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I am a practicing attorney in the areas of trial and appellate litigation, and a former law clerk to a federal appellate judge. My experience in both these areas leads me to the conclusion that the proposed rule of appellate procedure (FRAP 32.1) allowing citation of unpublished opinions is a bad idea.

Legal precedent in a common law system is a delicate balance between broad statements of universal principle, and nuanced accounts of the facts that make one principle rather than another the right one for a given situation. The essence of legal reasoning is deciding that some kinds of facts make a difference to matters of principle, and some do not. It is the job of our appellate courts to provide guidance in this area by publishing opinions that elucidate these distinctions and allow the rest of us to reason by analogy. When this is done well, it enables attorneys, and through them the public, to act with a large measure of confidence in most cases that they know how the law will apply to their actions.

Writing opinions that serve this function well is not easy. Judges must constantly make difficult decisions as to the proper level of generality in which to express a legal principle, so as to make it widely enough applicable to serve the functions of a rule of law without subsuming too many situations in which application of the rule is likely to be unjust. Because their opinions will serve as the basis for reasoning by analogy, judges must also be extremely careful about which facts they emphasize in explaining their decisions. Careless reference to a fact that is not pertinent to the court's legal reasoning will undermine that reasoning by suggesting that if that fact were different, the result would be as well.

Legal disputes can be divided into two rough categories: 1) Cases in which most disinterested people reasoning from existing precedent agree on the proper result; and 2) Cases in which a difficult call has to be made in an area where existing precedent is indeterminate. These two categories of cases, in turn, generally correspond to those in which appellate courts choose to issue unpublished memorandum dispositions, and those in which they deem it necessary to draft published opinions. As described above, the purpose of a published opinion is to resolve a question on which reasonable people might differ, and to explain the result in such a way as to reduce the number of future cases about whose outcome there will be substantial disagreement. This is an exacting task, one that takes time and care, and there is already room for doubt as to how well our courts are fulfilling it. The proposed rule would make this situation worse rather than better.

Unlike a published opinion, the purpose of a memorandum disposition is simply to inform the parties that one of them is mistaken about the proper application of the law. Because the reasoning that compels the result has already been worked out and explained in prior cases, it is necessary only to refer to those cases and to state in conclusory terms that they govern the present dispute. It is not the court's job to reinvent (or rejustify) the wheel for the benefit of the parties. To do so would be not only wasteful in the way that redundant effort is always wasteful, but pernicious in that every time one undertakes to explain and restate a legal principle, there is a chance that one will inadvertently introduce some minor variation or arguable ambiguity that advocates can seize upon to muddy an area of the law that had been fairly well clarified. This is why the appellate court in which I clerked has a general order stating, "[b]ecause the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result." General Order 4.3 of the United States Court of Appeals for the Ninth Circuit.

To the extent that a rule like this is followed, memorandum dispositions are written in such a way that they could hardly ever be invoked as precedent even if it were permitted. Such dispositions merely cite controlling precedent and identify the facts making that precedent clearly applicable. They do not recite all the other facts that were argued to compel a different result or provide detailed justifications for rejection of the losing party's arguments. These dispositions do not present any risk of muddying the legal waters, and their occasional appearance in an online database search is useful to practitioners only because they sometimes provide quick pointers to the governing cases in a particular area.

Most unpublished decisions, however, are not written this tersely. By my observation, what usually happens is that a law

clerk's bench memo is subjected to varying degrees of editing and then issued as the unpublished decision. Such memos are drafted prior to argument and decision of the case and represent the law clerk's initial reasoning and exposition as to the proper outcome. Having invested a great deal of time and effort in drafting these memos, and eager to have their own locutions given the force of law, clerks are generally loath to pare them down to the minimalist standard enjoined by General Order 4.3. While the resulting document is generally correct in that it reflects the result approved by the panel, it is written by someone lacking experience in the discipline of judicial writing. Further, because these dispositions are neither signed nor published, judges do not usually subject them to the same level of scrutiny given to opinions meant to serve as citeable precedent. They are "good enough" to serve their intended purpose, which differs from that of extending and refining the collective enterprise of judicial reasoning.

As a practitioner who often has to conduct legal research, I run across many of these unpublished opinions that have now become available online. Often the first ten results of a search will be such unpublished decisions. When this happens, I usually breathe a sigh of relief that they are clearly marked as non-citeable precedent. I say usually, because we have all had the experience of finding an opinion favorably addressing facts virtually identical to one's own case, only to find that it is nonciteable. In the aggregate, however, making all these unpublished opinions citeable would render my job much more frustrating than it is now. Legal research is already a maddeningly open-ended task. It serves no constructive purpose to multiply the number of decisions that must be read and evaluated in order to be confident that one has command of the contours of an area of legal doctrine. This is particularly so when the additional decisions are, as noted above, ones that are merely redundant of existing law, and that are not drafted with the same care and skill that go into published opinions. At best, such decisions would serve only to multiply examples as to how a principle applies within an area already clearly defined. Often, they would undermine such clarity as exists.

If enacted, the proposed rule would have two major effects. First, an extant large mass of badly edited bench memos would be retroactively transformed into binding legal authority. Second, in future courts would have to draft all dispositions with the same care now given to published opinions. This would literally double their already onerous workload. More likely, they would simply become much more vigilant in making sure that memorandum dispositions followed General Order 4.3, which would make them useless as precedent anyway. Little would be gained; much lost.

We must not forget that appellate judges have two different tasks--one is to resolve the appeals brought before them, and

the other is to develop, refine, and expound legal doctrine. Article III requries that the latter be done only through the former. But there is no reason why the former must always entail the latter. If it did, this would be a sign that the very goal of creating areas of certainty in the law--the whole point of having precedent in the first place--was an utter failure. Appellate judges are charged with the complex task of creating and maintaining a coherent body of legal doctrine. They should continue to have the power to determine which of their decisions properly serve as vehicles for furtherance of that task and which do not.

Thank you for considering my comments.

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