UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
125 SOUTH GRAND AVENUE
PASADENA, CALIFORNIA 91105-1510

CHAMBERS OF
RICHARD A. PAEZ
UNITED STATES CIRCUIT JUDGE

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03-AP-273

February 2, 2004

Peter G. McCabe, Secretary
Committee on Rules
of Practice and Procedure
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: FRAP 32.1

Dear Mr. McCabe:

As an active member of the Ninth Circuit Court of Appeals, I write to express my opposition to proposed Rule 32.1. This new rule, which the Committee characterizes as "extremely limited," will allow parties to cite "unpublished" opinions (dispositions) for their persuasive value. Rule 32.1, however, is misguided, unnecessary, and ultimately counterproductive.

Rule 32.1 is Unnecessary

As the Committees Notes indicate, circuit courts differ with respect to the restrictions they impose on the citability of "unpublished" dispositions. Some circuits allow parties to cite "unpublished" dispositions for their persuasive value, while others do not permit citation of

"unpublished" dispositions, except in limited circumstances.[1] According to the Committee, "[t]hese conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit." Committee Notes at 31. The Committee, however, fails to cite any evidence that this is an actual problem. Practitioners who practice in more than one circuit merely have to review local circuit rules to ensure that their submissions comply with the unique requirements of a particular circuit. From my experience, the adoption of a national norm to eliminate any hardship on practitioners cannot, by itself, justify reform unless the Committee is prepared to invalidate every unique circuit rule.

Fortunately, the current practice recognizes that each circuit is different. Circuit courts of appeal reflect their own unique experiences and traditional practices. Indeed, in California, the largest state in the Ninth Circuit, the California Rules of Court have long prohibited the citation of "unpublished" opinions by the California Court of Appeal. See Cal. Rules of Court 977(a). Thus, it is no surprise to California practitioners that the Ninth Circuit also prohibits citation of "unpublished" dispositions.

The Committee Notes also state that "it is difficult to justify a system that permits practitioners to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions." Id at 33. From my experience, there is indeed good reason to prohibit the citation of "unpublished" dispositions "Unpublished" dispositions are written for the benefit of the parties and therefore are not as complete or thorough as a published opinion. Further, although a judge may have some concerns about a particular outcome, the judge is more likely to join an "unpublished" disposition knowing that it cannot be cited as authority or for its persuasive force in future cases. Thus, citing to "unpublished" dispositions would provide a distorted view of a panel's perspective on questions outside of the context of the decided case. "Unpublished" dispositions have a limited purpose and it is misguided to suggest that an "unpublished" disposition should be allowed to

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[1] Ninth Circuit Rule 36-3 provides that "unpublished" dispositions may not be cited except when relevant under the doctrine of law of the case, res judicata, collateral estoppel, or for factual purposes. Rule 36-3 was recently amended to allow an "unpublished" disposition to be cited in a petition for panel rehearing or rehearing en banc, "in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." Ninth Circuit Rule 36-3(b)(iii).

have persuasive value. When viewed in this context, it is difficult, at least from my perspective, to understand why the Committee is so anxious to allow the citation of "unpublished" dispositions.

Rule 32.1's Unintended Consequences

Although Rule 32.1 seeks to promote the use of all persuasive authority, the proposed rule fails to even acknowledge the heavy workload of federal appellate court judges. In an ideal world, courts of appeal would issue reasoned binding opinions in every case that comes before the courts. This, however, is impossible in a circuit where each judge is responsible for hundreds of cases a year. We have no choice but to identify those cases that can be disposed of in a summary fashion and those that raise important legal or factual issues that warrant a full opinion. By prohibiting citation of an "unpublished" disposition in future cases, circuit judges can quickly resolve a case knowing that the disposition will have no persuasive or precedential force. At the same time, an "unpublished" disposition allows the court to provide the parties with a reasonably complete explanation of the basis for the court's ruling. Ultimately, restricting the citability of "unpublished" dispositions is beneficial both for the parties and for judges.

However, if all "unpublished" dispositions may be cited in future cases, judges will either spend more time ensuring that the disposition is well-reasoned and well-written, or draft the disposition to say as little as possible, thereby ensuring that the disposition will have no persuasive force. With the amount of time that it takes to draft an opinion, review opinions from other chambers, and prepare for calendar, judges will likely opt for the latter course of action. Although a one or two paragraph disposition may solve one problem, the parties would surely be disappointed with a summary explanation of the appellate issues they have pursued, often at considerable expense.

It is also wishful thinking to suggest that the proposed rule will have a limited effect — simply providing the parties with the right to cite an "unpublished" disposition for its persuasive value. Practitioners, as forceful advocates, will inevitably cite "unpublished" dispositions as binding authority. Practitioners frequently cite district court opinions, sister circuit opinions, and state court opinions as binding precedent, even when there is existing controlling circuit authority or existing circuit law that suggests a contrary result. Allowing citation of "unpublished" dispositions would only exacerbate this problem. In fact, it would become an even greater

problem because practitioners would be inclined to rely on a circuit's own "unpublished" dispositions, rather than non-binding (but more fully reasoned) authority from other courts. In short, Rule 32.1, is just a preview of what, in due time, will surely follow — the complete elimination of any restrictions on the use of "unpublished" dispositions.

Finally, Rule 32.1 does not recognize the costs to litigants of searching for citable "unpublished" dispositions. As the Committee's Notes reflect, "unpublished" dispositions are available through on-line legal research providers such as Westlaw and Lexis-Nexus. For pro se litigants and litigants represented by sole practitioners and small firms, the costs of on-line legal research can be prohibitive. It is no answer to say that "unpublished" dispositions can be obtained from a circuit's clerk's office or the court's own website. Although "unpublished" dispositions may be available on-line from the clerk's office, they are not maintained in a searchable format. The only effective way to search for relevant case law is through the on-line legal research providers. While this may not be an obstacle for wealthy or institutional litigants, it is an obstacle for pro se litigants and litigants with limited financial means. The Committee Notes do not address this problem.

For these reasons, although proposed Rule 32.1 is well-intentioned, it is unnecessary and will lead to unintended adverse consequences. I urge the Committee to reject Rule 32.1.

Thank you for considering my views.

Yours very truly,

Richard A. Paez