedent. So permitting would require presenting the

two kinds of "unpublished opinions in different formats, so they could be distinguished. There are various ways this could be done.

The Ninth Circuit is, by necessity, quite rigid concerning the binding nature of published decisions, perhaps more so than some other circuits. We all know that sentences in precedential opinions can become the subject of years of litigation regarding their import if not carefully thought out in the first place. The calendar-derived "unpublished" dispositions in our circuit are not vetted for this kind of statute-like reliance on particular language, but they are subject to sufficiently careful consideration that I am comfortable having them cited for persuasive value. I agree with the Comment to proposed Rule 32.1 that we will not spend more time on such dispositions than they are worth – we already spend substantial time, as I have noted – as long as we make quite clear to our constituencies, including district court judges, that they are not binding precedent.

B. My problem with the proposed Rule 32.1 is that it would not allow circuit-specific distinctions such as the one I hope my circuit will in the long run adopt. Instead, there will be a uniform, national policy that does not reflect the needs of each circuit.

I do not find the arguments favoring the need for a uniform policy at all convincing. Attorneys have to learn the local rules of each circuit for all manner of other reasons before drafting a brief. I don't see why they can't learn the citation rules as well.

Further, one result of the proposed rule is to impose uniformity not only on the federal appellate courts but, derivatively, on state courts as well. California, for example, is quite wedded to its rule that, with some exceptions, unpublished decisions are not citeable for any reason, anywhere, *see* CALIFORNIA RULE OF COURT 977. California Court of Appeal decisions are depublished when the California Supreme Court grants review, and the California Supreme Court sometimes depublishes Court of Appeal decisions without granting review, indicating that it is not comfortable with the case's reasoning but does not deem the case worthy of review. If we now allow such cases to be cited for their persuasive power, we are interfering with the considered decision of the California courts that

they are not to be so used.

Additionally, the Rule as proposed would apparently allow citation of *any* judicial opinion, order, judgment, or written disposition, without regard to the Federal Rules of Evidence or FRCP 44 requirements regarding judicial notice and authentication. Does this mean that in cases concerning prior convictions, for example, litigants can now bring to us purported judicial documents concerning such convictions that are not in the record below and are not subject to a request for judicial notice? I assume this is not the intent, but as drafted, the Rule may so provide. True, individual judgments and other dispositional documents and orders in trial courts are not designated as "unpublished," or "non-precedential," but they are implicitly so designated as a class.

For these reasons, although I support a change in the Ninth Circuit's rule regarding citation of "unpublished" opinions, I oppose the proposed Rule 32-1.

Sincerely,

Marsha S. Berzon
U.S. Circuit Judge

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