03-AP-063
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United States Court Of Appeals
For The Ninth Circuit

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PROCTER HUG, JR.
UNITED STATES CIRCUIT JUDGE

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December 16, 2003

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: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

Although the proposed F.R.A.P. 32.1 appears to be only a minor change in the national rule, it is in practical effect, a major change. Our courts of appeals have two major functions, error correction and developing the precedent of the law of the circuit. Unlike the Supreme Court, the courts of appeals cannot select those cases for review that have significance in developing the law; the error correcting function requires us to review all cases that are appealed. The unpublished memorandum is a very effective and fair way of resolving those cases that have no significant effect on developing the law of the circuit.

In the Ninth Circuit Court of Appeals we believe it is very important to provide the parties with the reasons why we have reached our decision. In those cases that are resolved by memorandum disposition we provide the reasons why, under existing precedent, the decision has been reached. The disposition is designed to inform the parties why and how the decision was reached. There is no need to extensively relate the facts or procedural background because the parties are very familiar with the facts and that background. It is important to recognize that this type of decision is designed to inform the parties of the reason for the decision and not the world at large. Approximately 75% to 80% of our dispositions are in this category.

In the Ninth Circuit at the judges' conference following oral argument after resolving the case, we pay special attention to whether the judges believe that the case involves a new or different application of existing precedent. If one judge believes that it does, we write a formal published opinion. If either of the parties believes that the case should be published for precedential purposes, there is a simple process by which a request can be made. The panel considers the request, and not infrequently revises the disposition into a published opinion. Thus, we have both the panel and the parties considering whether the disposition should be published for precedential purposes.

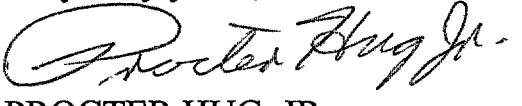
One might ask, as the commentary implicitly does, what harm is done by allowing citation to unpublished, non-precedential dispositions. The simple answer is that they are not designed for that purpose. The background facts and procedures are not fully developed, and thus, the interpretation of the law involved is often not readily apparent other than to the parties. If all of the unpublished decisions in the circuit (or indeed throughout the country) are fair game for citation, it will increase the cost of legal research as well as muddy the water of existing precedent.

The argument is made that these dispositions should be available for citation just as law review articles, treatises and district court opinions are. The essential difference is that those resources are intended to present arguments for particular points of law, whereas unpublished opinions are specifically not intended for that purpose; they are intended solely to advise the parties of why their dispute was resolved in a particular way. If the unpublished decisions are available for citation to the district courts, bankruptcy courts and the agencies, there is a real danger that a disposition by a panel of three judges, though not designed for precedential purposes, will be treated as though it were.

Another concern I have is the effect on the Court of Appeals. There is no way that the 75% to 80% of dispositions that may be cited can be drafted with the care we now give to our precedential opinions, yet there will be pressure on the judges to do so. That pressure will either detract from the care we are able to give to our precedential opinions or lead to simple judgment orders – AFFIRM or REVERSE.

One other comment I have is that there is no necessity for national uniformity on the way unpublished opinions are treated. I am unimpressed that lawyers practicing in multiple circuits cannot adjust to any difference in the circuits on this subject. As with any other difference, the answer is very simple – read the circuit rules before preparing your brief as you do for any other differences. We in our Ninth Circuit have worked out a system that works very well and this circuit and other circuits should be allowed the flexibility to deal with the subject as best fits the operation of the circuit. I have been a judge on the Ninth Circuit Court of Appeals for 26 years and Chief Judge for 5 years. The present arrangement that we worked out over the years works well for our circuit and I see serious disadvantages to the proposed national rule.

Very truly yours,



PROCTER HUG, JR.

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