ACLU LIBERTY AND JUSTICE FOR ALL
THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA
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January 28, 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, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The ACLU Foundation of Southern California opposes the adoption of proposed Federal Rule of Appellate Procedure 32.1. There are a number of strong arguments against the proposed rule that have been set forth in articles such as Case Comment, *Fairness and Precedent*, 110 Yale Law Journal 1295 (May, 2001), E. Lazarus, *The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful*, (Findlaw, November 27, 2003), and A. Kozinski & S. Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, (California Lawyer, June 2002). I will not touch on all of those arguments or why the ACLU of Southern California agrees with them, but will instead focus on two issues about which the lawyers in this office have the greatest expertise.

The first reason the ACLU Foundation of Southern California opposes the proposed rule is because it will dramatically increase the difficulty of our law practice, and that of other organizations like the ACLU, that represent clients on a pro bono basis and have limited budgets. In order to represent zealously and professionally our clients, it is necessary to find, read, and analyze relevant published cases among the ever-swelling volume of cases disposed of by the United States Circuit Courts of Appeal. This task is already very time consuming and expensive, since it is almost impossible to do without computerized databases, such as Westlaw.

If FRAP 32.1 were adopted, the number of citable cases issued by each circuit would increase by approximately four to five fold. Those organizations with greater resources, such as lots of young associates billing a paying client by the hour, would have a huge advantage sifting through and finding cases that were formerly not available to be cited. *See, e.g.*, *Fairness and Precedent*, 110 Yale Law Journal at 1301 ("Though unpublished opinions are available on commercial databases or thorough clerks' offices . . .finding these precedents, even when they are available for free, requires time, energy, and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants.").

It is probably impossible to make federal litigation a "level playing field" for litigants

with very different resources. Nevertheless, ensuring a fair opportunity for pro se litigants, as well as poor litigants and their lawyers, to present their cases to the federal judiciary is an essential component of a just society. Proposed FRAP 32.1 would undermine that goal by dramatically exacerbating the advantages that wealthier litigants already have in the federal judicial system.

Second, the experience of the lawyers in this office gives us particular insight into the preparation of Ninth Circuit memoranda dispositions. This insight leads to the realization that these dispositions are not suitable for citation in future cases, except in unusual circumstances.

Almost all of the lawyers at the ACLU of Southern California are former judicial clerks to judges in the Ninth Circuit Court of Appeals. As a result, they have seen first-hand how that Circuit's memoranda dispositions are prepared. Although our experience is that the judges deliberate carefully to ensure that the cases in which unpublished decisions are issued are properly decided, the judges are far too busy to devote substantial time writing or editing the actual memorandum disposition itself. In fact, clerks generally write the memoranda dispositions, often by cutting and pasting from, or adopting almost wholesale, their bench memoranda. And, even if the judge whose chambers drafts the memorandum disposition edits it with some care, the other judges on the panel generally give it only cursory consideration. As a result, the memoranda dispositions reflect an entirely different level of time and care from a published opinion, which often goes through dozens of drafts before being carefully reviewed and commented upon by the other judges on the panel.

These memoranda dispositions serve a valuable function – they enable the litigants in that particular case and their lawyers to have a basic understanding of how the panel arrived at its decision. Given the process by they are prepared they are not, however, suitable to be cited in future cases to try to persuade either district judges, bankruptcy judges, or other panels of the Court of Appeals.

In light of the case load and staffing in the Ninth Circuit (and, I venture to guess most other circuits as well), I cannot imagine a positive outcome to the adoption of FRAP 32.1. One possibility is that judges will spend more time on the written disposition of cases that previously were decided in memoranda dispositions because they know that will be citable. Cases that are currently decided by memoranda dispositions do not establish, alter, modify, or clarify a rule of law, publishing those dispositions is of little value. *See* Ninth Circuit Rule 36-2(a). Thus, increasing the amount of time spent on those dispositions would be inefficient, and would likely take away from time spent on those cases that are currently decided by published opinions, which almost always involve novel issues or issue of "substantial public importance." See Ninth Circuit Rule 36-2(d). Devoting more time to the written disposition of these cases is likely to delay decisions in these cases to the detriment of the litigants. Moreover, poorer litigants and prisoners bringing habeas corpus claims will tend to suffer the most from greater delays. *See*

Fairness and Precedent, 110 Yale Law Journal at 1301.

A second possible response to FRAP 32.1, if it were adopted, is that Ninth Circuit judges will cease writing short memoranda dispositions and will instead issue one or two line orders informing the litigants that the court is affirming or reversing. This would harm litigants who would no longer get any insight, however brief, into the court's reasoning and would provide no benefit to anyone practicing in the Ninth Circuit.

For these reasons, the ACLU Foundation of Southern California opposes the adoption of FRAP 32.1. The decision as to whether certain decisions issued by a Circuit Court of Appeals is best left to the sound discretion of the judges on that court, who have the greatest knowledge of the court's caseload, the judges' workload, and other relevant considerations affecting the court.

Sincerely,

Peter Eliasberg
Managing Attorney