CHAMBERS OF
JEFFREY W. JOHNSON
UNITED STATES MAGISTRATE JUDGE

United States District Court

Central District of California
United States Courthouse
Los Angeles, California 90012

03-AP-399

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February 13, 2004

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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Committee Members:

I am grateful for the opportunity to share my views with you regarding Proposed Federal Rule of Appellate Procedure 32.1. I write for myself only and not on behalf of any committee or other members of the Federal Judiciary. I have been a United States Magistrate Judge for almost five years. Before that, I was an Assistant United States Attorney for ten years and before that, a civil litigator with a large law firm. Having a quantity of experience as a judicial officer and litigator in federal courts, I have some educated expectations as to the consequences of FRAP 32.1 and its effect on both attorneys and judges.

I oppose FRAP 32.1 because I believe it would unnecessarily complicate the work of every federal judge without generating a corresponding benefit.

Generally, "not for publication" opinions, or "non-pubs," are written with an eye toward the parties to the litigation, who are familiar with the facts and legal issues in the case. Thus, in such instances, there is less need for a long, detailed summary of the facts; moreover, the legal analysis in these cases is frequently set forth in a "shorthand" intended only for the litigants' consumption. In contrast, opinions designated for publication are designed to stand as precedent and must

provide sufficient facts and legal analysis to allow an outsider to the litigation to understand the nature of the case and the court's reasoning. An opinion worthy of citation must be internally self-explanatory and understandable by non-litigants within the legal profession. I submit that this standard can not be achieved in every unpublished opinion issued by a circuit court without a significant reduction in efficiency.

A further consequence of the rule at all court levels would be to compel attorneys to spend more time and more money researching the nonpubs as well as published opinions, on the chance that there may be a favorable but unpublished decision to be found. The effects of Rule 32.1 would thus be harshest on those litigants and attorneys who have the least financial resources.

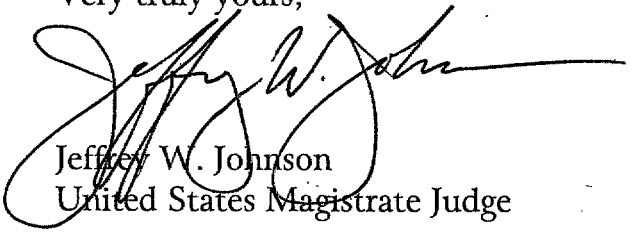
Finally, the Committee Note to the proposed rule states: "Rule 32.1 is extremely limited . . . It says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court." This comment has been offered as a "saving grace" of Rule 32.1, to wit: the fact that judges are free to determine the persuasive value of an unpublished opinion would eliminate the potential increased financial burden and likely confusion that many have predicted. The crux of the matter is, however, that if the persuasive value of an unpublished opinion is something less than that of precedent which must be followed by the lower courts, there is no purpose for a lawyer to cite the opinion; the same objective of persuasion could be accomplished by simply incorporating the reasoning and rationales of the opinion into a brief, *without* the non-binding citations.

Further, I suspect that from a practitioner's perspective, even if unpublished dispositions *could* be cited only for the purpose of persuasion, lawyers would have no choice but to treat those opinions as a significant source of authority that necessarily required briefing. Otherwise, a lawyer would run the continual risk of miscalculating the degree of deference a court would afford any particular nonpub. Thus, as a matter of prudence, a reasonable practitioner could never ignore relevant unpublished opinions decided by appellate panels in the very circuit court where he is litigating. Realistically, even if courts were not obliged to regard unpublished dispositions of a circuit panel as controlling, lawyers would - - in an abundance of caution - - accord those opinions significant weight in practicing before the various courts of the circuit.

On the other side of the bench, district courts, bankruptcy courts, and agencies within the same circuit would be more likely to treat unpublished opinions as controlling. It is simply improbable that a lower court in a circuit will lightly disregard or discount what at least two judges of a court of appeals in that circuit have determined to be a correct course of action. Thus, as previously stated, the job of identifying the proper precedent to follow will become unnecessarily problematic.

I am humbly grateful for the opportunity to convey my personal opinion to you.

Very truly yours,



Jeffrey W. Johnson
United States Magistrate Judge