CLEARY & SEVILLA, LLP

JOHN J. CLEARY
CHARLES M. SEVILLA
www.clearysevilla.com

ATTORNEYS AT LAW
1010 SECOND AVENUE, SUITE 1825
SAN DIEGO, CALIFORNIA 92101-4902
EMAIL: jcleary@mail.sdsu.edu

TELEPHONE
(619) 232-2222
FAX (619) 232-3711

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03-AP-242

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: Opposition to Proposed FRAP 32.1
Citation to Judicial Dispositions

Dear Mr. McCabe:

Thirty years ago when the Ninth Circuit introduced the rule for non-citation of unpublished decisions, some of us in the practicing appellate bar questioned its validity. It appeared to allow the drafting of opinions or dispositions, labeled memorandum, not be subject to the scrutiny and accountability expected in published opinions. The 30 years of experience under the Ninth Circuit rule precluding to citations for unpublished opinions has proved its validity in the efficient and fair resolution of appellate cases. The proposed change to allow the citation of unpublished decisions will create an unfair advantage for institutional appellate advocates and unleash many changes that could serious alter the time and manner of appellate resolution (achievement of reasonable judicial finality). The proposed rule claims to be an ever so minor modification, but it will have systemic consequences penalizing the irregular and small user of the appellate courts and decisively favoring the regular and gigantic users such as the Government. Such a monstrous change in the reporting of cases and the impact on the fundamental use of precedent should not have been couched as a minuscule adjustment. Before the adoption of this rule, I would strongly urge that hearings be held in every circuit to hear from judges and lawyers about the possible severe adverse consequences of the this rule change.

With over forty years of practice, most of it appellate and most of it before federal appellate courts, I strongly oppose the adoption of FRAP 32.1. I would offer the following reasons for its rejection:

1. **Mellifluous Misstatement.** The Committee Note states: "Rule 32.1 is extremely limited." That is a misleading statement concerning a categorical prohibition applying to all circuits on the use of unpublished dispositions. This proposed rule by its own terms is not limited to decisions of the courts of appeal, but could be applied to unpublished dispositions from any district (federal) or any state court. Does the rule permit me to use a three-page memo of a district court granting a motion to suppress or dismiss?

The Committee notes that it does not address the issue of precedent, but that these unpublished dispositions which before could not be cited will become "persuasive value." The Committee creates the problem without addressing whether unpublished dispositions may not be treated as "non-precedential." Rule 32.1 would create the problem that such dispositions could and would be used as precedent. Even if not precedent, other judges would have to treat these summary dispositions, usually result oriented with a minimum of explanation, with similar consideration given to published opinions.

The noble objective of this categorical imperative is to make work easier for the practitioner and to remove the "hardship" of having to check the requirements of each circuit before he or she determines how to use an unpublished decision. Every professional

appellate advocate, one-time or multi-user, should be responsible to check the local rules of every circuit before filing a pleading. The proposed rule is an aid for the unprofessional or lazy, who under this rule need not check the local circuit requirements concerning the use of unpublished dispositions.

The utility of unpublished decisions is that they summarily resolve the controversy. It is a decision that is binding only on the parties. It is true that public access to federal appellate unpublished dispositions has greatly increased in recent years, but it does not mean that the average appellate practitioner has ready access to these dispositions. Most lawyers want to use binding precedent, a limited body of law. For the individual practitioner legal research is costly, and there is only so much research time available on each case. Occasionally we use an opinion from another circuit if directly on point, but it is our local circuit that will decide the case. Practicing lawyers do not have the luxury to regularly pursue the law reviews which treat with general topics, not specific cases. Unpublished dispositions are not like law reviews for they summarily decide particular cases. The use of unpublished decisions as any form of precedent or "persuasive value" might create the disaster of having the parties citing the briefs or records in those cases in order to properly interpret the reasoning of these summary decisions.

2. **Procrustean Centralization.** The beauty of the FRAP is that they provide a central core of rules governing all federal appellate courts, which vary in size and structure. It is clear that such rules may be supplemented by more detailed circuit rules. Flexibility in addressing local needs is the key, which tracks our constitutional framework. That fundamental approach has been violated by the categorical imperative that forces the circuits to adopt some all or nothing rule with respect to the publication of its dispositions. If we in the Ninth Circuit prefer the tried and tested use of unpublished decisions, we are forced to adhere to a national standard without considering the staggering volume of cases and the large size of our circuit court. This rule arbitrarily imposes a standard that will not fit well in many circuits. It is not needed, for each circuit can now decide which method works best. It is better to allow the advocates of this rule to appeal to a national consensus of federal appellate judges in fashioning some agreed norm rather than make all circuits fit to one rigid rule.

3. **Government Advantage.** The Committee notes, but discounts, the complaint that this rule gives the institutional litigant such as the Department of Justice a substantial advantage in using unpublished decisions, now approximately 80% of all federal appellate decisions. All are now free to use the limited reasoning of unpublished dispositions in their arguments (transparency), but they are precluded from using the result as authority. Unpublished dispositions now be very helpful in crafting a legal argument, but the ability to use these numerous decisions as some form of authority gives a substantial advantage to the Government or institutional litigant. Most lawyers find the most important aspect of appellate argument the framing of the issue and its application to the unique facts of the case. Most cases will be applied by analogy, and several only touching on an issue will be used. Under the proposed rule the institutional litigant will be able to bombard the opposition with a flurry of small unpublished cases that will have to be answered. If string cites to published opinions was poor form, how much more so to unpublished ones. Will the use of unpublished decisions help to do justice in the particular case? No, but it will allow the institutional litigant to create new hurdles and obstacles for the individual litigant with less resources.

This rule fails to consider the extensive pro per litigation in the federal appellate courts. How will these unrepresented litigants, social security claimants as well as prisoners, be treated under this rule allowing the government to use unpublished decisions?

4. **Guaranteed Delay**. One of the most serious problems confronting federal

appellate courts is the size of their workload, the limited staff, and the requirement to timely decide cases. The proposed rule does not take into consideration the delay it will induce. When unpublished decisions may be cited, those authoring them will have to spend more time on the reasoning. The amount of time necessary to resolve a memorandum decision could be as little as a few hours, for such resolution is result oriented. The time necessary to write and address the issues in unpublished decisions will increase the amount of time in the resolution in 80% of the cases now being decided. After oral argument, if any, a panel may determine the fate of an unpublished case with a summary disposition and with a minimum of articulated reasoning, so that an unpublished case can be issued within a few days of oral argument or decision. Now, the panel members will have to give greater scrutiny to these decisions, and such scrutiny and consensus will take much longer than the existing practice. Summary dispositions will be substantially delayed. Few dissents or concurring opinions are now filed in unpublished decisions, but judges will feel necessary to justify their specific points of view and explain their different positions.

In addition, when there are several contradictory unpublished decisions that may be cited, the court will have to resolve these contradictions by the en banc process. In the Ninth Circuit we have approximately 20-25 cases each year resolved by a mini en banc (11 of 28 judges), but with unpublished decisions of "persuasive value" that may be cited to the court, this number will easily quadruple. At a time when a search for ways to reduce the time of decision making at the appellate level, this rule exacerbates the increasing time from filing to disposition.

Before implementing Rule 32.1, I suggest that a national rule be adopted that would require that a case be decided within six months of oral argument or taking under submission. Many could argue that such a rule is arbitrary and does not consider the volume or complexity of the caseload. However, such a proposal would be obviously impossible if Rule 32.1 were adopted, because this existing delay would be vastly increased for all cases, and the hoped for goal of dispositions in all in six months will become illusory.

Proposed Rule 32.1 is not a small change, but a recipe for disaster. If the federal judiciary learned one thing from the Feeney Amendment, it was the need for consultation and consideration before imposition of change that cuts off judicial discretion. That Congress did it was inexcusable, but for the Committee, an agency of the judiciary, to suggest this self-inflicted limitation in the regulation of unpublished decisions is irrational.

Sincerely,

John J. Cleary
Attorney at Law