United States Court of Appeals
for the Ninth Circuit
Richard H. Chambers Courthouse
125 South Grand Avenue
Pasadena, California 91105

03-AP-132

Chambers of
Kim McLane Wardlaw
Circuit Judge

January 7, 2004

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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write to oppose proposed new Rule 32.1 which would require courts to permit the citation of "unpublished Memoranda Dispositions," as we refer to them in the Ninth Circuit. Although the Committee believes that "the scope of the proposed new rule is extremely limited," in fact, it is not when considered in light of the magnitude of annual filings and dispositions on the merits in the Ninth Circuit. Managing this tremendous caseload would not be possible without the use of unpublished, non-precedential dispositions.

Although we spend as much time carefully preparing and considering a case ultimately decided in the form of an unpublished disposition, we do not spend as much time in the actual drafting and negotiation of a memorandum disposition. This conservation of scarce judicial resources is made possible only because memoranda dispositions are not citeable as either controlling or persuasive precedent. Memoranda dispositions are designed to concisely and quickly deliver a decision to the litigants in a particular case. Discussion of facts and procedural posture is largely omitted from the dispositions because we presume that the parties and their counsel are familiar with that information. Thus, the dispositions float without context, and are relatively meaningless

to anyone who does not understand the facts and procedural posture of the case. It makes no sense to permit their citation unless everyone involved, the litigants, counsel and reviewing panels, were also required to review and absorb the arguments and record of the earlier disposition. To require such an investment of time in analyzing non-precedential dispositions, in view of the magnitude of work entailed in reviewing and writing precedential dispositions, would be incredibly wasteful.

Our rules differentiate opinions precisely because they involve matters which contribute to the development of the law, address issues of first impression, have broad impact beyond the immediate parties to the litigation or clarify the law of the circuit. Opinions require many hours of research and drafting, editing, polishing and revising. Once an opinion is circulated, other judges and their law clerks scrutinize it, and once they are published they are circulated to each judge and, because of their importance, are analyzed carefully and subject often to lengthy post-publication review short of, but sometimes also including, en banc review. Allowing citation of memoranda dispositions would divert the energy of the court from this careful opinion process to matters not really pertinent to our decision-making.

The reality is that the case load in the Ninth Circuit is staggering, at least for the foreseeable future. I am sure you have heard of the triage analogy for managing our caseload. Although I am personally disinclined to view what we do as triage, it is true that of the 24 hours in a day, more hours are best spent on cases presenting complex, knotty, and cutting edge issues than on routine appeals where the law is clear and the case presents a straightforward application of the law to the facts. If the new rule is adopted, each judge would have to reprioritize the way he handles the caseload. I am not sure which way I would go at this point, but I would imagine that there would be many who would opt for one-line summary dispositions in cases where the law is clear. I believe our current system of handling the caseload by disposing of most cases by memoranda dispositions furthers the interests of justice more than issuing flat one-liners would; at least, under our current system, the parties receive a reasoned decision that is comprehensible to them.

It is unclear to me what the new rule is designed to accomplish. I understand that lawyers want to cite memoranda dispositions, but I'm not sure that if they fully understood the delicate balance of judicial resources, which has resulted in the published/unpublished dichotomy, and the memorandum writing process itself, that they would disagree with the balance our court has struck. I hope you will reconsider the adoption of proposed new rule 32.1.

Very truly yours,

Kim M. Wardlaw

The Honorable Kim M. Wardlaw
United States Circuit Judge

KMW:bw