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Subject: Submission from http://www.uscourts.gov/rules/submit.html

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Comments:

Dear Members of the Judicial Conference Committee:

I am writing to express my grave concerns about Proposed FRAP 32.1. I believe this rule would cause serious problems in circuits such as the Ninth, where I practice, which currently prohibit the citation of unpublished decisions. I am an Assistant Federal Defender specializing in appeals and habeas cases. I appear regularly in the Ninth Circuit. As an appellate litigator, I appreciate the concerns of attorneys who wish to cite unpublished cases. However, my own experience convinces me that permission to cite such cases -- even without specification in the rules of the precedential value to be afforded them -- would create problems much worse than those the proposed rule is intended to solve.

In researching and writing briefs, and preparing for oral argument, I often come across unpublished cases which appear to involve issues similar to mine. The predominance of web-based legal research has made this a common occurrence. However, the summary nature of unpublished dispositions in the Ninth Circuit makes the value of these decisions for other cases questionable to say the least. I know from the unpublished dispositions of my own cases that dispositional memoranda do not comprehensively set forth the facts, or even state the legal issues with the degree of specificity that is necessary to convey to persons other than the parties why the panel reached its decision.

If opposing counsel were to cite unpublished decisions in one of my cases, I would feel obliged to look beyond the unpublished decision to the briefs in the cited cases, in order to argue why their outcome does or does not have persuasive value for my case. Because briefs are not currently available on-line, this would be

hugely burdensome. Even if appellate briefs were to become readily available, this would be an inappropriate diversion of counsel's energies. The amount of work involved in "researching" the unstated context of unpublished decisions would threaten to overtake the more important enterprise of researching published cases with readily arguable precedential value.

My primary objection to Proposed Rule 32.1 is therefore its potential to confuse the law and burden its practice. But I am also concerned that the rule would result either in delayed appellate resolution of cases (because the courts of appeal would have to put more work into unpublished decisions if they were going to be cited) or in an increased number of summary affirmances without ANY discussion (if the courts wish to avoid citation.) Either result would make my work, and that of my colleagues, more difficult and would ill serve my clients.

I was persuaded by the argument made by Judges Kozinski and Reinhardt in their 2000 article in California Lawyer, defending the current practice of the Ninth Circuit. I urge you to reject Proposed Rule 32.1, and leave the question of citation to the individual circuits. This issue is best decided locally.

Thank you for your consideration of these comments.

Allison Claire, Assistant
Federal Defender

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