United States Court of Appeals
THE PIONEER COURTHOUSE
PORTLAND, OREGON 97204-1396

03-AP-285

Chambers of
DIARMUID F. O'SCANNLAIN
United States Circuit Judge

(503) 326-2187

February 5, 2004

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

RE: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. Having served as a Judge on the Ninth Circuit Court of Appeals for more than 17 years, I fear that the proposed rule would both seriously disrupt our already-strained efforts to maintain a consistent law within the circuit and would impose massive and debilitating demands on our already thinly-stretched resources.

My court has received approximately 24,000 appeals during the past two years alone, and we are experiencing an ever-quickening, double-digit percentage annual growth in the number of filings. Not only does this mean that we can barely find time to read the published dispositions filed by our colleagues (which is, of course, necessary to keep abreast of the latest developments in our circuit and to maintain some grasp on its ever-shifting law); we hardly have sufficient time to devote to those published dispositions for which we are ourselves responsible. Like my colleagues Judges Reinhardt and Kozinski,[1] I believe that opinion writing is an art: It takes weeks, and often months, of intense drafting and revision to craft an opinion that adequately resolves the appeal immediately before the court, clarifies (or expounds) the appropriate rule of law,

[1] *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, Cal. Lawyer, June 2000, at 43-44 & 81.

and establishes a legal principle competent to guide the resolution of future cases without leading litigants, lawyers, and jurists astray with loose, ambiguous, or misdirected language.

The availability of non-citable memorandum dispositions, in turn, is the lifeblood of that process. Such summary dispositions allow us not just quickly to dispose of frivolous appeals but rapidly to resolve the thousands of cases which present issues already clearly governed by binding Supreme Court or circuit precedent,[2] providing us in turn with (barely) enough time to do the work that really needs doing in the remaining cases for publication—articulating the finer points of the law, clarifying existing ambiguities, filling the law's innumerable lacunae, and settling the truly difficult legal disputes that come before the court.

I fear that, if adopted, proposed FRAP 32.1 would cause resort to at least one of two regrettable practices. On one hand, it might lead my colleagues to turn to single-line summary affirmances and reversals in lieu of our current memorandum dispositions—thereby depriving litigants of the opportunity even to get the gist of the court's reasoning, yet (by failing to say anything substantive at all) depriving ever-resourceful attorneys from exploiting an ill-considered turn of phrase. On the other, we may (in expending additional effort on what otherwise would be simple memorandum dispositions) be forced to sacrifice the additional care and effort that goes into each of our published opinions, effectively reducing productivity overall and the average quality of our written work product to the level of today's unpublished, non-citable memorandum dispositions. Neither of these options serves the cause of justice in our society.

I realize that the Committee has attempted to avoid these pitfalls by seeking to draw a line between the citability and the precedential effect of such dispositions. I fear,

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[2] To provide just three examples, our court currently has *hundreds* of cases raising at least one of the following issues: the constitutionality of California's three-strikes law (upheld by *Lockyer v. Andrade*, 538 U.S. 63 (2003)); the constitutionality of the Bureau of Immigration Appeals's "streamlining" regulations, which allow a single judge of the BIA to affirm the decision of an Immigration Judge (upheld in *Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003)); and the constitutionality of retroactively applying provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (upheld by, *inter alia*, *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003)).

however, that any such distinction is illusory. The *only* reason litigants have any interest in citing an unpublished opinion is because such authorities bear the imprimatur of an Article III appellate panel. And once the parties begin to comb and to call upon such authorities, we will be forced to sort out the well-reasoned from the under-reasoned by comparing the "holdings" (and—yes—even the "dicta") of unpublished dispositions to those of our published opinions, and to begin the long, arduous, and resource-draining process of declaring anew what is and what is not the law. Once brought to the court's attention, in short, there is no way simply to ignore our memorandum dispositions; notwithstanding the best efforts of its drafters, proposed FRAP 32.1 opens wide the back door to precedential status—and it will inexorably be accompanied by all its associated dilemmas.

I fully recognize the widespread concern about non-citation rules within the practitioners' community. But given the realities of our ever-growing caseload and the increasingly intolerable strain on our already limited resources, the perfect truly is the enemy of the good.

I urge the Committee to vote against proposed FRAP 32.1.

Sincerely yours,

Diarmuid F. O'Scannlain
United States Circuit Judge
U.S. Court of Appeals for the Ninth Circuit