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02/01/2004 08:35 PM

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

03-AP-237

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Comments:

I oppose the amendment to FRAP 32.1, which would allow parties to cite the unpublished decisions of the Courts of Appeal. I was in private practice with Sutherland, Asbill & Brennan in Washington, D.C. for two years and I have been an attorney with the Federal Defender's Offices in Maryland and Sacramento for over 15 years. I have handled appeals in the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Ninth Circuit.

Generally, courts do not set forth new legal principles in unpublished dispositions. The value of allowing citations to unpublished opinions would be outweighed by the incredible burdens associated with combing through all of the unpublished cases for something on point or relevant. In addition, unpublished decisions often contain only a limited factual discussion, reducing the ability to determine whether the decisions are actually relevant to other situations. Because unpublished decisions are more trucated, there may also be an appearance of conflicting results or inconsistent decisions.

The fact that the proposed rule does not provide the weight to be accorded to unpublished decisions would not alleviate the problems with the proposed amendment. To the contrary, it greatly complicates the situation. In every instance where an unpublished opinion is cited, the parties will have to address and the Court will need to determine what weight to give the unpublished opinion. Thus, appellate briefs will contain arguments about why the Court should or should not give a great deal of weight to certain unpublished opinions. In turn, when the appellate court issues its opinion, the Court's statements about the weight it has

accorded the unpublished opinion will then be cited in the briefs and opinions in later cases, creating a new and unnecessary body of law on the weight of various unpublished opinion.

There are other ways to ensure that any unpublished decisions that merit publication are designated for publication by the Court. For example, a party has the ability to request publication of an unpublished decision. In the Ninth Circuit (and possibly others), the lawyers may request publication of any unpublished decisions that we believe merit publication. In my 17 years of practice, I have handled one appeal which resulted in an unpublished opinion that I believed should have been published. I requested publication and the Ninth Circuit granted my request to publish the opinion. United States v. Bodwell, 66 F.3d 1000 (9th Cir. 1995). This practice is valuable and much more workable than the amendment to the rule.

This change should not be made on a nationwide basis. Rather, each circuit should be permitted to handle this as they see fit. What is appropriate and workable for one circuit may be extremely disastrous or burdensome for another. At most, the circuits should be encouraged to examine their local rules on this subject and the matter should be reviewed in a few years.

If this change is made, appellate judges will have to be very careful with the wording in each and every case, and they will need to devote additional time to writing opinions. The result of a change would be even greater delays in having appeals heard and decided.

Thanks for your consideration of these comments.

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