Law Offices

Rintala, Smoot, Jaenicke & Rees LLP

10351 Santa Monica Boulevard, Suite 400

Los Angeles, California 90025-6937

William T. Rintala
Peter C. Smoot
J. Larson Jaenicke
Robert A. Rees
Melodie K. Larsen
Frank E. Melton
Robert W. Hodges
G. Howden Fraser
Michael B. Garfinkel
Heather M. Noelte

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Telephone (310) 203-0995
Facsimile (310) 556-8921
E-Mail
wrintala@rsjr.com
Website
www.rsjr.com

In Reply Please Refer To:

VIA FACSIMILE and U.S. MAIL (202) 502-1755

Mr. 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 Rule 32.1 of the Federal Rules of Appellate Procedure**

Dear Mr. McCabe:

I write to voice my opposition to proposed Rule 32.1 of the Federal Rules of Appellate Procedure. I believe that permitting the citation of unpublished opinions will erode the adherence to precedent and weaken the common law process. I also believe that the rule will encourage decisions which simply announce the result without any written analysis. The circuits should be permitted to adopt rules suited to their circumstances and culture. If a uniform rule is considered essential to alleviate the perceived burden on practitioners, which I do not believe is a sufficient reason for a uniform rule on this subject, I urge the committee to adopt a rule similar to Ninth Circuit Rule 36-6 which prohibits the citation of memorandum decisions not certified for publication in the official reports.

In order to put my views in context and to disclose my bias, I wish to disclose that I have been a member of the state and federal bars in California for thirty-six years. I had the privilege of serving as a law clerk for the Honorable Murray Draper, Presiding Justice of Division Three of the First District of the California Court of Appeal in 1967 and 1968. From late 1968 through the end of 1970, I was a staff attorney and later assistant director of litigation at the Western Center on Law and Poverty. In those capacities I did a substantial amount of

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appellate work in connection with "test case" litigation filed by the Center. From 1971 through late 1981, I was an associate and later a partner in the litigation department of Kaplan, Livingston, Goodwin, Berkowitz & Selvin. The Kaplan, Livingston firm had a general civil practice and I was involved in trial and appellate work as well pre-litigation counseling for firm clients. In late 1981, Peter Smoot, Larson Jaenicke and I formed our current firm and we continue to be involved in trial and appellate work as well as pre-litigation counseling. I have a professional and academic interest in the common law system and I am a strong proponent of that system. Finally, since I have practiced in California and since both California and the Ninth Circuit do not permit the citation of unpublished opinions, I am familiar and comfortable with that practice.

I will acknowledge at the outset that it would be preferable if appellate judges were able to write formal, precedential opinions in most of the cases they are called upon to decide.[1] This would assure careful consideration and reduce the chance of an erroneous or unwise decision. The preparation of a formal opinion in most cases would also add depth and texture to the common law by multiplying the factual setting in which the law has been applied–depth and texture which are lost when the majority of cases are decided without a formal opinion.

Unfortunately, we have not, as a society, devoted sufficient resources to the judicial branch of government to make the preferable possible. At least in the Ninth Circuit the case load is so heavy that it is not possible for the court to produce a formal, precedential opinion in most of the cases the court is required to decide. [*See* A. Kozinski and S. Reinhardt, *Please Don't Cite This, California Lawyer* June 2000, 43.] As a result of this reality, Ninth Circuit panels must use the more informal memorandum decision in the majority of their cases in order to keep the backlog at bay.

The Advisory Committee's comments to the proposed rule accept the reality that the courts of appeals are required by practical realities of staffing and case load to issue a large percentage of their opinions in the informal memorandum form. This is not viewed as a problem by the Committee because the proposed rule does not prohibit the use of memorandum decisions or require that they be given precedential weight. This does not seem to me to be an adequate response to the concern that permitting the citation of memorandum decisions will cause the judges issuing such opinions to take greater care in drafting such decisions, thereby defeating their purpose, or will limit the memorandum to a brief statement of the disposition without

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[1] I do not believe that it has ever been the case that appellate courts have written reasoned opinions in every case they decided. The difference is that the practice has become much more widespread as the caseloads have mounted. The Committee cites statistics indicating that "80% of the opinions issued by the courts of appeals in recent years have been designated as 'unpublished.'"

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explanation or analysis. The reason that appellate panels will take one of these two courses of action is that decisions of a circuit court of appeals would be binding on other panels and the inferior courts in the circuit were it not for the no citation rule. The Advisory Committee deals with this issue by observing that the proposed rule does not require that these memorandum decisions be given precedential authority.

There are, in my view, several problems with the Committee's solution. First, the primary purpose of citing a memorandum opinion particularly to an inferior court is its precedential weight whether that weight is officially sanctioned or not. Since memorandum opinions do not by definition contain an elaborate analysis or exposition, they are not likely to contain persuasive reasoning like that found in a law review article or the precedential decision of a court in another jurisdiction that is not binding on the court to which it is cited. Second, it does not strike me as desirable to have a two-tier system in which there are decisions of a court of appeals that are binding on the circuit and those which are not binding. This system could undermine the adherence to precedent which is not, in any event, honored to the degree it should be. Third, since the actual authors of memorandum decisions are not judges and since the memorandum decisions do not receive the same scrutiny from judges as do opinions certified for publication in the official reports, the proposed system could result in important issues of law being resolved by individuals who lack the seasoning and who have not been subject to the rigorous appointment process that a judge must pass through.[2]

I also do not believe that the hardship for practitioners of differing rules in different circuits is a reason to adopt a uniform rule on the subject. A lawyer has an obligation to know and follow the rules of the court hearing the matter in which he or she is appearing. If a lawyer appears in several circuits, he or she must know and follow the rules of several circuits. If a lawyer should err, and we all do from time to time, then the court should politely point out the error and ignore the improper citation. Except in cases of intentional and repeated violation, sanctions and charges of unethical behavior are not an appropriate response. Indeed, in the case cited by the Committee as an example of the burden placed on lawyers, the court did not sanction the lawyer who cited the unpublished decision.

> Contrary to counsel's contention, then, we conclude that Rule 36-3 is constitutional. We also find that counsel violated the rule. Nevertheless, we are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in

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[2] As a former law clerk, I do not intend to demean the staff of the Ninth Circuit. The lawyers working for the court are intelligent and dedicated and they are to be congratulated for their public service. But they are not judges.

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> good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.

[*Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).][3]

There is another concern with the memorandum decision policy that is not expressly addressed in the Committee's commentary but appears to underlie the leading case arguing that courts may not issue non-precedential opinions. In *Anastasoff v. United States*, 223 F.3d 898, 904 *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), Judge Arnold argued:

> Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you

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[3] *Hart v. v. Massanari* contains an excellent discussion of the issues raised by the no citation rule and makes a persuasive case for constitutionality of the memorandum decision policy followed in the Ninth Circuit.

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> cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Certainly, lawyers who find themselves on the losing side in a case in which the opinion was not certified for publication have wondered, on occasion, if the court was seeking to reach a particular result without regard for the governing precedent and utilized the memorandum decision to accomplish that goal. I am sure no one supports the proposition that the courts are empowered, in Judge Arnold's words, to "create an underground body of law good for one place and time only." But even if the no citation rule allows a result oriented decision that disregards binding precedent, proposed Rule 32.1 does not address that issue. The same result can flow from a summary ruling without explanation. And even an opinion certified for publication can support a result that is at odds with precedent without acknowledging it. In short, if the memorandum decision policy is being abused, and I do not believe it is in any systematic way, proposed Rule 32.1 does not deal with such abuse.

Thank you for the opportunity to state my views on the issue and for your consideration of them.

Very truly yours,

William T. Rintala

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WTR:jrs