UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

IN CHAMBERS
WILLIAM C. CANBY, JR.
UNITED STATES CIRCUIT JUDGE

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January 8, 2004

03-AP-110

Peter G. McGabe, 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 Fed. R. App. P. 32.1
(Citation of unpublished dispositions)

Dear Mr. McGabe:

This letter is to urge the Committee not to adopt the proposed rule requiring every circuit to permit citation of unpublished dispositions. Such a rule will result in one (or some combination) of several undesirable results. One likely result is that our work will be slowed severely, with an attendant increase in backlog and waiting time for decisions. Another is that, in order to avoid that result, we will substitute mere one-sentence judgment orders for unpublished dispositions, leaving the parties in doubt about why we decided as we did. A third possibility is that we will be pressed to accord some lower level of care to all of our decisions, with an attendant decline in quality of all of our work. The notion that the proposed rule will cause no change at all is simply not realistic.

None of us, I am sure, is particularly happy with the practice of issuing unpublished dispositions. We would prefer the 1920 model of circuit judging, where every case is decided with a written opinion that is thoroughly deliberated among the panel and binds us all. But in those days, the caseload per judge per year was perhaps a tenth of what it is today. As the workload increased, we had to do something, or else allow years to pass between notice of appeal and decision in most cases. The result was the unpublished disposition which could not be cited as precedent. That permitted quick disposition of an appeal once the panel had decided upon the result. The use of such dispositions is a pure function of

workload. My recollection is that, when I joined this court some 23 years ago, less than half of our decisions were by unpublished memoranda. But our caseload per judge has easily doubled since that time, and as a consequence we, like other circuits, now dispose of more than eighty percent of our cases by unpublished memoranda.

The time efficiency of a memorandum disposition is evident. When I write one, after a draft by my clerk, I am content with a short statement of reasons and, if the result is correct, I do not concern myself greatly with how we describe our reasons. Thus I can circulate a memorandum disposition either while still away on calendar, often within a day of argument, or within a day or two thereafter. Opinions take weeks and months. When I receive a proposed memorandum disposition from a fellow judge, I simply read it over, make sure the result is the one we agreed upon, and sign off. When I receive an opinion, I refer it to my clerks for a substantive cite-check and other critical comments. When the results are returned to me, I study the opinion intensively (footnotes and all) and respond with recommended changes. The back-and-forth may continue for many drafts.

There is a compelling reason for the difference in treatment: in one case, we are not making law that will bind the court in the future, and in the other we are. The Committee note recognizes the force of this argument, but responds that the proposed rule does not purport to make unpublished dispositions binding; it merely requires courts to permit their citation. To me, this is the major flaw in the Committee's proposal. To cite, even supposedly for persuasive value, is to ask us to follow our decision. Our need to maintain consistency with our own decisions, or to justify departure, is what makes citation of our own memorandum dispositions different from citation of all other material that may be offered for its persuasive value. If our own disposition may be cited to us, we must distinguish it or explain why we may decide inconsistently. The burden will be on us to show why we are not following the disposition, and the tendency will be to follow it. The bar will know this and will begin to rely on the reasoning of dispositions.

As a result, we will have to be much more careful with our unpublished dispositions. If we are going to say anything, we will have to check our statements as carefully, or nearly as carefully, as we do in the case of our opinions. The minute we do that, we cannot keep up with our work. One alternative will be simply to issue one-line judgment orders, which contain nothing that might bind us or permit reliance by attorneys. The cost, of course, is that the parties will not know why we decided as we did. I doubt that this result is one that the bar will

welcome (especially if they want Supreme Court review of our decisions). My guess is that our response will be an unsatisfactory amalgam: we will be distracted from our opinions by a considerable number of "reasoned" memorandum dispositions, causing a general decline in quality of our work, and we will issue large numbers of judgment orders.

It may be that some circuits with smaller workloads are able to permit citation of their unpublished decisions. They may be left to their own rule. I know that the Committee's proposed rule will cause major problems in this circuit, with its many thousands of decisions per year. The past system of circuit choice has been working as well as can be expected, and the proposed rule will certainly not be an improvement on that condition. The Committee states that it is a burden on lawyers to follow different rules in different circuits. But any attorney has to pay attention to the rules of each court in which he or she practices. There is nothing new here. Nor does there appear to be any record of numbers of attorneys being blindsided by sanctions for violating a rule that is well known within the bar.

The system is not broken, and does not need fixing. Our active judges are sorely pressed to keep up with their workload now. The proposed rule will make that task much harder. I urge the Committee not to adopt the proposed rule.

Thank you, and the Committee, for your attention.

Sincerely,

William C. Canby, Jr.