Kathryn Dobel
<kdobel@yahoo.com>

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To: Rules_Comments@ao.uscourts.gov
cc: spedlaw@comcast.net
Subject: Re: Proposed Federal Rule of Appellate Procedure 32.1

03-AP-042

December 12, 2003

Via Fax 202-502-1755

Via e-mail:
Rules_Comments@ao.uscourts.gov

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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing to express my opposition to proposed FRAP 32.1. As I understand the proposed rule, it would require courts of appeals to allow the citation of "unpublished" memorandum opinions. This rule would pose a significant burden to practitioners , particularly to sole practitioners and those in small firms , in the many circuits that currently prohibit the citation of unpublished dispositions as precedent. Far from easing practice, the proposed rule would make legal research more burdensome; force lawyers and lower courts to rely upon ambiguous and often misleading dispositions; and delay the disposition of cases. It will make it much more difficult to represent families of disabled children who have limited resources.

I have been a lawyer for twenty-five years, and have practiced in state and federal courts in California, and in federal courts in neighboring states. I have argued before the Ninth Circuit and defended cases appealed to the United States Supreme Court. For the past twenty-two years, my practice has focused on special education law, representing disabled children and their families in actions to obtain a free, appropriate public education as guaranteed by the Individuals with Disabilities Education Act (IDEA). I am a solo practitioner with a practice within the jurisdictional boundaries of the Ninth Circuit.

My clients are individuals and families to whom the cost of legal services is a serious burden. I try very hard not to refuse clients with viable claims even when they cannot afford representation. To that end, keeping the cost of legal services affordable is a constant struggle. I am firmly convinced that repealing the Ninth Circuit rule that prohibits the citation to unpublished opinions will significantly increase the cost of legal services, and may price some of my neediest clients out of the market.

The increased cost would come in two significant ways. At this time, I can limit my legal research to those IDEA decisions published by the Ninth Circuit every year. However, if it were permissible to cite unpublished memorandum opinions, I would have a professional obligation to research those opinions as well. Although nothing significant may be found, the cost of the research will add significantly to the burden and cost of litigation for my already disadvantaged clients.

I am gravely concerned about the likely increase in litigation cost in disputing the meaning and significance of unpublished opinions cited by opposing counsel, who are often members of large firms with substantially greater personnel and resources. My experience over the years has been that where the judges have not seen fit to certify an opinion for publication, they have had good reason for doing so. Generally cases published are well explained and focus on novel interpretations of the law. On the other hand, in those unpublished cases I have reviewed, the discussion of the facts is so cursory it is hard to figure out what occurred, and the discussion of the law is often imprecise and perhaps even misleading, so the cases are not very helpful as precedent to either party.

However, if opposing counsel were to cite these cases in their briefs, I would have no choice but to research and argue the merits of all of the cases, whether meaningful points of legal interpretation or not. Valuable time and client money would be spent arguing about whether some stray statement in an unpublished opinion that probably was written by a law clerk or staff attorney without much judicial supervision really reflects the law of the Ninth Circuit. I can see no justification for imposing this additional burden on the parties, especially parties like my clients to whom a few hundred dollars in legal fees may make the difference between maintaining their case and giving up.

I am aware that the term "unpublished" may no longer be accurate, as unpublished opinions are widely available on Westlaw, Lexis, and on some free websites as well However,the very fact that the cases are widely available is precisely what makes them so likely to be abused. We need the non-citation rule of unpublished cases to keep the parties from escalating the cost of law practice by delving into these essentially useless materials to search for an ambiguity they can exploit.

I urge the committee not to go forward with the adoption of a national rule on this issue. However, if the committee believes that a national rules is necessary, it should adopt a rule like that in the Ninth Circuit, which prohibits citation of unpublished opinions except in certain very limited circumstances, such as to such res judicata.

Sincerely,

Kathryn E. Dobel
Berkeley, California
