UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBERS OF
EDWARD LEAVY
UNITED STATES CIRCUIT JUDGE

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February 5, 2004

03-AP-289

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 in opposition to proposed Federal Rule of Appellate Procedure 32.1 which would prohibit the courts of appeals from imposing a prohibition or in any way restricting the citation of its own or any other courts' unpublished written dispositions beyond restrictions it places on other written dispositions. I believe this is an ill-conceived, time consuming, expensive, and possibly illegal restriction on the power of the circuit courts.

Each memorandum disposition filed by a three judge panel of the Ninth Circuit Court of Appeals contains an order which provides "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3." The order is the product of the panel's individualized deliberation process. I doubt that the rule making process can be used to reverse, overrule, or otherwise render void the thousands of such orders of the court of appeals.

Federal Rule of Appellate Procedure 2 gives courts of appeals the authority to "suspend any provision of these rules" "to expedite its decision." The only exception to the authority to suspend rules granted by Rule 2 is Rule 26(b) which governs the time for taking appeal or seeking review. Is it the intent of the Rules Advisory Committee that the proposed rule would eliminate the courts of appeals' power to suspend the provision of Rule 32.1 once it is adopted and, thus, would it become an unmentioned exception to Rule 2?

The 9th Circuit's prohibition on the citation of its memorandum dispositions is the considered judgment of each panel when it decides to enter such a disposition instead of an opinion. The panel uses that device to expedite its decision and thus contribute to the elimination of delay in the specific case as well as other cases in the court's backlog. Rule 2 says, "a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules . . . ." Thus, a court of appeals, finding non-citation of its memorandum dispositions desirable and expedient, would be authorized under Rule 2 to suspend any rule taking away its power to prohibit citation.

I have been a judge of the Ninth Circuit Court of Appeals for the past sixteen years. During that time, not a single new judgeship has been added while the caseload has increased more than thirty percent. Managing that caseload so as to provide timely disposition of appeals has been a focus of our court. Just as the circuit courts choose to limit the pages of briefs and the length of oral argument, if a circuit chooses to restrict the citation of unpublished dispositions it should be free to do so in the context of the management of its entire caseload.

I served on our circuit's Rules Committee from 1996 - 2000. During my tenure, the committee considered and debated a proposal to allow citation of unpublished dispositions similar to proposed Rule 32.1. Ultimately, even many who were advocates of a rule change were convinced that the cost of the proposed rule to the court and to litigants was simply too high and that our present rule permitting citation only under special circumstances was a wiser choice.

Adoption of the proposed rule is a risky proposition. Requiring the circuit courts to allow the citation of unpublished dispositions may have consequences that are not now foreseeable. The circuit courts may dispose of more cases by simple order to guarantee that they will not be cited. The alternative is to spend more time on the preparation of dispositions. This will create delay for litigants and a larger backlog for the courts.

The proposed rule is different from a simple rule of appellate procedure. It is a rule which by its terms diminishes the power of the circuit courts. The rule making process should not be used as a vehicle for that purpose.

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I ask that the Advisory Committee abandon the proposed rule.

Sincerely,

Edward Leavy

EDWARD LEAVY

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