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Via E-Mail (Rules_Comments@ao.uscourts.gov) and U.S. Mail
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 Federal Rule of Appellate Procedure 32.1

Dear Mr. McCade:

I write to urge your Committee on Rules of Practice and Procedure to reject proposed Federal Rule of Appellate Procedure 32.1, which would allow citation to unpublished opinions in support of any argument to the Court of Appeals.

It is elementary that ours is a *stare decisis* legal system, whereby our laws are comprised of statutory enactments by the legislature and precedential case law issued by the courts. (See *Hart v. Massanari* 266 F.3d 1155 (2001 9th Circ.) for an excellent discussion of *stare decisis* in the federal system, and see *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* 57 Cal.2d 450, 20 Cal.Rptr. 321 (1962 Cal.) for a discussion of *stare decisis* in the California state system.) It may be equally elementary that the grounds for determining whether an opinion should be published are set forth in Ninth Circuit Rule 36-2.[1] In general, an opinion is published

[1]Rule 36-2, "Criteria for Publication," reads:
A written, reasoned disposition shall be designated as an opinion only if it:
(a) Establishes, alters, modifies or clarifies a rule of law, or
(b) Calls attention to a rule of law which appears to have been generally overlooked, or
(c) Criticizes existing law, or
(d) Involves a legal or factual issue of unique interest or substantial public importance, or
(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

and becomes part of our case law when it explains, modifies, or criticizes existing law, applies existing law to a new fact pattern, or is of special interest or substantial public importance. The published opinions, then, direct the application of our law and guide the evolution of our law.

Precisely because of their importance, great care is taken in the preparation of published opinions. As explained in the article "Please Don't Cite This!," written by the Honorables Alex Kozinski and Stephen Reinhardt of the Ninth Circuit United States Court of Appeals, each published opinion takes many days – if not weeks or months – to write, edit, polish, and revise. Each opinion is scrutinized by the members of the panel deciding the case and is reviewed by the other judges in the Circuit to be certain that the opinion states the facts correctly and thoroughly enough for the legal analysis to be meaningful and helpful to the bench and bar, and to be certain that the opinion has considered the law correctly, is well-reasoned, and does not create a conflict with existing precedent or go beyond the questions presented in the case. (A copy of the article "Please Don't Cite This!" is attached to the original of this letter and is included as an attachment to the e-mail transmittal of this letter.)

Unpublished decisions, precisely because they do not meet the criteria to be published *and have not been deemed appropriate for publication by any of the authors of the opinion,* have not undergone the scrutiny and internal review and revision process of published opinions. Consequently, both for their lack of merit and lack of in-depth study, these decisions correctly cannot be cited in most arguments to the court. (The Ninth Circuit allows unpublished decisions to be cited for limited purposes. See Ninth Circuit Rule 36-3.) Yet if counsel can cite to these unpublished decisions, we counsel would be obligated to review them to avoid missing an argument or particular language which might be persuasive to a lower or lateral court. This would add enormously to our research time with little real gain. That is, we might find a literary nugget, but we will gain little additional insight into the law.

Researching the law is a creative part of appellate advocacy; it is also enormously time consuming. Of the time spent preparing an appellant's opening brief or appellee or respondent's brief, fully one-third of my time is spent on research. (The other two-thirds of the time is spent on outlining, drafting, and editing the brief.) Research for me consists of reading and making notes on each case found through a review of the treatises and annotated codes, found through *KeyCiting*™ every case read to determine whether there are other cases which have addressed the particular issue, and found through a query-search on *WestLaw*. I generally ignore all unpublished cases because I do not need to cite them. If I am researching a novel issue, I will infrequently look at a few unpublished opinions to see if the court is citing to a case which I may have over-

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(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

looked. *Note that I am looking for citations to published opinions. I am not looking to cite the unpublished case itself.* If an area of the law is undeveloped, given the care devoted to published opinions and the respect they carry in each jurisdiction, I prefer to cite to published opinions in sister jurisdictions than to unpublished decisions for a fuller understanding of the evolving law.

The legal issues addressed in my practice vary. Some cases involve established law; some involve one or two issues; some are complex and address issues of first impressions. Thus, some cases involve substantially more time than others for research. Still, virtually all of my cases involve *at least 30 hours of research.* This is at least 30 hours related to published cases. Due to the sheer volume of unpublished decisions, I am actually relieved that I need not review them! It would be daunting to be required to read the unpublished decisions, especially given that they add nothing to the law. It would add unnecessary hours to the preparation of each brief, and it would add thousands of dollars to the fees incurred for the preparation of each brief.

Equally troubling, aside from the time spent reviewing unpublished decisions, the reasoning or holding in an unpublished case might mislead the court where the facts of the decision were not fully explained or the legal discussion addresses an issue in a summary or unthoughtful manner. For example, some years ago, our California Court of Appeal affirmed a decision of the trial court which held that celebrity goodwill exists but that the value of the goodwill was zero. (*Marriage of D'Anna and Moriarty* (1993) 2d Civ. B-073604.) An author of a family law treatise requested that the opinion be published. Had that opinion been published, a new and significant asset would have been created in California – celebrity goodwill. The issue was – and is – significant and required careful consideration about the questions of ownership of goodwill, the potential duration of personal goodwill, the wisdom of existing laws and legal experiences in sister states with celebrity goodwill, and the accounting questions of "double dipping" when a celebrity-spouse must pay for his or her goodwill. None of these issues had been developed or explored adequately in the trial court or by the appellate court. Yet, publication of the opinion would have had wide ramifications in California. As I represented the wife (the party with the supposed goodwill), I asked the court to deny the request for publication, explaining that the case had not given the court an opportunity to explore these various questions. The court did not publish the case. It is not beyond my imagination that there are other complex issues which could become law without adequate review and careful consideration through the ability to cite to unpublished opinions.

There is a final reason for disallowing citation to unpublished decisions, and that is the public trust in our legal system. Honorable Richard Posner of the United States Court of Appeals for the Seventh Circuit has predicted that "if courts were forbidden to designate certain decision as nonprecedential, they would cease issuing reasoned opinions in such cases but instead would say 'Affirmed,' which is already the practice in the busier circuits. Our court has always given reasons for its decisions, but if those reasons can come back to haunt us, even though they were

actually reasons furnished by staff rather than by judges, we might stop doing so." (See How Appealing, "20 Questions for the Appellate Judge," at http://20q-appellateblog.blogspot.com (Monday, December 1, 2003).) Explaining the reasons for a decision is respectful to litigants, who have typically invested small fortunes, years, and emotional energy into the litigation. Knowing why a court has ruled as it has is important to litigants: it softens the blow of losing and it helps litigants evaluate whether or not to pursue further review. And understanding a court's decision increases the litigants' trust in our legal system because the justices are open – *transparent* – about their reasoning and their decision.

Thus, there are many reasons for not allowing citation to unpublished decisions. As discussed herein, the decisions do not substantively add to the body of law, they unnecessarily burden the cost and time devoted to research, and the loss of decisions which explain the reasons for the holdings in non-published cases will undermine the public confidence in our legal system. For these reasons, I respectfully request that your Committee on Rules of Practice and Procedure reject the proposed new Federal Rule of Appellate Procedure, Rule 32.1.

Thank you for your consideration.

Sincerely,

HONEY KESSLER AMADO

PLEASE DON'T CITE THIS!

WHY WE DON'T ALLOW CITATION TO UNPUBLISHED DISPOSITIONS

By Alex Kozinski and Stephen Reinhardt

Like other courts of appeals, the Ninth Circuit issues two types of merits decisions: opinions and memorandum dispositions, the latter affectionately known as memdispos. Opinions contain a full-blown discussion of legal issues and are certified for publication in the Federal Reporter. Once final, they are binding on all federal judges in the circuit—district, bankruptcy, magistrate, administrative, and appellate. Until superseded by an en banc or Supreme Court opinion, they are the law of the circuit and may be cited freely; indeed, if they are directly on point, they *must* be cited.

The rule is different for memdispos. Pursuant to Ninth Circuit Rule 36-3, memdispos are not published in the Federal Reporter, nor do they have precedential value. Although memdispos can be found on Westlaw and Lexis, they may not be cited. So far as Ninth Circuit law is concerned, memdispos are a nullity.

Few procedural rules have generated as much controversy as the rule prohibiting citation of memdispos. At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problems.

In fact, it's the lawyers who don't understand *our* problems. Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules.

Writing a memdispo is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

Writing an opinion is much harder. The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule and rejecting others. We must also make sure that the new rule does not conflict with precedent or sweep beyond the questions fairly presented.

While a memdispo can often be prepared in a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, revising. Frequently, this process brings to light new issues, calling for further research, which, in turn, may send the author back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and their clerks' time, to cases in which they write opinions, dissents, or concurrences.

Judge Reinhardt has served on the Ninth U.S. Circuit Court of Appeals since 1980, Judge Kozinski since 1985.

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions, or additions. It is quite common for judges to exchange lengthy memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of a memdispo is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers, and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about three-quarters of the published cases. Based on the petition and an independent review of the case, off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999 there were 44 en banc calls, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda supporting or opposing the en banc call. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing, and the response thereto. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4,500 cases on the merits, approximately 700 by opinion and 3,800 by memdispo. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 memdispos—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 memdispos circulated by other judges with whom we sat.

Writing 20 opinions a year is like writing a law review article every two and a half weeks; joining 40 opinions is akin to commenting extensively once a week or so on articles written by others. Just from the numbers, it's obvious that memdispos get written a lot faster than opinions—about one every other day. It is also obvious that explaining to the parties who wins, who loses, and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. Moreover, we seldom review the memdispos of other panels or take them en banc. Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions.

If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And, though three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied in future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, we would have to start treating the 130 memdispos for which we are each responsible, and the 260 memdispos we receive from other judges, as mini-opinions. We would also have to pay much closer attention to the memdispos written by judges on other panels—at the rate of 10 a day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15 percent of the cases already and may well have to reduce that number. Or we could write opinions that are less carefully reasoned. Or spend less time keeping the law of the circuit consistent through the en banc process. Or reduce our memdispos to one-word judgment orders, as have other circuits. None of these are palatable alternatives, yet something would have to give.

Lawyers argue that we need not change our internal practices, that we should just keep doing what we're doing but let the memdispos be cited as precedent. But what does *precedent* mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.

With memdispos, this is simply not true. Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed memdispos in 100 to 150 screening cases. If we unanimously agree that a case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the memdispo, much less rewrite it from scratch. Is it because the memdispos could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition. Any refinements in language would cost valuable time yet make little difference to the parties. Using the language of the memdispo to predict how the court would decide a different case would be highly misleading.

We are a large court with many judges. Keeping the law of the circuit clear and consistent is a full-time job,

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DON'T CITE THIS!

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even without having to worry about the thousands of unpublished dispositions we issue every year. Trying to extract from memdispos a precedential value that we didn't put into them may give some lawyers an undeserved advantage in a few cases, but it would also damage the court in important and permanent ways. Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of memdispos is an uncommonly bad idea. We urge lawyers to drop it once and for all. ❑