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February 9, 2004

03-AP-474

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20455

Dear Mr. McCabe:

I write to express my opposition to proposed Federal Rule of Appellate Procedure 32.1. As a practitioner who has handled hundreds of cases before the Ninth Circuit, I believe that citation to unpublished decisions will unduly burden both judges and lawyers, and that it will create substantial confusion, particularly in light of the ongoing debate in the Ninth Circuit regarding the precedential effect of *published* opinions.[1]

First, having read dozens of unpublished cases in the course of researching issues arising in various appeals, I believe that citation to unpublished cases will redirect the energies of attorneys and judges to the task of attempting to discern the scope of any holding contained in an unpublished decision. In memorandum dispositions in which there are few facts and minimal (written) analysis, parties simply will not be able to demonstrate that the 'authorities' that they cite are truly analogous, and judges will not be able adequately to evaluate the parties' efforts to distinguish or analogize to these authorities. These efforts, which are unlikely to bear significant fruit, represent a diversion of attorney and judicial resources from analysis of authorities intended by judges to be relied upon: published opinions. Trying to guess precisely what was intended by the authors of an unpublished memorandum is more akin to reading tea leaves than to legal analysis.

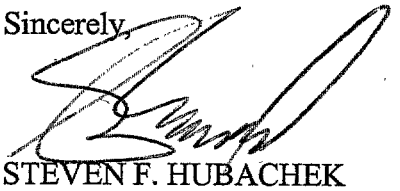
Second, citation to unpublished cases is likely to exacerbate the ongoing debate in the Ninth Circuit on the precedential effect of published cases. In *United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc), Judge Kozinski and Judge Tashima filed separate opinions offering differing interpretations of *stare decisis*. Judge Kozinski described as binding those opinions in which the panel (1) provided a reasoned analysis and (2) intended to resolve a legal issue. *See id.* at 916-17. *See also United States v. Joyce*, __ F.3d __, No. 02-30423, slip op. at 1458-59 (Feb. 3, 2004) (declining to follow a decision in which there was no analysis). Judge Tashima, on the other hand, has argued that only those portions of an opinion that are necessary to the decision are binding. *See Johnson*, 256 F.3d at 919-21. *See also Joyce*, slip op. at 1463-65 (rejecting the majority's refusal to follow decision not supported by analysis). In short, if the effect of *published* decisions can provoke such a substantial debate, the citation to *unpublished* decisions will be even more troubling: the language of such decisions does not reveal the panel's analysis and such decisions are not intended to serve as precedent; nor is it possible to tell when conclusions reached in them are strictly necessary to the decision. Thus, judges are even more likely to disagree on what

[1] I fully agree with the comments made by my colleague, Shereen J. Charlick, in her letter dated January 28, 2004.

weight, if any, should be given unpublished decisions. In short, unpublished memoranda are far more likely to sow discord than consistency.

I strongly oppose proposed FRAP 32.1 for all of the above reasons, and the reasons expressed by Ms. Charlick. Thank you for considering my comments.

Sincerely,



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