UNITED STATES COURT OF APPEALS
125 SOUTH GRAND AVENUE
PASADENA, CALIFORNIA 91105-1621

CHAMBERS OF
PAMELA ANN RYMER

January 28, 2004

03-AP-233

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 Rule Change – Rule 32.1

Dear Mr. McCabe:

I urge the Committee to reconsider its position on citation of judicial dispositions as reflected in proposed new Rule 32.1. Ramifications of the proposed rule are far from "extremely limited," as the Committee Note suggests. The rule would likely generate more unreasoned dispositions, not more "persuasive" ones. It would likely lead to increased delay in disposing of an increasing caseload. It would likely add to the burden and cost of litigation; it would not expand the arsenal of meaningful authority to be considered by a court, but counsel would, nevertheless, feel obliged to research the entire pool of potentially "persuasive" decisions and to present them in argument. It would likely impede, not enable, access to the courts by those without the capability of informed, computer assisted legal research. And, as the new rule would apparently apply retroactively, it would likely sweep into the pool of "persuasive" authority tens of thousands of decisions (from all circuits) crafted without any intention that they ever be cited for any purpose.

The new rule is not needed to achieve the fair, impartial, and efficient administration of appellate justice. Non-precedential dispositions are appropriate when the law is clear and well-settled, and the case falls squarely within existing precedent. To cite to such a disposition adds nothing to a cite to the controlling precedent. Put differently, it is the controlling precedent that matters, not how many unmeritorious cases (resolved by a non-precedential disposition) follow in its wake. Reasoning beyond controlling precedent also matters, of course, but it will not (and should not) be found in non-precedential dispositions. Reasoning of persuasive value may be found in the opinions of other courts, or in law review articles, because of the judicial or academic scholarship reflected in the work. However, non-precedential dispositions are not meant to exposit the law but simply to decide a single appeal raising a straight-forward issue requiring no novel research or analysis. In short, non-precedential dispositions shed no light on novel legal issues.

As the Committee Note recognizes, courts of appeals allow citation of non-precedential dispositions where that disposition itself makes a difference to the outcome of the case on appeal, for example, where preclusion principles are invoked. Otherwise, there is no point to citation of non-precedential dispositions. Non-precedential dispositions by definition aren't binding, and by design lack the contextual ingredients that make a holding influential (statement of facts, procedural background, arguments of the parties, analogizing to or distinguishing of authority, etc.). Nor would citation of non-precedential dispositions add anything to the "insight and information that can be brought to the attention of judges," as the Committee Note states. Cites to non-precedential decisions at most reveal quantity, not quality.

The Committee Note also indicates that the proposed rule would make "the entire process more transparent to attorneys, parties, and the general public." But non-precedential decisions are already available on-line, and to allow citation would not increase transparency. If anything, the proposed rule may have the opposite effect, *reducing* transparency by increasing the incentive to eliminate *any* statement of reasons in support of non-precedential decisions when a judgment order will do. I firmly believe in giving *some* reasons for a disposition in every case, and cannot embrace a change in the rules that will encourage *no* reasons to be given at all.

Although I understand that conflicting rules of procedure are a pain for attorneys who have a multi-circuit practice, the costs of uniformity in the case of citation to non-precedential decisions would far outweigh the benefits. All counsel with a multi-circuit practice can check the "local" rules without difficulty. But not all counsel, certainly not litigants representing themselves, can realistically be expected to check the entire pool of "unpublished" or non-precedential decisions rendered throughout the country for those that might have "persuasive" value in their cases. To this extent, the proposed rule would seem to favor institutional litigants and invite "game-playing," not curtail it.

There are compelling reasons why three judges (back-stopped by their full court) ought to be free to decide that some dispositions warrant citation – whether for persuasive or precedential effect – while others do not. It is one thing to agree on the result in straight-forward cases, another to agree on language and rationale in difficult ones. Infinite care is required to craft a new rule of decision for cases that have precedential effect in one's own circuit and persuasive effect in others. In my experience, at least, when three judges agree that an issue is controlled by existing precedent and doesn't need a precedential opinion to resolve, it doesn't. But, if this is wrong, anyone may request publication of an "unpublished" disposition – that is, may ask that a non-precedential decision be made precedential – when, in their judgment, the decision would be helpful to the resolution of future disputes. So, if interested parties believe that a particular non-precedential decision is capable of being persuasive, there is a way to make it so short of allowing across-the-board citation to all non-precedential decisions.

Even more importantly, people, and lawyers, rely on precedential decisions and govern their lives and fortunes accordingly. Clarity matters. To blur the line between decisions that control and those that don't will needlessly complicate the task of attorneys who must give advice based on their best assessment of what the law is and where it may logically go, as well as of district judges who must make rulings and instruct juries based on their best assessment of what the law is and where it may logically go. Non-precedential decisions that can be cited to courts of appeals, can be cited to district courts, too.

For all these reasons I ask the Committee to rethink proposed Rule 32.1. Upon reconsideration I hope it will conclude that the new Rule should not be adopted. If, however, the Committee were to continue to believe that some change is indicated, it is quite important that any change apply only from the effective date forward. Otherwise, courts could now be called upon to deal with dispositions, written years ago, to which there was agreement on result but not on reasoning.

Thank you for considering these views.

Sincerely,