United States Court of Appeals
for the Ninth Circuit
P. O. Box 31478
Billings, Montana 59107-1478

03-AP-398

Chambers of
SIDNEY R. THOMAS
United States Circuit Judge

February 6, 2004

TEL: (406) 657-5950
FAX: (406) 657-5949

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Fed. R. App. P. 32.1

Dear Mr. McCabe:

I write in opposition to the proposed amendment to Fed. R. App. P. 32.1 because I believe that, at this time, the question should remain a matter of circuit option. If the Committee believes that a uniform rule should be adopted, then I urge the Committee to consider adopting the Ninth Circuit experimental rule.

Within our Court, I have advocated allowing the citation of unpublished decisions for their persuasive (not precedential) value. There are occasions when consideration of non-precedential decisions is useful, particularly in deciding whether publication is warranted in a case, most notably in specialty practice areas such as bankruptcy and tax. Allowing citation also would tend to assist us in maintaining uniformity of decisions by permitting the parties in an appropriate case to highlight unpublished decisions that they believe are in conflict with each other. Perhaps most importantly, allowing the citation of unpublished decisions would serve to reassure the bar and public that the Court is neither attempting to be secretive nor possessed of ulterior motives in designating cases as non-precedential. In this information age, no decision is truly "unpublished," and the wide dissemination of "unpublished" decisions inevitably means that attorneys will consider them for persuasive value, even if the Court does not. Indeed, many specialty publications routinely print our "unpublished" decisions for guidance of their readers.

I believe the fears of misuse by attorneys are somewhat overstated, as are the concerns that adoption of such a rule will compound the workload of the Court. I concede that adoption of such a rule is likely to make bad briefing worse, and that it may cause attorneys unnecessary labor by expanding the universe of citable cases. However, I believe that good attorneys will understand that the string citation of unpublished cases will not be persuasive in a brief and, in fact, will be counterproductive. Good attorneys will be able to identify those circumstances in which citation of non-precedential authority is appropriate.

All that being said, I oppose the amendment. This question has been debated at length within our Court. As the Committee can doubtless discern from the number of thoughtful letters it has received from my colleagues, it is a controversial issue with the Court closely divided. In the end, we adopted a compromise that has proven to satisfy most of the concerns of the proponents of change, while allaying the fears of the opponents. That compromise, as the Committee doubtless knows, is to allow citation of unpublished decisions in support of a petition for rehearing or a request for publication. In practice, it has allowed litigants to bring unpublished cases to the attention of the panel in an appropriate manner. It has not resulted in extra work for judges; it has not reduced the quality of briefing; it has not been used inappropriately by attorneys; and it has not resulted in undesirable secondary effects, such as altering the way in which judges write opinions and dispositions. In short, it has worked.

The Ninth Circuit experimental rule has shown the value of allowing courts to try various approaches to this perceived problem. Despite the desirability of a national rule, additional time should be afforded to assess through actual experience the best method of resolving this question. If the Committee believes that the time has come to implement a national rule, then I strongly suggest that it propose the rule that our Circuit has adopted on an experimental basis. To do otherwise would be to create unnecessary complications and consternation at a time when the federal circuit courts can least afford it.

Sincerely,

Sidney R. Thomas
United States Circuit Judge