United States Court of Appeals
For the Ninth Circuit
United States Courthouse
San Diego, California 92101-8918

Chambers of
J. Clifford Wallace
Senior Circuit Judge
Chief Judge Emeritus

03-AP-082

December 23, 2003

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

Re: Proposed F.R.A.P. 32.1

Dear Peter:

I oppose the proposed amendment. It would make sense 100 years ago, but time has moved on and the demands of the court and expectations of the citizens of the United States have changed. I do not claim that my position will mean a perfect system of judicial decision-making. What I do contend is that in practical realities the court system faces today, the non-citation rule makes good sense from a practical point of view and provides for a fair decision making system.

I was an active judge on the United States Court of Appeals for the Ninth Circuit when we began the non-publication, non-citation procedure. It was not an act that the court took hastily or without thorough consideration. Rather, it was based upon a study of what the Court of Appeals does and what is the most efficient use of our judicial resources to accomplish our assigned mission. The person appointed by Chief Judge Richard Chambers to head up our introspection and analysis was Circuit Judge Shirley Hufstedler, a bright, and I think brilliant, judge with a very practical and knowledgeable approach to appellate inquiry. She had been on the California State Court of Appeal as well as one of the long-term members of our court. She was mentioned many times as a possible nominee to the Supreme Court of the United States and resigned her judgeship at the urging of then-President Jimmy Carter to become the first Secretary of Education. She still practices law and has made great contributions to the legal system.

After a thorough study, Judge Hufstedler developed an analysis which the court unanimously adopted and which I believe is still relevant today. As Judge Hufstedler reasoned, there are two purposes for decisions of our court. The first is error correction. The parties who appeal to our court are entitled to know whether there are grounds for reversal and, whether we affirm or reverse, the parties are entitled to know the reasoning of our decision. As she pointed out, the only people interested in this portion of our decision-making process are the parties and the trial judge. From a legal point of view, no one else has any standing to object and, other than curiosity, no real interest.

The second part of our responsibility deals with setting precedent. In the process of error review, there are times when we establish new law that is precedential and which will guide lawyers and judges when similar circumstances arise. What Judge Hufstedler was able to demonstrate was that you can have one without the other. That is, you can have error correction without stating precedent because the court has already published a decision on the issue.

From this, Judge Hufstedler argued that a proper use of our resources would be to do what is necessary in the error correction (and no more), thus allowing us additional time to provide the more in-depth work and use of additional resources necessary for a precedential opinion. For error correction only, the judge should provide a brief but reasonable explanation of why the court decided the way it did. Time will not be used to massage the wording -- the only audience of the disposition are the parties and trial court which know the facts, understand the case, and only wish to know the reasons why the court decided the way it did.

This logical resource-saving process allows the court more time in which to develop published dispositions which must be not only so clear that they are understood, but written so they cannot be misunderstood.

This proposal will impose from the outside how a Circuit Court wishes to do its business. A panel of the court has already decided that there is nothing of precedential value in the unpublished disposition. The panel is speaking for the court when it makes this decision. If the court has decided that there is no

precedential value, why should lawyers be allowed to clog their presentation with non-precedential citation to and argument favoring a non-precedential disposition? Why do we need a case cited when the court has already decided the disposition is not precedential and therefore we will not consider it as a statement by the court?

Is our non-citation rule fair? Clearly, all that due process requires is the amount of process due. To the extent that the court can differentiate (as it has) between those cases requiring precedential opinions and those that do not, the system has provided all the process due. Due process does not require treating each disposition the same.

That Courts of Appeals have some variation in application of the non-citation rule is irrelevant. Each circuit has its unique problems. Indeed, we learn from each other as we encounter different experiences. But this is no reason for a national rule.

No one contends that this is a perfect result. Of course, there will be times when there will be disagreement as to precedential value. That is why in the Ninth Circuit anyone can ask for publication of one of our unpublished dispositions. But when we have made that decision, it should not be circumvented by the proposed amendment. As we use it, the non-citation rule is fair and responds to the problem of volume which confronts us. We have looked at our workload and have adopted an appropriate way of dealing with it. I believe the amendment is misguided and should be rejected.

Very truly yours,

J. Clifford Wallace

JCW/prh