United States Court of Appeals
125 South Grand Avenue, Suite 303
Pasadena, California 91105-1510

Dorothy W. Nelson
Senior Circuit Judge

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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, D.C. 20544

RE: Proposed Federal Rules of Appellate Procedure

Dear Mr. McCabe:

As a Senior Judge on the Ninth Circuit who has served this court for twenty-three years, I write to oppose strongly the adoption of proposed Federal Rule of Appellate Procedure 32.1 that would not allow any restriction to be imposed upon the citation of any judicial opinions including those designated as "not for publication".

My colleague, Judge Alex Kozinski testified eloquently on this subject before the Congressional Subcommittee on Courts, the Internet, and Intellectual Property on June 27, 2003. I shall not repeat his arguments here, but rather shall emphasize several arguments against adoption of the rule that are of great importance to me and many judges.

The adoption of the proposed rule will be costly to the entire federal court system. When we write "unpublished" (uncitable) dispositions called memorandum dispositions, we write them for the purpose of error correction. We briefly explain who won, who lost and why. Since the dispositions are only written for the parties, we need not state the facts as the parties are familiar with them and we cite two or three key cases. It is rare that such a disposition is more than two pages long.

Published opinions, are written to develop the law of the circuit. We announce the rules of law or extension of existing rules. They require a recitation of the facts in sufficient detail so lawyers and judges unfamiliar with the case can

understand the question presented. We generally write legal opinions only in cases where the law is unclear. Therefore the legal discussion must be broad enough to provide useful guidance for future cases. Published opinions range in length from approximately 10-50 pages or more.

A memorandum disposition can often be prepared in a few hours whereas an opinion may take many days, even weeks or months to prepare.

Also, we must review the memorandum disposition and opinions of the two judges with whom we sit. Review of a memorandum disposition may take an hour or two at most, whereas the review of an opinion may take days, weeks or months.

Memorandum dispositions account presently for about 70% of our dispositions. Therefore, if all dispositions are to be published and citable, we shall need many more judges.

Since all published opinions go into the federal reporter, we shall probably at least double the number of volumes in our libraries. Thus, we shall double the cost of books purchased and double the cost of space needed to house them.

Although lawyers have sometimes suggested that unpublished decisions make up a secret body of law that conflicts with our published decisions, this is not borne out by the evidence. For a 30-month period beginning in July 2000, we relaxed court rules to allow lawyers to cite unpublished dispositions in requests for publication of memorandum dispositions (allowed by our court rules) and in petitions for rehearing. There was not a single request for publication that identified a legitimate conflict among unpublished dispositions or published opinions.

I urge you to give consideration to these and other arguments made by my colleagues to defeat adoption of proposed FRAP 32.1.

Thank you so much for considering my views.

Sincerely,

Dorothy W. Nelson

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