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February 11, 2004

Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington DC 20544 **Fax: 202-502-1755**

The Hon. Samuel A. Alito, Jr.
Chair, the Committee
357 U.S. Courthouse
P.O. Box 999
Newark, NJ 07101-0999

Dear Mr. McCabe, Judge Alito, and Judicial Conference Judges:

I am writing in opposition to proposed Rule 32.1 of the Federal Rules of Appellate Procedure, which would require unpublished dispositions to be citable, nationally. I write as a long-time consumer of such opinions, having been a federal appellate practitioner for 20 years, five of them spent as the Chief of the Appellate Section for the U.S. Attorney's Office for the Northern District of California. In the latter position, I argued over 50 Ninth Circuit appeals, briefed hundreds more, and reviewed hundreds of unpublished dispositions.

Whatever may be the case in other Circuits, in this Circuit the unpublished dispositions are often not well-written and (to be blunt) not infrequently wrong in their reasoning. I am not aware that the Committee that proposed the new rule has any basis for concluding to the contrary. If this is so – and not only lawyers but prominent judges of the Ninth Circuit have told you so themselves – then it is difficult to fathom why the Judicial Conference would want to make such poorly written and erroneous legal expositions citable as precedent (and there is no denying that it is "as precedent" that supporters want them cited, see below), thereby (1) increasing the workload and costs for appellate practitioners – and all federal judges – across the nation, (2) further widening the gap between the "haves" who can afford the extra work and the "have nots" who can't, and (3) not leading to any appreciable gain in either quality or accuracy of judicial decisionmaking.

Even if judges in other Circuits believe, based on their own practices and workloads, that non-citation rules are wrong-headed, they have little insight or experience with the Ninth Circuit, and consequently no basis for disallowing "local control" over this workload mechanism. If out-of-Circuit judges want unpublished Ninth Circuit opinions to be citable in their Circuits, let them write a rule to say so. But we know they are not deserving of citation here. No national body should compel the judges and lawyers who know the Ninth Circuit best to live under a rule that they know, from experience, will only work mischief.

The Federal Rules of Appellate Procedure currently embrace dozens of variations in "local" Circuit requirements. This makes perfect sense (and the proposed Rule will hardly make a dent in the variety facing practitioners). The Circuits as presently constituted are extremely different in their caseloads, not to mention their cultures and their predominant "mix" of cases. What works well in a small Circuit with less chambers-locations, less geography to travel, and less cases and lawyers to evaluate, unsurprisingly may not work well in other, larger Circuits.

More importantly, only the lawyers and judges with detailed experience in any particular Circuit are competent to opine as to solutions that may work best, for those problems that arise directly from the non-uniform sizes and workloads of the Circuits. Until the larger lack of uniformity in Circuit size is addressed, it makes common sense to allow the differing Circuits to have differing rules to address differing circumstances. One size does not fit all, when one begins with the knowledge that all are far from one size.

I do not think it useful to further repeat the many concerns that others opposing the proposed Rule have explicated. My hope is that you will find what follows original. I make this challenge to the Committee: Before you foist your uniform proposal on the Ninth Circuit, do an empirical survey. Has any member of the Committee actually read a month's worth of unpublished Ninth Circuit dispositions? Or a few months, randomly selected? I am willing to bet the answer is no. I challenge you to pick any random three months in the last three years, and read all of the unpublished dispositions (roughly 500 in number). Then assert, with a straight face, that that body of law is one that the Committee feels is worthy of precedental citation, or even of useful persuasive value. If you find that you actually think this is so, then by all means finalize the proposed rule. If, however, you conclude what we practitioners have

concluded – that unpublished dispositions, while decent explicators of results and something to show the client or put in a rehearing petition, are also full of questionable or erroneous legal reasoning and aphoristic-at-best logic – then you really must continue to allow the Ninth Circuit to continue to manage its docket as it finds best, in consultation (the Ninth Circuit is very good at this) with its many experienced appellate practitioners.

Two final closing thoughts. First, the ban on citing unpublished dispositions does not impact anyone's right to free speech; the constitutional argument is seemingly attractive only until it is even briefly examined. The Ninth Circuit places no copyright on its unpublished dispositions. Any lawyer with a meritorious legal position is welcome to steal the reasoning and even the words of an unpublished disposition, and present it to the Court. There is no limit to free expression here.

The fact that this does not mollify the complaining lawyers demonstrates that their motivation is really is – and this seems undeniable, does it not? – to try to gain some <u>precedental force</u> from the unpublished decisions. That is, they wish to argue that the writing ought to be persuasive because of <u>who</u> wrote it, rather than what was written. (The irony, of course, is that seldom do the judges listed on an unpublished opinion actually write them. They are written at best by law clerks or, more frequently, by staff attorneys.) I have seen attributed to your Committee an argument that the proposed rule does not require that any precedental force be given to unpublished opinions. That seems a laughable disavowal of what must, logically and realistically, underlie the rule. Not only is this a less-than-enthusiastic passive disavowal of any strong version of the Rule, but it is also simply wrong. In reality, the rationale for wanting to cite these short dispositions is obviously, and purely, to try to gain some precedental force from the fact that "the Court" purportedy endorsed them. To disavow this is, simply, disingenuous.

Finally, it seems clear to those of us in the Ninth Circuit that the unintended result of the proposed rule, if it is forced upon our Court, will be to actually result in <u>fewer</u> written opinions overall. It will ultimately lead, in this Circuit at least, to adoption of a practice of one-word "Affirmed" dispositions in many cases. This tool is used by other large Circuits but, so far, the Ninth Circuit has resisted it, believing that parties prefer and deserve at least some written rationale to none at all. But if the Ninth Circuit is forced to choose between adding to its

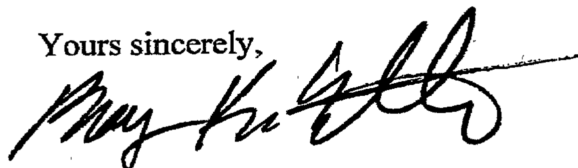
citable case inventory roughly 2,000 staff-attorney-drafted opinions a year, or going to one-word affirmances, the pressure to choose the latter option seems virtually irresistible. The workload of this Circuit simply can not yield any "extra" time for its judges to carefully review the content and logic of an additional 2,000 opinions a year.

Now, some practitioners (myself included) don't think a move to one-word affirmances would be such a bad thing. I personally don't believe that losing parties are made any happier by a poorly written and/or reasoned unpublished opinion. (Although the point that unpublished opinions at least give parties something on which to base a rehearing, or rehearing en banc, petition, does give me pause. But that is not a reason to make them citable.) But forcing a move to one-word affirmances does not appear to be the conscious intention of your Committee – certainly it has not explicitly told the public that this is one of its goals. (Is it?) Indeed, it seems likely that some number of your Committee would affirmatively be against it. Again, it seems sensible to give this unhappy but realistic choice to each Circuit, which can best assess its own needs and the desires and needs of its practitioners. The Ninth Circuit has chosen to give its many litigants at least some written idea of the rationale for their decisions, even in cases that frankly may not merit it. That is not a choice your Committee has announced it wishes to overrule. But that will ultimately be the effect of your Rule if adopted.

I wish your Committee the best, in addressing this seemingly trivial, but actually quite essential, issue. I look forward to a considered decision by the Committee to withdraw the proposed rule in favor of further study and reflection. At the very least, some member of your group needs to actually read a fair sample of the Ninth Circuit's "memdispo"s and see whether what you are hearing from our lawyers and judges isn't, perhaps sadly, but realistically, quite true.

Please feel free to contact me if I may be of further service in any manner. I remain,

Yours sincerely,



Professor Rory K. Little

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