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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
FAX Number: 202-502-1755

Re: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

I wish to submit a comment critical of the proposed new rule 32.1 of the federal Rules of Appellate Procedure. I urge the Committee to decline to adopt the rule for several reasons.

I am the Federal Public Defender for the Central District of California, the largest federal defender office in the country. In Fiscal Year 03, our office opened 150 new appeals (as appellant or appellee) and closed 173 appellate cases. Given the large number of appeals we handle, the proposed new rule would significantly affect our practice.

I am opposed to the proposed rule in two capacities: as a lawyer who practices before the United States Court of Appeals for the Ninth Circuit and as a public administrator who stewards scarce federal resources for the benefit of indigent individuals accused of federal offenses and has experienced the scarcity of resources available to the judiciary in general.

As counsel for litigants with matters before the Ninth Circuit, I have an interest in thorough, thoughtful, and speedy resolutions of my clients' appeals. Having practiced before the Ninth Circuit since 1981 (after clerking for a circuit judge for one year), I have

rarely questioned the integrity of the decisions rendered by the court. More significantly to my clients, however, is the fact that the court, **as a matter of course,** issues reasoned written decisions in every case. Although they may be short, the memorandum dispositions contain a statement of the basic facts and the arguments raised and a reasoned resolution of the pertinent arguments. That the circuit states its reasons for the parties is a very important part of criminal justice process for my indigent clients who appeal by right. They are afforded an opportunity to have three judges review what happened at the district court. They are given a definitive response to their arguments on appeal that, generally, concludes their criminal matters once and for all. They have been heard – not with unexplained abrupt rulings that sometimes characterize proceedings in the district court; not with abbreviated one word evidentiary rulings during trial that have to be explained by counsel; not with heated colloquies between court and counsel or the negativity that necessarily surrounds the sentencing process. Instead, they have received a dispassionate ruling on their arguments by judges who have made the time to write it down for them. For many appellants, this detached and thorough written treatment of their arguments is the most important factor in fairly concluding the criminal proceedings – both legally and psychologically.

I am also concerned with the speed of the appellate process. Memorandum dispositions are generally issued within a month of the date the matter is submitted; published opinions generally take at least three times as long to issue. Dragging out the appellate process not only delays the resolution of individual cases (important in criminal matters if the issue relates to a sentence that is currently being served), but also inefficiently squanders resources – there are more cases to track for longer periods, more drafts to review, more staff time expended. The Ninth Circuit, with its system of memorandum dispositions, renders its written decisions with remarkable speed.

In sum, the memorandum disposition system in place in the Ninth Circuit permits the court to render short but to-the-point rulings that satisfy the litigants' desire to know why they won or lost and does so speedily and efficiently.

The question is whether the proposed rule change permitting citation of unpublished dispositions must necessarily change the current issuance of timely and reasoned rulings. There is no question that it will, precisely because good judges are good judges. Circuit judges are paid to think deeply and write well. Their job is to explicate the law, clarify it when vague, challenge it when unconstitutional, and otherwise enforce it. No circuit judge worth his or her salt will permit a disposition to be used as precedent (and that will be the effect of the proposed rule change, whether or not the new rule expressly states as much) unless the disposition had undergone the rigorous "spit and polish" now reserved for published opinions. That is a fact about our federal appellate courts that we, as litigants, should take pride in but also beware. My fear is that instead of issuing the memorandum dispositions that explain the case sufficiently to justify the individual resolution, but not so expansively that they should or could be cited as precedent, my clients will receive the dreaded one-word ruling--affirmed, reversed, remanded, dismissed— a fate that befalls appellants in other circuits. Moreover, I fear (and predict) that the speed with which appeals are concluded with memorandum

dispositions will disappear if the judges now feel the need to refine, rethink, redraft, and review.

Second, I write as a public administrator. The Ninth Circuit carries the highest, caseload per judge in the country. Just as not every prosecution warrants pulling out all law enforcement stops, just as not every defense warrants funds for every expert possible, so, too, not every appeal warrants expending the enormous amount of resources that goes into drafting, circulating, and getting a majority of judges to sign off on a published opinion. Sometimes a case, particularly an appeal of right, simply requires the court to a legal doctrine or to point out the bad or good facts. Appellate rulings just don't always involve clarifying a vague rule, pronouncing a watershed decision, reining in a consistently wayward judge or party, or reinforcing a rule that has been overlooked. In other words, sometimes a case is just a case and the resources expended on cases in this category should be minimized.

The Ninth Circuit has used the memorandum disposition process as a case management tool. The system allows the court to take those cases that are just "cases" and get a ruling to the parties in a straightforward, timely and reasoned decision with a minimum of staff and judge time. It prompts the court to concentrate its scarce resources on those cases that warrant the time and energy that go into crafting published decisions, while permitting the court to ably maintain its calendar and steward its funds.

It is neither realistic nor fair to expect appellate judges who work under the enormous caseload pressure of the Ninth Circuit and who pride themselves on their ability to set the legal course for one of the nation's second highest courts to simply continue with the effective triage procedure they use and watch the quality of their published opinions decline. Instead, I predict we will see these judges either opt to go with one word rulings or double their workload by reworking formerly unpublished memorandum dispositions into published opinions, at a significant cost in resources to the court and in delay to litigants.

As a public administrator, I don't relish the prospect of delay for litigants, increased expenditure of resources by already overworked jurists or fewer statements of reasons. For what? So that there can be a uniform national rule of citation? Each circuit has its own set of local rules now and, frankly, each circuit has its own pronounced substantive law where there is no dispositive United States Supreme Court decision in an area. Uniformity for its own sake is insufficient to justify the disadvantages of the proposed rule. The proposed change is bad and unnecessary public policy.

Thank you for the opportunity to comment on proposed F.R.A.P. 32.1.

Respectfully submitted,

Maria E. Stratton

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