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January 12, 2004

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: Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to express my strong opposition to the proposed FRAP 32.1.

I am engaged in civil appellate practice in the federal Courts of Appeals (primarily the Ninth Circuit) and the California state appellate courts. I am a Certified Appellate Specialist in California. I am a former President of the California Academy of Appellate Lawyers, a by-invitation membership organization of leading appellate practitioners in California.

My comments will focus on the impact of the proposed rule in the Ninth Circuit, with which I have the greatest familiarity. As you know, the Ninth Circuit disposes of approximately 3800 appeals each year by very short memorandum dispositions—referred to as "memdispos"—while only 700 appeals are decided by published, citable opinions. This amounts to approximately 150 opinions per judge per year, with 20 opinions and 130 "memdispos" and as explained by Judges Kozinski and Reinhardt, in "memdispos" the court

> can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases. ("Please Don't Cite This," *California Lawyer* at 43 (June, 2000))

In a perfect world of unlimited resources, all appeals would be resolved with a full opinion.[1] A "memdispo" is preferable to no explanation for the ruling at all, but it can be less than fully satisfying. The confidence of the parties and their counsel that their arguments were fully heard, grasped and considered will often be much greater if their unsuccessful appeal is resolved in a comprehensive opinion stating the relevant facts, citing the relevant authority, and applying that authority in a reasoned manner. But it is not a perfect world, appellate judicial resources are limited, and the Ninth Circuit could not possibly dispose of 4500 cases per year with full-blown appellate opinions with the number of judges and supporting staff available to it. That is an indisputable fact of life.

Another fact, which I am equally confident will not be seriously disputed, is that the judges of the Ninth Circuit work hard. I know several of them quite well, and it appears to me that they work to something very close to the physical and mental limits of their capacity. They already have substantial research staff, and there is a point of diminishing returns in adding staff even if the financial resources were available to do that.

Thus while I would prefer it otherwise, the "memdispo" system permits the Ninth Circuit to decide 4500 or so cases a year in a conscientious way, and to write published opinions in about 700 of them. Undoubtedly, a substantial amount of each judge's time is devoted to the preparation of the published decisions, on which other members of the bench and bar will rely. Deciding the more routine cases by "memdispos" permits the Court to give the necessary time and attention to those cases which will become citable precedent.

Accordingly, the proponents of Rule 32.1 must come to grips with the consequences of the proposal on a busy court that presently disposes of five out of six cases by "memdispo" in order to get its work done in the best possible way. Assuming no substantial increase in the size of the Ninth Circuit or its staff, there are not many alternatives: (1) the Court could continue to produce "memdispos" in their present,

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[1]That is not to say that were resources unlimited, all appeals would be resolved with a *published* opinion. In the California intermediate appellate courts, we have for many years seen most appeals disposed of with unpublished opinions which are not citable. Experienced practitioners hold divided views as to the wisdom of this practice, but in my opinion it has worked well. The cases can be retrieved on Lexis and Westlaw and used as research tools, but the standard of practice does not require lawyers to wade through a large number of routine cases that cannot be cited in order to assure themselves that they have brought to the court's attention every possibly relevant case.

The Ninth Circuit's "memdispos" are typically more abbreviated than California unpublished opinions, which are often quite extensive even though they are not published because the justices have determined that they do not meet the criteria for publication.

truncated form, with no increase in the time and attention devoted to producing them; or (2) the Court could expand the format of a "memdispo" so that it could be citable. Each of these alternatives would, in my judgment, be worse than the present practice.

Were the Court to allow 3800 "memdispos" per year to become citable, it would be irresponsible to craft them in a form that is as abbreviated as they are at present. A memorandum order that does not recite the facts would be very difficult to evaluate. A memorandum order that does not explain its reasoning might be cited for its result, but a result without reasoning would be of no help to another appellate court in most cases, and could be misleading or confusing in others. It seems to me a virtual certainty that responsible judges would be *compelled* to devote more time, attention and resources to the preparation of more elaborate unpublished opinions if they could be cited for their "persuasive" authority.[2]

Accordingly, the proponents of the rule must accept that to be the inevitable consequence, and must evaluate the impact of that redirection of time and resources to the preparation of unpublished, but citable, memorandum opinions. An already overworked court will have no hidden sources of time and staff to summon; the only choice will be to eat into the time and resources devoted to preparing published opinions. That will mean either(1) a decrease in the time and effort devoted to the 700 cases per year currently disposed of by published opinion; (2) a decrease in the percentage of cases disposed of by published opinion; or (3) a decrease in the number of cases decided each year—or some combination thereof.

The first of these possibilities is self-evidently undesirable. The Ninth Circuit's published opinions by and large are the cases that involve complex and/or significant questions of law that will become part of the body of precedential law. It is imperative that these opinions be carefully reasoned and explained. Any significant diminution in the time devoted to preparation of the published opinions runs a substantial risk—perhaps the certainty—of diminishing their quality and utility.

The second of these possibilities would be an ironic consequence of a rule whose purpose is to increase the body of citable work. Although it would accomplish *that* purpose, it would do so by *decreasing* the body of citable *precedent*. Some cases

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[2]The Committee Note is particularly unsatisfying on this point. It says that "Rule 32.1(a) does not require a court of appeals to treat its 'unpublished' opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any 'unpublished' opinions that it issues." While that statement is an accurate description of what the proposed rule *says*, the Committee has failed even to discuss, let alone predict, what its practical *effect* would be. I have no doubt that the practical effect would be exactly as discussed in the text above.

that presently meet the standards for disposition by published, citable opinion would be disposed of by a citable, but non-precedential, opinion. To the extent that this is the outcome, everybody loses.

The third possibility would mean that disposition of appeals would be delayed. I need not elaborate on the reasons why that would be highly unfortunate. The judicial system has made, and continues to make, Herculean efforts to move cases expeditiously. Appeals inevitably take time—time to prepare the record, time to write thoughtful briefs, and time for the court to consider the issues and resolve the case. Extending that time—and adding to delay—ought to be avoided.

The foregoing list of negative consequences of the proposed rule must, of course, be weighed against its perceived benefits. The Committee Notes say that one benefit is relieving practitioners of the burden of having to learn the rules of the various Circuits in which they practice. This uncommon solicitude for the convenience of practicing lawyers would be welcome were the burden a significant one, but it is not. It is a relatively easy matter to discover the citation practices in the court one is before, and the need for uniformity is slight. Indeed, the impact of the proposed rule would be confusing for California lawyers, who presently operate under well-understood rules in the Ninth Circuit and in the state appellate courts that prohibit citation of unpublished opinions.

The Committee Note says that it is "difficult to justify prohibiting or restricting the citation of 'unpublished' opinions" when parties may cite decisions from other jurisdictions, published articles and treatises, "Shakespearian sonnets, and advertising jingles." With all respect, there is more rhetoric here than reason. There is no danger that federal judges will base their decisions on "Shakespearian sonnets" or "advertising jingles." And the citable decisions from other jurisdictions, and the published law review articles and treatises, are written and edited with a view to their possible contribution to legal precedent. Surely it is not difficult to discern a distinction between those writings and a "memdispo" that was expressly intended to inform the parties—and the parties alone—the reasons for the disposition of the case.

The Committee Note concludes that the rule "will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of justices . . . ."[3] Ultimately, that is the only potential benefit that carries any

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[3]The same sentence goes on to say that it will also "mak[e] the entire process more transparent to attorneys, parties and the general public." I do not understand that part of the statement. As the Committee Note points out a few pages earlier, all unpublished opinions will soon be posted on court websites (and they already are found in Lexis and Westlaw); the Note also observes that such decisions

(continued . . .)

weight to be balanced against the significant detriments I have discussed. It would be impossible to say that there will *never* be a case in which an unpublished decision could be useful; but in a circuit which disposes of cases by highly abbreviated "memdispos," I think that such instances will be few and far between. There is no shortage of published, citable precedent in the state and federal reporters. The prospect that something marginally useful would be found in the "memdispos" does not warrant the negative consequences of the proposed rule that I have addressed in this letter.

For these reasons, I urge rejection of the proposed rule.

Thank you for your consideration of my views.

Sincerely,

JEROME B. FALK, JR.

JBF:pmm

(. . . continued)
are frequently discussed in the media. They are all public documents. What more is needed for transparency?