03-AP-142 1/20/04

Michael Barclay
601 California Avenue
Palo Alto, California 94304
(650) 320-4849

January 14, 2004

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 FRAP 32.1

Dear Mr. McCabe:

The purpose of this letter is to comment on proposed new Rule 32.1 of the Federal Rules of Appellate Procedure ("proposed Rule 32.1"). As we understand it, proposed Rule 32.1 would require all of the U.S. Circuit Courts to permit the citation of unpublished or non-precedential opinions. This is contrary to the present rules of at least some Circuits that do not permit citation of such opinions.

The author of this letter opposes proposed Rule 32.1. This letter addresses one unintended but particularly harmful result that likely will occur if proposed Rule 32.1 is adopted: a vast decrease in the number of written opinions formerly designated as unpublished, in place of summary dispositions without opinion. This result will not benefit the public as proposed Rule 32.1 intends, but to the contrary will be detrimental to legal practitioners and their clients.

I. Nature of the Author's Interest

I am an attorney at a large California law firm based in Silicon Valley.[1] My practice primarily consists of representation of private clients in intellectual property matters in the Federal Courts. On the appellate level, my cases are usually reviewed by the U.S. Court of Appeals for the Federal and Ninth Circuits, and occasionally other Circuits. I have been admitted to practice before the Ninth Circuit since 1981 and before the Federal Circuit since 1986.

As an attorney in private practice, I have worked on cases of widely varying public importance – some cases on which I have worked have generated great public interest, and some

[1] The views expressed in this letter are those of the individual undersigned attorney and do not necessarily reflect the views of his law firm.

have not. All of my cases have one thing in common: they are of great interest to my particular clients, and to myself. As such, when a decision is made at any level, either by the trial courts or by the appellate courts, both my clients and I appreciate having an explanation of the reasons for the decision that is as detailed as is practical. Whether we win or lose, our interest in, and commitment to, the judicial process generates a desire to understand the reasoning behind any outcome. I believe that these views apply to the vast majority of lawyers in private practice, and their clients.

As will now be explained, proposed Rule 32.1 will harm the above considerations, by greatly reducing the number of written decisions in appeals.

II. Proposed Rule 32.1 Will Likely Result in a Vast Increase in Summary Dispositions at the Expense of Written Decisions

Both the Federal Circuit and the Ninth Circuit, where I primarily practice at the appellate level, have similar rules prohibiting the citation of unpublished opinions or dispositions. See Federal Circuit Rule 47.6(b); Ninth Circuit Rule 36-3. In addition, the Federal Circuit has a specific procedure where it disposes of some appeals without any written statement of reasons at all (Federal Circuit Rule 36). (The Ninth Circuit's "order" in its Rule 36-1 arguably permits the same thing, but it is my understanding that – at least up until now – the Ninth Circuit does not use summary orders or judgments with nearly the same frequency that the Federal Circuit uses Rule 36.)[2]

Thus, both Circuits' rules presently provide for three kinds of dispositions of appeals: (1) published opinions that are precedential and citable by the general public; (2) unpublished opinions or memoranda that are not precedential and cannot be cited (except in limited circumstances such as res judicata and the like), but that inform the parties of the reasoning of the appellate court; and (3) summary "orders" or judgments merely announcing the decision (usually an affirmance) without any statement of reasons, and which are neither precedential nor citable.

From the standpoint of private parties, dispositions in the form of category (2) are greatly preferable to category (3). Essentially, an unpublished opinion is a letter to the parties letting

---

[2] Some of my appellate practice in the past has been in the California state courts. The intermediate California appellate courts also have a rule permitting the designation of opinions as unprecedential and uncitable. See Rule 977 of the California Rules of Court. Interestingly, all of the California state courts, the Federal Circuit, and the Ninth Circuit have procedures allowing any interested person to ask the Court to redesignate an unpublished opinion as published, and hence precedential, if good reasons exist. See id, Rule 978; Federal Circuit Rule 47.6(c); Ninth Circuit Rule 36-4.

them know that the Judges read their briefs, understood their arguments, and took the time to tell the parties who won and why. Sometimes unpublished decisions are brief; sometimes they are fairly lengthy. They are most frequently used in situations where the case seems "routine" to the appellate panel, so no precedential opinion is necessary. But a federal case that goes all the way to an appeal is not "routine" from the standpoint of the parties, who care about the case and its result.

Thus, unpublished opinions satisfy the interests of private parties in understanding the result, be it favorable or not. (In the course of my career, the majority of my appeals have been disposed of by unpublished opinion. While I personally may regret not seeing my name in print in the official reporters more often, I do not recall a single instance where my client cared one way or the other if the opinion was published – if my client even knew of the difference. Clients like to see the written reasoning telling them what happened, and are usually much less interested in setting precedent for the rest of the world.)

By contrast, a summary order or judgment (category (3)) does none of these things. The parties are told who won or lost, but are left guessing why that is the case. If the oral argument was brief, or if there was no oral argument at all, the parties are left to wonder if the appellate court really considered the case on the merits. Plainly, it is in no one's interest to see a large increase in summary orders at the expense of unpublished opinions.

Proposed Rule 32.1 will likely change the current dynamics so as to greatly increase the number of summary orders or judgments, at the expense of unpublished opinions. If all written opinions (or memoranda) must be citable, then the appellate panel has to spend a lot more time working on them. (In the Federal Circuit, the practice as I understand it is that all published opinions are actually circulated for review by the entire Circuit before they are released, making work for all the judges.) A mandatory citation rule would thus have the effect, at least in the Federal Circuit, of a huge increase in the use of dispositions by order only under Federal Circuit Rule 36. (Other circuits, such as the Ninth Circuit, would greatly increase the use of a similar rule, or would adopt one.) By contrast, there would be a large decrease in unpublished opinions the parties would otherwise get to see. The ultimate result of proposed Rule 32.1 thus would benefit the public only slightly, at the expense of acting to the detriment of the parties in many cases.

Realistically, one cannot expect the federal judiciary to prepare all appellate opinions in a form suitable for citation. It is a very different matter to tell the parties (who know the facts and procedural history of the case) who won or lost, and quite another to phrase it in such terms as can be used by future parties as precedent. If unpublished dispositions were to become citable, the courts have no choice but to write a lot less, to the point of relying heavily on summary orders or judgments – giving the lawyers and their clients little if any explanation about what happened.

III. Conclusion

I understand that you will be receiving comments about proposed Rule 32.1 from many sources in the legal community, which will voice concerns on a number of issues. As this letter explains, proposed Rule 32.1 will result in undesirable and unfair treatment to the private civil litigant. The Committee on Rules of Practice and Procedure should not adopt proposed Rule 32.1.

Respectfully submitted,

Michael Barclay

Michael Barclay
California State Bar No. 088993