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February 2, 2004

03-AP-301

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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

As a former law clerk with the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States, and now a practicing attorney, I write to express my opposition to the proposed new Federal Rule of Appellate Procedure 32.1 ("FRAP 32.1"). Adopting a one-size-fits-all rule that prevents the individual Courts of Appeals from exercising their supervisory authority to regulate the use of their unpublished dispositions does not acknowledge the diverse problems that different circuits may face. In the case of the Ninth Circuit, with which I have some familiarity, it is a very bad idea.

The statistics published by the Administrative Office of the United States Courts show that the Ninth Circuit terminates around 10,000 cases each year, with over 5,000 of them terminated on the merits. That is a staggering workload, even for the federal appellate court with the largest number of authorized judgeships. Because of this overwhelming docket, it is necessary for the Ninth Circuit to leave the preparation of some dispositions to staff attorneys at the court's home office. (I suspect, although I do not personally know, that other circuits have similar arrangements.) Despite the fact that some of these dispositions may look much the same as published opinions, their language is oftentimes not scrutinized to the same extent that the words used in published opinions are. And given the crush of work before the Ninth Circuit, it is inevitable that such unpublished dispositions cannot have their verbiage as finely tuned as the court's published opinions. Thus, the focus of these dispositions is properly on correcting any errors in the result reached in the case at hand, or stating that there was no error, and not on articulating any rule of law that should be applied in similar cases.

The Committee Note to the proposed new rule finds irony in allowing "Shakespearian sonnets" and "advertising jingles" to be cited in briefs while prohibiting the citation of such unpublished dispositions. But it is no surprise that a court would have no problem with the citation of various sources that are in essence cited for no more than the persuasiveness of their reasoning, yet not permit the citation of unpublished dispositions. Such dispositions are, after all, likely to be cited not for the persuasiveness

of their reasoning (indeed, in the Ninth Circuit, there is oftentimes little or no reasoning contained in those dispositions), but rather simply for the fact that they were issued under the auspices of a judge or judges of the Court of Appeals. As an unpublished disposition of another Court of Appeals can only be viewed as persuasive, and not binding, authority, allowing litigants to cite such dispositions could be seen as a lesser evil. (Moreover, the Courts of Appeals restrict the citation of their own opinions in the courts of that circuit by exercising their supervisory authority over the district courts in the circuit; it is by no means certain that they could exercise such authority over the district courts of another circuit.) Should the citation of unpublished dispositions be forced upon all courts, such dispositions will without a doubt quickly become fertile ground for attorneys hunting for cases that appear at first blush to be factually similar. Therefore, regardless of the stated neutrality of the proposed Rule with respect to whether such cases must be treated as precedent, they are likely to carry weight greater than the judges issuing them believe they should be given.

Yet affording any precedential weight to such decisions, which are likely to have received much less scrutiny than an opinion designated for publication (which sets forth and explains the applicable rule of law in the circuit), could lead to lower courts relying upon loose language that will produce confusion in the law. Especially in a court the size of the Ninth Circuit, it is enough of an uphill battle to maintain consistency in the law by keeping up with the hundreds of published opinions issued each year. A need to monitor the language used in unpublished dispositions would make doing so well-nigh an impossible task.

The Committee Note also appears to find significance in the fact that the Supreme Court of the United States sometimes reviews unpublished dispositions. However, that fact is neither surprising nor significant. One of the functions that the Court serves is to resolve splits among the circuits on issues of law. Once an issue of law has been definitively decided in a circuit, it is unremarkable that the Court of Appeals for that circuit would dispose of cases controlled by that rule that later arise by way of unpublished disposition. That does not take away from the fact that other circuits might disagree with the rule (yet the disagreement of other circuits on an issue is certainly no reason to continue publishing opinions on a settled point to reaffirm the existence of the split). Thus, in many cases that the Court takes to resolve a split, the rule of law has become well-established in the circuit in which the case arises, and it has simply taken time (and published opinions in other circuits) to allow the split to develop more fully. *E.g.*, *Buckhannon Board & Care Home, Inc. v. West Va. Dept. of Health & Human Resources*, 532 U.S. 598, 602 (2001) (resolving circuit split by affirming unpublished decision; case controlled by *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc)).

Although some may argue that treating a disposition as unpublished is somehow disrespectful of the parties involved, or an indication that their case has not been taken as seriously as it should have been, that is incorrect. Some (if not many) cases do not

involve the application of controversial or novel legal principles; rather, they are more or less controlled by existing precedent. Having such cases disposed of in a different manner than cases that involve issues of unsettled or unclear law is not at all disrespectful; it serves the function of allocating scarce judicial resources in the most efficient manner, which benefits the entire system. Indeed, requiring that unpublished dispositions be citable could in fact have a perverse effect on such cases. It could well be that judges who are uncomfortable with whether the language contained in unpublished dispositions is precise enough to avoid unintended misinterpretations would decide, rather than issuing nonprecedential dispositions that offer some reasoning behind the action taken, instead simply to issue judgment orders informing the litigants only that the decision below was affirmed. The loss of a more complete explanation of the reasons that the court took the action it did in a particular case would work a much greater harm upon litigants than any possible perceived dignitary harm associated with the knowledge that the decision on appeal in their case is not citable as precedent.

For the foregoing reasons, I urge the committee to reject the proposed FRAP 32.1.

Sincerely,

Eugene M. Paige