THE LAW OFFICES OF
SALZMAN & WINER, LLP
325 BROADWAY, SUITE 303
NEW YORK, NY 10007

ALAN CHESTER SALZMAN
HARVEY WINER

(212) 233-6550
(212) 964-0081
FAX (212) 233-6714

CHRISTOPHER J. ALBEE

03-AP-332

January 31, 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, D.C. 20544

Re: Opposition to proposed change to F.R. App. P. Rule 32.1

Dear Mr. McCabe:

I write to oppose strongly proposed Rule 32.1, F.R. App. P.,that would provide for the ability to cite as precedent memoranda dispositions of the United States Courts of Appeals.

I've practiced in the federal courts, exclusively, for nearly 25 years, and have briefed and argued about 150 appeals in the Ninth Circuit, and thus am intimately familiar with federal appellate practice and procedure. (A listing of appellate cases I have handled can be found in my CV at our firm's website, yagmanlaw.net.)

The reasons I oppose the Rule, which might seem obvious are these:

1. Memoranda dispositions are ordinarily do not present full-blown, reasoned analysis of the issues presented, as do opinion dispositions, and thus, their publication will result in either less than fully reasoned discussions of the law ending up being citable law, or judges having to do an extraordinary about of work to get what would be the usual memoranda up to opinion quality, or perhaps resulting in dispositions that simply say "affirmed" or "reversed," so that the ability to cite them will be wholly nugatory, with the concomitant disadvantage of the parties and lawyers involved in such instances having no hint (which they really should have) of the reasons for a disposition.

2. I read the Federal Reporter advance sheets every week, and have done so for over 20 years. Thomson West relatively recently began publishing the Federal Appendix, which now makes available uncitable memoranda dispositions, so that public dispositions that used to be not readily available to the public, except to parties to an appeal, now are readily available. (Were this not the case, I probably would be in favor of an open-government approach to the Rule because I believe what the courts do should be readily accessible to the public.)

3. Federal judges are overburdened. Many of them will not want to put out, so that they may be cited, dispositions that usually will not be as polished as a memorandum disposition, and the proposed change probably will have the unintended effect of forcing conscientious judges to spend considerably more time on memoranda dispositions, which really only are intended to be "letters" to counsel and parties to an appeal to provide them with some brief explanation of how the court reached its disposition. This likely will cause an enormous burden, slow down the disposition process, and also, as above, may result in dispositions that simply say "affirmed" or "reversed." This would be a disservice to the parties and counsel. Also, it will put an enormous burden on appellate judges.

4. The proposed Rule will create too much law, which concomitantly will put an enormous burden on both appellate judges, to stay current with the law in their (and perhaps other) circuits, and on district judges, many of whom attempt to keep current on the law. Too much law can be a bad thing. Also, with respect to lawyers, like me, who try to keep current at least on the law in their own circuits, there will be too much law.

5. My regular reading of the Federal Appendix indicates to me, at least, that the vast majority of, or a highly significant number, of currently uncitable memoranda dispositions involve criminal cases that do not make new law, but the ability to cite them I suspect will give an unfair and unnecessary perceived and perhaps real advantage to the government, who will use the memoranda, if they become citable, to create an unwarranted impression that there is more law on their side in criminal cases than there actually is. Using string citations including citable memoranda dispositions in criminal cases is both unnecessary, and will create significantly more work for appellate judges and their law clerks, who obviously will need to read all the cases cited. This makes no sense: if there is a citable opinion on point, adding to it memoranda dispositions on the same point will add nothing, but may give an unfair advantage to the Dept. of Justice, who will want to create an impression that the number of cases that support their positions is far greater than it is in reality. One controlling case on point is sufficient.

6. Unless the Rule also will mandate an increase the number of hours in a day, which obviously it will not, the proposed change will create an enormous and unnecessary burden for both the judiciary and federal practitioners.

Therefore, I strongly oppose Rule 32.1. If there is any hearing, I would like to give oral testimony. Thank you.

Very truly yours,

SALZMAN & WINER, ESQS

HARVEY WINER