



United States Court of Appeals
for the Ninth Circuit
THE PIONEER COURTHOUSE
555 S. W. Yamhill Street
PORTLAND, OREGON 97204-1396

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2/17/04

03-AP-400

SUSAN P. GRABER
United States Circuit Judge

February 10, 2004

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

With respect, I encourage the Committee not to adopt proposed Federal Rule of Appellate Procedure 32.1.

Unpublished dispositions in this circuit lack the "persuasive value" that the proposed Committee Note assigns to them. We reserve these dispositions for cases in which settled law simply is to be applied. A typical example of an unpublished disposition might explain in a few short paragraphs that summary judgment for the defendant in an employment case was improper because Witness A's affidavit says that she overheard Manager B say that the plaintiff was fired for a discriminatory reason. These kinds of record-specific explanations are useful to the parties and to the district court but they do not make law and truly are not persuasive in resolving future cases.

Were FRAP 32.1 to be adopted, many of us might resort to shorter, more cryptic resolutions of such appeals. We would do so to avoid the crushing burden of writing a full opinion (whether labeled as an opinion or as a disposition) in every case, knowing that it may be cited later. That result would be unfortunate for the parties involved, because they would obtain less information about the decision that the court has made and would have less opportunity to seek panel rehearing when they can see that we have made a mistake.

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It may be that unpublished dispositions in other circuits do have persuasive value. The Ninth Circuit's rule may not work in those circuits. Conversely, the kind of rule that works elsewhere may not be the best fit here. Because different circuits draft dispositions in different ways and for different reasons, there is no compelling reason for national uniformity.

For some time lawyers in our circuit urged us to expand the local rule. We did. The existing process within each circuit, in other words, is effective to meet local concerns. Our current rule allows parties to cite unpublished dispositions for essentially every purpose except the substance of the law—e.g., to establish a fact or support a claim (issue preclusion, law of the case, double jeopardy, notice, entitlement to attorney fees, and the like). This makes sense because, as noted, by definition an unpublished disposition makes no new law.

It is interesting to observe how infrequently lawyers cite unpublished dispositions to us in the contexts in which they argued most strenuously that the citations were needed. For instance, unpublished dispositions may be cited to demonstrate a conflict in our precedents or to argue for publication when a new legal issue is involved. Such citations are a rarity. The paucity of citations under the current rule suggests that even the most strenuous advocates identify conflicts and new legal issues only rarely; that is, unpublished dispositions really are applications of settled law.

For these reasons, I respectfully ask the Committee to reject proposed FRAP 32.1. Thank you for considering my comments.

Very truly yours,

A handwritten signature in cursive script that reads "Susan P. Graber". The signature is written in black ink and is positioned above the printed name.

Susan P. Graber