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Robert G. Badal
601 So. Figueroa Street, 40th Fl.
Los Angeles, CA 90017
phone: 213-689-7645
fax: 213-614-1868

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

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure ("FRAP") 32.1, which would create a nationwide rule, binding on all federal circuits, that would permit the citation of unpublished federal appellate decisions. It is our view that, in all likelihood, the rule would have a significant negative impact on the practice of law before federal courts of appeals, including the Ninth Circuit Court of Appeals.

My opinion of the proposed rule is grounded not only in the intuitively obvious deficiencies in a blanket rule of this type but also in years of active practice in the federal district and appellate courts. I have been actively engaged in the practices of law for over 30 years and I am presently a senior partner in a large national law firm based in San Francisco. My practice involves the litigation of complex commercial disputes, with substantial components of both state and federal cases, as well as trial and appellate work. I write these comments to express my personal opinion of the proposed rule. Additionally, the other individuals indicated below have authorized me to submit these comments on their behalf (however, the opinions expressed herein are not necessarily those of my law firm or its individual clients).

As a general matter, corporate civil litigants are interested in prompt, and accurate resolution of their disputes, together with at least some explanation of the basis for the decision. The proposed FRAP 32.1 would undermine these fundamental interests.

A. The Proposed Rule Will Result In Either Increased Delay or More Frequent Use of "Postcard" Dispositions.

As the Administrative Office of the U.S. Courts knows from its own database, a large number of appeals are lodged with the Ninth (and other) Circuits every year. In the last year for which data is publicly available, over 56,000 appeals were lodged in the Circuit Courts and over 9,900 of these were filed in the Ninth Circuit. *See "Federal*

Judicial Caseload Statistics, March 31, 2002," Table B, Administrative Office of the U.S. Courts (2002). Unlike the U.S. Supreme Court, which can select a handful of cases for full written disposition, the Circuit Courts have no such luxury - - they receive and must accept nearly all appeals taken from the District Courts.

This unavoidable fact of life has forced many of the Circuits to divide their appeals into two broad categories. As Ninth Circuit judges themselves have acknowledged, cases pending before the Ninth Circuit are divided as follows: a modest percentage are designated for publication and the opinions drafted in those cases receive close judicial attention; the majority of cases, however, are not designated for publication and the "memorandum dispositions" (or "memdispos") in those cases are generally drafted by a law clerk with limited judicial oversight - - other than instructions as to the ultimate outcome. Alex Kozinski and Stephen Reinhardt, "Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions," *California Lawyer* pp 43-44 (June 2000).

This division of all appeals into two broad categories makes perfectly good sense. It allows the Ninth Circuit to summarily dispose of a large volume of cases where the primary goal is to provide the parties with a final result as expeditiously as reasonably possible and to conserve its resources for a much smaller body of cases where the primary goal is to clarify the law or provide precedential authority for future parties and future cases. In effect, this approach allows the Ninth Circuit to control an otherwise unwieldy docket.

Permitting citation of memdispos will, accordingly, inevitably increase pressure on judges to spend more time reviewing and polishing those summary decisions - - if they continue to be made publicly available. This increased burden would expand geometrically, since as a practical matter the courts would have to address all relevant published and unpublished decisions. Thus, not only would more dispositions require increased judicial attention, but each disposition would require consideration of a significantly broader range of decisional authorities. With the courts of appeals already operating at or near full capacity, spending additional time working on memdispos would simply add to the backlog of cases and increase the time it takes to obtain a final decision.

Faced with this potential additional burden and backlog, it is conceivable, even likely, that courts with an extensive practice of writing unpublished but explanatory dispositions (such as the Ninth Circuit) will abandon the practice altogether and begin issuing summary, or "postcard," dispositions instead (*e.g.*, "The judgment of the District Court is affirmed.").[1] While this would doubtless increase the efficiency with which

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[1] *See* "20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit," December 1, 2003 at Question 16 (*available at* http://20q-appellateblog.blogspot.com) ("I predict that if courts were forbidden to

(Footnote continued)

courts dispose of the "easy cases" (*see* Frederick Schauer, "Easy Cases," 58 S.Cal. L. Rev. 399 (1985)), it serves neither the interests of the litigants, the general public, nor the courts themselves.

Litigants ought to receive some explanation of the court's rationale. Such an explanation serves several purposes. First, civil litigants often negotiate a settlement even after a final appellate decision is handed down. Having even a brief analysis from the court of appeals can facilitate meaningful dialogue and, therefore, negotiated resolution of disputes. Second, the discipline of writing *some* analysis of the case serves as a check upon the process to increase the likelihood of a correct resolution. Third, a brief analysis (even one written by a law clerk) allows litigants to feel as though they have received a fair hearing and promotes confidence that the court has not simply acted arbitrarily. Even unpublished opinions must, at their core, contain a rational disposition of the case at hand. The fact that an opinion cannot be cited as *precedent* does not mean that the drafters are free to act irrationally.

The public benefits from unpublished decisions as well. Even if they are not citable to the court, they are nonetheless an intermediate source of legal research, and a potential fount of available arguments.

Finally, the courts benefit from the practice of issuing unpublished decisions rather than postcard decisions. Their decision making is thereby made more transparent, which in general serves to increase public confidence in the court system.

B. The Committee's Observation that Unpublished Opinions Could Be Cited Like Law Review Articles Blurs the Distinction Between Persuasive and Binding Authorities.

The Committee Notes for the proposed Rule 32.1(a) fail to acknowledge fully the profound distinctions between persuasive (*i.e.,* permissive) and binding (*i.e.,* mandatory) authorities:

> An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might – that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

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designate certain decisions as nonprecedential, they would cease issuing reasoned opinions in such cases but instead would just say 'Affirmed,' which is already the practice in the busier circuits.").

The distinction between permissive and mandatory authorities goes significantly beyond whether a particular source carries binding precedential value. The distinction also governs whether such a source *must* be cited to the court, or merely *may* be cited at the party's option (even if it is directly on point). *See* Robert S. Summers, "Statutory Interpretation in the United States," in MacCormick & Summers, eds., *Interpreting Statutes* at 422 (1991) (listing separately mandatory and permissive authorities); *see also* Christian E. Mammen, *Using Legislative History in American Statutory Interpretation* at 10-27 (2002) (discussing permissive and mandatory materials used by U.S. Supreme Court in aid of interpreting statutes).

To permit citation of both "published" and "unpublished" opinions to the issuing court would blur and confuse the distinction between permissive and mandatory authorities. This issue does not generally arise in relation to on-point *favorable* authorities; in those circumstances, the blurring and confusion works to the advocate's benefit by creating the impression that an even longer line of cases supports his position. Rather, the issue arises in relation to similar or on-point *unfavorable*, unpublished decisions. Then, the advocate is faced with the Hobson's choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation from her opponent (or worse, the court) for ignoring those decisions.

In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedential published opinions, the *substance* of the distinction would quickly erode. *All* relevant opinions, whether or not designated "published" or "precedential," would have to be cited and addressed by all parties for fear of oversight or *post hoc* criticism.

At bottom, the proposed FRAP 32.1 threatens to blur or destroy the long-held distinction between the Circuit Courts' limited dispute-deciding function and their broader precedent-making function. The Circuits should remain free to decide which cases - - based on the factual record and/or legal principles involved - - are worthy of detailed written analysis that will bind future litigations and which need to be summarily disposed of in order to resolve the narrow dispute between the named parties.

C. A Nationwide Rule Is Unnecessary

Finally, I have not been able to identify or ascertain from the Committee Note what rationale propels the need for a uniform nationwide rule on this subject in the first instance. If some Circuits - - by culture, custom or practice - - are comfortable in drawing no distinction among types of opinions while others (like the Ninth Circuit) are uncomfortable in doing so, why not allow each Circuit to decide for itself? Here, where California state courts have long followed a no-citation rule identical to the Ninth Circuit's rule, a change in the federal rule would be inconsistent with long accepted practice of both bench and bar. Indeed, for the reasons set out above, if there is a

compelling rationale for a nationwide rule on this subject, it seems that the more sober rule would forbid citation to unpublished opinions.

D. Conclusion

For the reasons set out above, we respectfully register our disagreement with the adoption of proposed FRAP 32.1.

Respectfully Submitted,

Robert G. Badal on behalf of himself,
Edward J. Slizewski,
William Forman,
Michael Lawrence, and
Connie Tcheng

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