UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBERS OF
CYNTHIA HOLCOMB HALL
UNITED STATES CIRCUIT JUDGE
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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 Fed. R. App. P. 32.1

Dear Mr. McCabe:

As you are undoubtedly aware, the judges of the federal Courts of Appeal are the most overworked members of the judiciary in this country. To alleviate the burden imposed upon the Courts by the proliferation of routine appeals from every sector of the legal establishment, Circuit Judges have developed the admittedly misnamed practice of deciding some cases by "unpublished opinions."

Unpublished opinions are a crucial bulwark against the potentially overwhelming tide of cases that threatens to envelop the federal judiciary. With the approximately 150 dispositions required of active judges in the Ninth Circuit, a carefully constructed, thoughtful publication in each case is next to impossible. Instead, judges rely on the unpublished disposition, a deliberately circumscribed but nevertheless reasoned resolution to cases which present relatively simple legal questions. The opinions are designated "unpublished" precisely because the substantial investment of judicial resources required to churn out a published opinion is not warranted in such cases. The language of the unpublished disposition is not nearly as scrutinized as that of the published disposition,

primarily because of judges' recognition that uncitable, non-precedential opinions do not need as thorough an exposition of facts or applicable law (both that which is followed, and that which is distinguished) as do published opinions.

Regardless of the Committee's suggestion that Proposed Rule 32.1 is "limited" in scope because it addresses only the citation, and not the precedential value of unpublished dispositions, the Rule's passage would essentially eviscerate the practice of unpublished dispositions. To the extent that there is any possibility that an "unpublished disposition" might serve as even persuasive authority in a future case, conscientious judges will refrain from preparing anything but the most thoroughly vetted opinion out of concern that imprecise language might later be manipulated by a clever attorney to support a proposition that the judges never intended. Eliminating the unpublished disposition as a viable mechanism for deciding cases will thus lead to one (or both) of two unintended, but equally troublesome consequences.

First, judges may replace the unpublished disposition with completely unreasoned summary decisions that give litigants no inclination as to the theory underlying the decision in their case. Rather than seeing a two or three page opinion that describes, albeit in less detail, the reasoning which governed the outcome of a case, parties will receive a one-word judgment such as "Affirmed." In such cases, there would obviously be no danger of the "unpublished" opinion playing even the most cursory role in the adjudication of future cases, but litigants would also be left without even the slightest idea as to why their case was decided as it was.

On the other hand, judges may replace the unpublished disposition with something akin to a published opinion. Instead of a two or three page memorandum describing in fairly broad strokes the reasoning underlying a decision, litigants in many cases will receive a much longer memorandum that elucidates the same principle, but painstakingly sets forth the facts of the case, explicates the development of the law of the applicable field, and sets forth a governing rule that neither conflicts with circuit precedent nor unduly binds future

courts required to apply the new rule. Of course, preparing a significant number of these opinions will dominate a judge's time, thereby producing a commensurate reduction in the amount of time spent on the more difficult questions presented in more complex cases. Needless to say, the quality of the opinions rendered in the more complex cases will suffer, thereby retarding the development of the law in the most crucial areas in order to dedicate resources to cases in which publication is essentially unnecessary.

Whichever of the two consequences I have outlined comes to fruition, it should be clear that passage of Proposed Rule 32.1 will hamper the ability of the federal judges in the Courts of Appeal to adequately discharge their duties of upholding and developing federal law. The time constraints under which federal judges already operate are oppressive; Proposed Rule 32.1 would likely exacerbate this unfortunate situation. Under the current framework, the unpublished disposition plays a fundamentally important role in the adjudication of appeals in the federal courts. A rule which begins to chip away at its foundation is no improvement at all.

I urge you to reject Proposed Rule 32.1.

Sincerely,

Judge Cynthia Holcomb Hall