03-AP-473 RECEIVED 2/18/04

WITHERSPOON, KELLEY, DAVENPORT & TOOLE

A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
422 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201-0300
Telephone: (509) 624-5265
Telecopier: (509) 458-2728

COEUR D'ALENE OFFICE
THE SPOKESMAN REVIEW BUILDING
608 NORTHWEST BOULEVARD, SUITE 401
COEUR D'ALENE, IDAHO 83814-2146
(208) 667-4000

February 11, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Comment on Proposed Rule of Appellate Procedure 32.1

Dear Mr. McCabe,

Please accept this letter of comment on the proposed change to Rules of Appellate Procedure, Rule 32.1. That your committee may decide what weight to put on my comments, permit me to say that I am a practicing lawyer, and a member of the bars of the States of Washington, Idaho, Oregon and Hawaii. I have been admitted to practice in the United States Court of Appeals for the Ninth Circuit since 1980. I am a Fellow of the American College of Trial Lawyers, a member of the Ninth Circuit Advisory Board, a member of the Washington Appellate Lawyers Association and an Adjunct Professor of Law at Gonzaga University (I hasten to add that I hold no authority to express the views of any of the foregoing organizations; the opinions expressed herein are mine alone).

I write in support of proposed Rule 32.1, which would though not perfect would improve the litigation process by permitting free discussion of decisions which have been designated by their authors as "unpublished" or otherwise not precedential. I am very much aware that two of the federal appellate judges I admire most, Judges Kozinski and Reinhardt of the Ninth Circuit, have written and spoken strongly in opposition to the proposed rule. Their opposition is entitled to (and I know it will receive) great weight among their colleagues who must ultimately decide on the wisdom of the proposed rule, but I remain convinced that the rule should be adopted for sound reasons. But because I do not believe that their valid

concerns are entirely disposed of by the terms of the proposed rule, I take the liberty herein of proposing a modest adjustment to the proposed rule that I hope may go some way to ameliorating their concerns.

A rule that would designate unpublished dispositions as non-binding but leave counsel free to cite them to courts in appropriate circumstances would best accommodate the competing interests involved in efficiently deciding appeals and in effective advocacy. By "competing interests" I mean, on the one hand, a court's legitimate desire to be free to write shorter, less painstakingly detailed dispositions (that, not being intended as binding precedent, may not contain as extensive development and exposition of the facts and the principles at issue as might otherwise be expected in published opinions), and on the other hand, the advocates' reasonable wish for the liberty to direct to the attention of a court such previous dispositions of like cases as may be relevant in deciding a pending matter. A rule permitting citation to unpublished authority for its persuasive value, but not as binding precedent, would serve both ends.

There are two contexts in which citation to unpublished opinions would be helpful. First, an unpublished disposition may be the only word from a court on an issue that is otherwise one of first impression. Those situations do not arise frequently, but when they do, lawyers (and also trial judges) consider that there is some value in knowing how the appellate court has actually handled the issue, even if the appellate court was clear that it was not intending to make law. Second, it sometimes happens that unpublished dispositions (or, more often, a series of them) on a single issue furnish a kind of reassurance of the vitality of a long-standing legal principle, where no recent case has been published that addresses the principle under consideration.

In the first situation, the case of first impression, the unpublished disposition sits somewhere on a continuum from, at the very least, being some indication about how the appellate court might decide a similar case to, in the best case, constituting a well-reasoned analysis of the problem presented.

As to the former, least valuable kind of disposition, Judge Kozinski is probably right that the most important thing about it is the cachet it gets from having been subscribed by three appellate judges; but even with those limitations it is still useful as an indication, however vague, of the view of the appellate court. After all, it would not be useful at all (no one would bother to cite it) did it not at a minimum recite enough facts similar to the later case in which it is be cited to be relevant, and describe enough of the outline of a rule of law that can be applied in the later case. Ultimately all precedent can be described loosely as a

prediction about how an appellate court will decide a given point on given facts, and even badly-done dispositions shed some small light.

As to the better-written unpublished dispositions at the other end of the continuum (and I would respectfully submit that not all unpublished dispositions are as awful as Judge Kozinski suggests, however rapidly they may have been drafted and filed), some are well done and truly useful to the development of a legal argument if not (because they are not binding) to the development of the law itself.

In the second set of circumstances where citation to unpublished authority might be useful, occasionally no recent published case can be found that addresses a venerable point of law. As the Ninth Circuit observed in Glencore Grain v. Shivnath, 284 F.3d 1114 (2002), when a point is "unexceptional", it is sometimes possible to "uncover[] little authority squarely addressing the issue." In such circumstances, it may be that what recent decisions there are, are unpublished, the court having reasonably elected not to publish on a settled point. Citation to these decisions would help show a court that the principle of law in question was still vital and well-settled – that the lack of recent published caselaw is itself evidence of how well-settled the principle is.

The rule should also take into account what lawyers and, more importantly, trial judges actually do in connection with unpublished dispositions. Were the problem simply that bad lawyers are disregarding the rule, I might be reluctant to propose that the existing Ninth Circuit rule merely be scrapped instead of better enforced.[1] My own experience has been that the prohibition on publication currently in effect in the lower courts of the Ninth Circuit is utterly disregarded, not just by bad lawyers but also by good ones – even by leading lawyers, not always, to be sure, but in many cases when there is no binding, published authority available.

---

[1]Of course, enforcement of such procedural rules is easier proclaimed than accomplished. The lawyer faced with an adversary's indifference to the requirements of such rules most often feels constrained to ignore violations and hope the court notices, being mindful that the courts take a dim view of the lawyer who, instead of arguing his case, starts a "hosing contest" with his adversary. See Kozinzki, 'The Wrong Stuff', 1992 *B. Y. U. L. Rev.* 325 at p. 328. The Ninth Circuit announced not long ago that it was serious about issuing sanctions for violations of the rule, *Hart v Massanari*, 266 F.3d 1155 (2001), but since its publication I have observed continued citation to unpublished authority in the lower federal courts, and have heard no reports of sanctions.

Judges too are frequently indifferent to the current rule as well. I have never seen a lawyer sanctioned for having disregarded the prohibition on citation to unpublished opinions, and have sometimes felt that the playing field was not level for my clients where I have observed the rule and adversaries have been free not to do so. I am aware of a case in which the trial judge granted counsel for another party leave to cite to unpublished decisions, when leave was requested in a call to the clerk. Indeed my own opinion about the desirability of a rule permitting citation to unpublished decisions was fixed during a case in which we found, but did not cite - - because it was unpublished - - a favorable opinion "on all fours," only to have our trial judge later cite it to us in his opinion. Our clients were not hurt, since the unpublished opinion was on the right side of the issue from our point of view, but I thought at the time that my adversary might justly have felt aggrieved about having had no opportunity to try to convince the court that there were good reasons *not* to follow the unpublished decision.

I would respectfully submit that a fallacy in the current rule in the Ninth Circuit is that while it prohibits *lawyers* from *talking* to judges about unpublished opinions, it doesn't forbid *judges* (or their clerks) to *think* about them, or to be influenced by them in their decision making. It couldn't possibly do so, and that is its major flaw.

Since the proposed rule is specific that unpublished dispositions are *not* binding (because the deciding court has specifically designated them as not binding) the concern that appellate courts will be consigned to writing nothing but publishable dispositions can fairly be rephrased as a worry that lower court judges won't know the difference between (binding) published and (non-binding) unpublished decisions, won't know not to follow a badly reasoned unpublished opinion, or won't understand how and when to appropriately use non-binding, non-precedential unpublished decisions. That worry cannot be entirely discounted (though it can perhaps be mitigated, as suggested below), but it must be tolerated. We lawyers are constantly mindful that our justice system depends absolutely and ultimately on the good judgment of those chosen to serve as judges; that fact will be no less critical to the correct application of the proposed rule 32.1, if it is adopted, than of any other rule of law applied by the courts. The rules (and the appellate courts) have no alternative but to proceed in faith that it will be the exceptional lower court judge who will be confused by abuse of unpublished opinions (and, without doubt, any tendency to be confused can be corrected with a sharp reminder if necessary from the appellate court that non-precedential decisions are, in law, not precedential[2]).

---

[2]As Clarence Darrow is supposed to have remarked, "all men are presumed to know the law – all men, that is, except trial judges, for whom our founding fathers wisely provided courts of appeal."

Judges Kozinski and Reinhardt express a related concern, less easily discounted, that general confusion about the law will ensue from a rule giving broad currency to badly written opinions. To be sure, the best lawyers will *not* simply toss in unhelpful dispositions to confuse the issues, and they will *not* attempt to untrack the correct application of the (published) law by citation to bad or incorrect or misleading (unpublished) decisions, and good judges won't sit still for such conduct. But bad-to- middling lawyers will do so; and busy judges might be misled. Your committee ought to think about whether lawyers will be permitted to file briefs ignoring published precedent in favor of wrong or misleading, but more favorable (to them) unpublished decisions; whether, if no limits are put on the circumstances in which unpublished decisions can be cited, good lawyers will be obliged to research both published and unpublished caselaw; whether the fees payable by clients represented by good lawyers will be multiplied by counsel's need in every case to search for and account for (by distinguishing them, reconciling them, or otherwise explaining them) unpublished decisions[3]; and whether busy trial judges will have to sort through briefs littered with myriad (potentially contradictory, if Judge Kozinski is correct) citations to published and unpublished cases.

The latter examples convince me that Judges Kozinski and Reinhardt are *not* wrong to worry about how the rule will actually work. Their concerns are valid, but I am nonetheless convinced that the proposed rule (with a minor modification) is still the wiser choice. However problematic citation of unpublished dispositions may be, it is preferable to rely on the adversary process to fully air the weaknesses (and limit the effect) of bad decisions on lower court decision-making than to forbid all discussion (but not the application, *sub rosa*) of unpublished decisions.

I respectfully submit to your Committee that, in view of the valid concerns of Judges Kozinski, Reinhardt, and others, in addition to being specific that unpublished dispositions are not precedential, the rule should be clear that citation of unpublished dispositions is limited to specific circumstances. I have been able to identify only two, detailed above; wiser heads may well be able to identify more.

The rule might, for example, provide that citation to unpublished decisions is appropriate only in cases where counsel certifies there is no recent, binding, published precedent that applies.

---

[3]Among the lawyers who tell me they oppose proposed rule 32.1, the most oft-stated objection is that if unpublished opinions may be freely cited without limits, they will be obliged to use their time (and client's money) to chase down all possibly relevant unpublished opinions.

Eliminating any excuse for routine citation to unpublished decisions in situations where binding, published authority already exists might go some distance toward reassuring the critics of the proposed rule who are justly worried that the true state of the law might be confused (and the cost of resolving disputes increased) by repeated and casual reference to wrong, confusing, or contradictory unpublished dispositions. It would also help good lawyers to reconcile their ethical duty to zealously advance the interests of their clients (which might weigh in favor of extensive reliance on unpublished authority to contradict, blunt or diffuse binding published authority) with their duty to limit their arguments and briefs to assertions supported by "existing law" or a good faith extension thereof, by making it unmistakable that "existing law" means published authority only (if any exists) and not unpublished opinions.[4]

Thank you for the opportunity to comment on the proposed rule.

Very truly yours,

WITHERSPOON, KELLEY, DAVENPORT & TOOLE

By: 

Leslie R. Weatherhead

---

[4]Having presented as one justification for scrapping the current rule the observation that the current rule is routinely ignored and defied, I cheerfully acknowledge a certain inconsistency in my suggestion that limits imposed within a new rule will be effective. Of course, the suggested limitation will not guarantee against problems caused by bad lawyers. But they would be useful to clarify for courts and *good* lawyers the limits on appropriate citation, and further, to provide good lawyers and the courts a ready basis to reject improper references to unpublished decisions when binding, published authority is on the books. To the extent that the logic of proposed rule 32.1's opponents depends on the assumption that most lawyers and judges follow the rules, the proposed limiting modification ought to meet with their approval if proposed rule 32.1 is ultimately adopted.