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February 13, 2004

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VIA HAND DELIVERY

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 FRAP 32.1

Dear Mr. McCabe and Committee Members:

I write to express my opposition to Proposed Rule 32.1 of the Federal Rules of Appellate Procedure. Based on my experience litigating civil rights cases as well as clerking on the Ninth Circuit and U.S. Supreme Court, I believe that the Proposed Rule would impose significant burdens on appellate judges, practitioners, and, most critically, poor litigants. I therefore urge you to reject Proposed Rule 32.1.

My first concern is that Proposed Rule 32.1 will lead to the increased use of summary dispositions and, concomitantly, to a decreased perception on the part of litigants of the legitimacy of appellate rulings. The sheer number of appeals filed each year – upwards of 25,000 in total and over 4500 in the Ninth Circuit alone – make it impossible for the courts of appeals to issue fully-reasoned, precedential opinions in every case. Nor should they have to. Few appeals present novel questions of law or deal with situations of public significance that require issuance of binding precedent. The vast majority of appeals are resolved by the straightforward application of settled law.

When a court of appeals is merely applying settled law to the facts of a case, an unpublished, non-precedential disposition is an efficient way to resolve the case. By providing the parties a brief statement of the case and the grounds for the decision, the court confirms that it has given the appeal due consideration, but saves the time and energy that are necessary for the drafting of precise, detailed opinions in controversial or groundbreaking cases. A system that allows for the resolution of cases by brief, non-precedential disposition as well as full-length, binding opinion is particularly important in a circuit as large and as busy as the Ninth Circuit.

Proposed Rule 32.1, if adopted, will undermine this efficient system. If parties can cite unpublished dispositions as precedent, judges will have to spend time crafting more precise rulings that more fully explain the facts and legal reasoning behind the conclusion. Another possibility is that judges will turn to issuing summary dispositions in which they do not explain their reasoning at all. Given the high number of appeals and the limited number of hours in a day, it seems more likely that judges will choose this latter route.

Litigants, however, deserve better than a summary ruling on their appeals. A brief unpublished disposition at least informs the parties that the court knew the basic facts of their case, considered their arguments and had a principled reason for its ruling. A summary ruling provides no such assurances and almost certainly will undermine the losing party's confidence in the federal courts. In my experience, summary rulings in civil rights cases are particularly harmful because they exacerbate the dignitary harm that many civil rights plaintiffs have incurred.

My second concern about Proposed Rule 32.1 is that it will necessarily increase the work required to prepare and argue an appeal, and thus will increase appeal costs to the disadvantage of poor litigants. If unpublished dispositions can be cited on appeal, the universe of relevant caselaw will be expanded dramatically. Appellate lawyers will be obliged to spend time researching those dispositions and attempting to marshal them on their clients' behalf. This will be a burdensome and expensive process. Litigants who are poor or who are representing themselves will be at an even greater disadvantage compared to those who can shoulder these extra costs. Moreover, because unpublished dispositions generally do not contain a full exposition of the facts or law, they are capable of being manipulated to lend support to a variety of arguments. Again, litigants who are able to fund such creative attorney work will have a distinct advantage over litigants who are not.

I am aware that some appellate panels have designated as unpublished dispositions that address either issues of first impression, *see, e.g., Christie v.*

United States, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (*per curiam*), or significant matters of public concern, *see, e.g.*, *Banks v. Cockrell*, 48 Fed. Appx. 104 (5th Cir. Aug. 20, 2002) (*per curiam*), *cert. granted*, 123 S.Ct. 1784 (April 21, 2003) (No. 02-8286). Such misdesignation is certainly the exception rather than the rule. In my experience, judges on the Ninth Circuit are very conscientious and do not hesitate to insist on publication if they deem it appropriate. But, from time to time, an appellate panel does issue an unpublished disposition that really should have been a published opinion.

Proposed Rule 32.1, however, is not the best way to address this concern. Rather, recent initiatives taken by the Ninth Circuit should serve as a model. In 2000, the Ninth Circuit sought public feedback as to whether any of its unpublished dispositions were in conflict with its published precedents. (Impressively, no such dispositions were identified.) Also, for a 30-month period beginning in July 2000, the Ninth Circuit allowed the citation of unpublished dispositions in requests for publication and petitions for rehearing. Such exercises, if undertaken by other courts of appeals, would be an effective way to foster accountability and to identify the occasional misdesignated disposition. Moreover, they would avoid the distinct disadvantages that will accompany the adoption of Proposed Rule 32.1.

In sum, I believe Proposed Rule 32.1 will cause a major shift toward summary dispositions, impose a burden on practitioners and unfairly impact poor litigants. Accordingly, I urge you to reject Proposed Rule 32.1. Thank you for your consideration.

Sincerely,

Jennifer M. Mason