United States Court of Appeals
for the Ninth Circuit

Robert R. Beezer
Judge
802 United States Courthouse
Seattle, Washington 98104-1115

February 6, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

I write to urge rejection of proposed Rule 32.1, Citation of Judicial Dispositions.

The proposed rule may be an advantage to law book and electronic publishers who seek to expand their data base. Such data will be of little or no use to others. All materials which do not reflect precedent in the court of origin, certainly will fail to aid judges in their development of the common law.

I believe that only opinions of a court are worthy of publication. I believe that only opinions are of precedential value. I agree with Judge Aldisert[1] that an appellate opinion is a document which contains, at a minimum, the following five elements:

(1) The nature of the action and how it reached the appellate court;

(2) The questions to be decided;

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1 Opinion Writing, Ruggero T. Aldisert, West Publishing Co. (1990).

(3) The material or adjudicative facts;

(4) The determination of the questions of law;

(5) The disposition of the case.

Opinions which establish or refine a principle of law are certainly worthy of publication and of citation to an appellate court in support of or as opposed to the question of law at issue. Other cited materials burden an appellate brief and detract from the persuasiveness of the argument directed to the question to be decided.

The United States Court of Appeals for the Ninth Circuit entertains more than 10,000 appeals per year. It would be unreasonable to expect that each of those appeals would be resolved with an authored opinion in each appeal. Yet in some way or another each of those cases will be resolved by the required entry of a judgment. Proposed Rule 32.1 will prohibit the Ninth Circuit from barring publication of the judgments entered by the court. Rest assured that each of the active and senior judges of the court will not be familiar with all the more than 10,000 annual judgments entered by the court. Even though every case is ultimately resolved by entry of a judgment, no rule requires the filing of an opinion.

Active judges read about 8,000 pages of briefing in preparation for one oral argument week. Further, the judge will read portions of the district court or agency record. The case preparation next requires the judge to become familiar with the controlling statutory and case law. After argument there is not much time left for the careful, detailed preparation of a full opinion for publication in every case submitted to an oral argument calendar. In addition to cases submitted after oral argument, judges are required to deal with cases submitted without oral argument and an extensive motion practice.

When opinions are published, each member of the court receives a copy of the filed opinions for review. This review may lead to corrections, efforts to assure consistency in the law of the circuit and, in rare cases, a complete rehearing en banc.

Because of time constraints and an ever increasing volume of appellate cases, some measures will have to be initiated to manage the appellate workload in the face of an adoption of proposed Rule 32.1. In response, judges could refuse to file any type of opinion or disposition now designated "not for publication." Compliance with the rule only requires appellate judges to file a one line order directing judgment be entered for one party or the other. Such judgment orders would be of no precedential use to counsel, the trial courts or the parties in persuading an appellate court to take like action in a pending appeal.

I would much prefer to give the parties on appeal a short written or oral disposition which eliminates one or more of the critical parts of a reasoned opinion so long as I can prohibit publication and bar citation. Action prohibited by Proposed Rule 32.1 imposes a burden on appellate judges. I believe the proposed rule deals with matters best left to consideration by each circuit court on a local needs basis.

Sincerely,

Robert R. Beezer
United States Circuit Judge

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