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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

03-AP-345

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1, which would permit the citation of unpublished federal appellate decisions. In all likelihood, the rule would have a significant negative impact on the practice of law before federal courts of appeals.

My opinion on the proposed rule is informed by my professional experience: I clerked for Hon. Robert R. Beezer on the Ninth Circuit from 1995-96. Since 1997, I have been practicing litigation in a major San Francisco law firm. My practice includes substantial components of both state and federal cases, as well as trial and appellate work. Additionally, I hold a doctorate in law from Oxford University. I write these comments to express my personal opinion of the proposed rule. Additionally, the other individuals indicated below have authorized me to submit these comments on their behalf (however, the opinions expressed herein are not necessarily those of my employer or its clients).

As a general matter, corporate civil litigants are interested in prompt, accurate resolution of their disputes, together with at least some explanation of the basis for the decision. The proposed FRAP 32.1 would undermine these interests.

A. The Proposed Rule Will Likely Result In Increased Delay or More "Postcard" Dispositions.

As Ninth Circuit judges themselves have acknowledged, cases pending before the Ninth Circuit are divided into two groups. A modest percentage are designated for publication and the opinions drafted in those cases receive close judicial attention. The majority of cases, however, are not designated for publication and the "memorandum dispositions" (or "memdispos") in those cases are generally drafted by a law clerk with minimal judicial oversight—other than instructions as to the outcome. Alex Kozinski

and Stephen Reinhardt, "Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions," *California Lawyer* pp 43-44 (June 2000).

Permitting citation of memdispos will inevitably increase pressure on judges to spend more time reviewing and polishing those decisions—if they continue to be made publicly available. And this increased burden would expand geometrically, since, as noted above, as a practical matter the courts would have to address all relevant published and unpublished decisions. Thus, not only would more dispositions require increased judicial attention, but each disposition would require consideration of a significantly broader range of decisional authorities. Assuming that courts of appeals are already operating at or near full capacity, spending additional time working on memdispos would simply add to the backlog of cases and increase the time it takes to obtain a final decision.

Increased delay would not be a good result for many civil litigants.

Faced with this potential additional burden and backlog, it is conceivable, even likely, that courts with an extensive practice of writing unpublished dispositions (such as the Ninth Circuit) will abandon the practice and begin issuing summary, or "postcard," dispositions instead (*e.g.*, "The judgment of the District Court is affirmed.").[1] While this would doubtless increase the efficiency with which courts dispose of the "easy cases" (*see* Frederick Schauer, "Easy Cases," 58 S.Cal. L. Rev. 399 (1985)), it serves neither the interests of the litigants, the general public, nor the courts themselves.

Litigants ought to receive some explanation of the court's rationale. Such an explanation serves several purposes. First, civil litigants often negotiate a settlement even after a final appellate decision is handed down. Having a reasoned analysis from the court of appeals can facilitate meaningful dialogue and, therefore, negotiated resolution of disputes. Second, the discipline of writing *some* analysis of the case serves as a check upon the process to increase the likelihood of a correct resolution. Third, a reasoned analysis (even one written by a law clerk) allows litigants to feel as though they have received a fair hearing and promotes confidence that the court has not simply acted arbitrarily.

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[1] *See* "20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit," December 1, 2003 at Question 16 (*available at* http://20q-appellateblog.blogspot.com) ("I predict that if courts were forbidden to designate certain decisions as nonprecedential, they would cease issuing reasoned opinions in such cases but instead would just say 'Affirmed,' which is already the practice in the busier circuits.").

The public benefits from unpublished decisions as well. Even if they are not citable to the court, they are nonetheless an intermediate source of legal research, and a potential fount of available arguments.

Finally, the courts benefit from the practice of issuing unpublished decisions rather than postcard decisions. Their decisionmaking is thereby made more transparent, which in general serves to increase public confidence in the court system.

B. The Committee's Observation that Unpublished Opinions Could Be Cited Like Law Review Articles Blurs the Distinction Between Persuasive and Binding Authorities.

The Committee Notes for the proposed Rule 32.1(a) fail to acknowledge fully the profound distinctions between persuasive (*i.e.,* permissive) and binding (*i.e.,* mandatory) authorities:

> An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might – that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

The distinction between permissive and mandatory authorities goes significantly beyond whether a particular source carries binding precedental value. The distinction also governs whether such a source *must* be cited to the court, or merely *may* be cited at the party's option (even if it is directly on point). *See* Robert S. Summers, "Statutory Interpretation in the United States," in MacCormick & Summers, eds., *Interpreting Statutes* at 422 (1991) (listing separately mandatory and permissive authorities); *see also* Christian E. Mammen, *Using Legislative History in American Statutory Interpretation* at 10-27 (2002) (discussing permissive and mandatory materials used by U.S. Supreme Court in aid of interpreting statutes).

To permit citation of both "published" and "unpublished" opinions to the issuing court would blur and confuse the distinction between permissive and mandatory authorities. This issue does not generally arise in relation to on-point *favorable* authorities; in those circumstances, the blurring and confusion works to the advocate's benefit by creating the impression that an even longer line of cases supports her position. Rather, the issue arises in relation to similar or on-point *unfavorable*, unpublished decisions. Then, the advocate is faced with the Hobson's choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation from her opponent (or worse, the court) for ignoring those decisions. Imagine the oral argument where counsel failed to cite an on-point, unfavorable, unpublished opinion:

Court: Counsel, are you aware of this court's prior decision in *Smith v. Jones*?

Counsel: Yes, your honor. But that is an unpublished decision, so technically I don't have to cite it, and it is not the law of the circuit.

Court: Setting that to one side for the moment, how would you respond to the quite persuasive reasoning in *Smith v. Jones*? Doesn't the analysis there persuasively support your opponent's position?

And so forth. In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedental, published opinions, the *substance* of the distinction would quickly erode. *All* relevant opinions, whether or not designated "published" or "precedental," would have to be cited and addressed by all parties.

Put another way, the proposed FRAP 32.1 threatens to blur or destroy the distinction between the Circuit Courts' case-deciding function and their law-making function.

Respectfully Submitted,

Christian E. Mammen
on behalf of himself,
Michael K. Plimack, and
Christopher Stoll