

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
U.S. Circuit Judge

January 16, 2004

(626) 229-7140
FAX: 229-7444
kozinski@usc.edu

The Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
357 United States Courthouse
Post Office Box 999
Newark, NJ 07101-0999

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Sam:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. The proposed rule would make more difficult our job of keeping the law of the circuit clear and consistent, increase the burden on the judges of our lower courts, make law practice more difficult and expensive, and impose colossal disadvantages on weak and poor litigants. None of the reasons the Advisory Committee Note advances in support of this rule is remotely persuasive. Circuits differ widely in size and legal culture, and the current situation—where the matter is left to the informed discretion of the court of appeals issuing the dispositions in question—has caused no demonstrable problems. I urge the Committee to abandon this ill-advised proposal and move on to more pressing matters.

1. **The Proposed Rule Will Undermine Our Mission of Maintaining Uniformity and Clarity in the Law of the Circuit.**

The Ninth Circuit has adopted Ninth Circuit Rule 36-3—which would be preempted by proposed FRAP 32.1—in a sincere and considered effort to maintain the consistency and uniformity of our circuit case law. We are aware of complaints by a small but vociferous group of lawyers and litigants about the rule,

and we have considered and debated their objections on numerous occasions over the years. Nevertheless, the judges of our court have consistently voted to retain the rule, in the firm belief that the rule's benefits far outweigh its disadvantages. We are convinced, moreover, that the great majority of lawyers practicing in the courts of our circuit strongly support our noncitation rule.

The Advisory Committee Note, which provides the only public insight into the Committee's thinking, gives surprisingly short shrift to the carefully considered policy judgment of the very judges whose names appear on the dispositions in question. When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway. The Advisory Committee Note observes that all manner of sources may be cited in court papers, including "opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles," and finds no persuasive reason to prohibit the citation of unpublished dispositions of the courts of appeals. Proposed Fed. R. App. P. 32.1 advisory committee note, at 35 [hereinafter Advisory Committee Note]. Our judges, however, find very persuasive and obvious reasons for drawing that distinction: Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value.

Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges. This is not so much of a problem in the court of appeals, where we are well aware of the distinction between opinions and unpublished dispositions. But it is a serious and ongoing problem in the lower courts of the circuit, where the distinction is much less well understood or respected, and a poorly phrased memorandum disposition can cause endless delay and confusion for the lawyers and the court.

This is no mere speculation. Despite our rule, parties do on occasion cite unpublished dispositions to the district, bankruptcy and magistrate judges of our

circuit, and I have read a number of transcripts in which an unpublished disposition was the subject of discussion. The judge and opposing counsel often spent endless pages of transcript debating what Judges X, Y and Z might have meant when they used a particular phrase in an unpublished disposition—a phrase slightly different from that in a published opinion on the same point. Why did the judges use these particular words rather than other ones? What exactly did they mean by that slight change in wording? The fact of the matter is, Judges X, Y and Z almost certainly meant nothing at all, because they had little or nothing to do with the drafting of the disposition, which in all probability was drafted by a law clerk or central staff attorney. Nevertheless, lower court judges, whose rulings will be appealed to the circuit, are extremely reluctant to ignore fine nuances of wording that they believe reflect the views of three court of appeals judges. Unlike law review articles, opinions of district courts and other nonbinding authorities, unpublished dispositions of the circuit are seldom dismissed as inconsequential, yet they should be.

What the Advisory Committee Note fails to appreciate is that our noncitation rule, like that of many other courts, applies not only to the parties, but also to the courts of our circuit. See 9th Cir. R. 36-3 (“Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit . . .”) (emphasis added). This is quite significant and explains the rationale of the rule. By prohibiting judges of this circuit—district judges, bankruptcy judges, Bankruptcy Appellate Panel judges, magistrate judges—from relying on unpublished dispositions, we are giving important instructions as to how they are to conduct their business. Their responsibility in applying the law is to analyze and apply the published opinions of this court and opinions of the Supreme Court. They are not relieved of this duty just because there is an unpublished circuit disposition where three judges have applied the relevant rule of law to what appears to be a similar factual situation. The tendency of lower court judges, of course, is to follow the guidance of the court of appeals, and the message we communicate through our noncitation rule is that relying on an unpublished disposition, rather than extrapolating from published binding authorities, is not a permissible shortcut. We help ensure that judges faithfully discharge this duty by prohibiting lawyers from putting such authorities before them, and thereby distracting the judges from their responsibility of analyzing and reasoning from our published precedents.

The Advisory Committee Note naively claims that “[a]n opinion cited for its ‘persuasive value’ is cited not because it is binding on the court [but 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.” Advisory Committee Note, supra, at 34. Of course, nothing prevents a party from copying wholesale the thorough research or persuasive reasoning of an unpublished disposition—without citation. But that’s not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that three court of appeals judges endorse that reasoning. The Advisory Committee’s persistent failure to even acknowledge this important point undermines its conclusions.

The same error underlies the Advisory Committee’s spurious attempt to draw a distinction between citability and precedential value. No such distinction is possible. Unlike other authorities, cases are cited almost exclusively for their precedential value. In other words, by citing what a court has done on a previous occasion, a party is saying: This is what that court did in very similar circumstances, and therefore, under the doctrine of stare decisis, this court ought to do the same. (Of course, a party distinguishing an earlier case would do the converse—argue that, because the facts are different here, this court ought to reach a different result than the earlier court.) By saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value—no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case. By requiring that all cases be citable, proposed FRAP 32.1 is of necessity saying that all prior decisions have some precedential effect. If the Committee persists in going forward with its ill-advised rule, one would hope that the Advisory Committee Note will be revised to candidly recognize this inescapable reality.

A few years back, my colleague Judge Stephen Reinhardt and I wrote an article in California Lawyer titled Please Don’t Cite This! I attach a copy at **Tab 1**. In that article we discuss in some detail the practices within our court and explain why it is folly for lawyers and lower court judges to spend time researching, analyzing and debating the fine points of our unpublished dispositions. As we explain, unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys. See Alex Kozinski & Stephen Reinhardt, Please Don’t Cite This!, Cal. Law., June 2000, at 43, 44 [Tab

1]. A good 40 percent of our unpublished dispositions—some 1520—were issued as part of our screening program in 1999. *Id.* That number increased to 1800 in 2002 and to 1998 in 2003. This means that these dispositions were drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case. During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings. *Id.* We are very careful to ensure that the result we reach in every case is right, and I believe we succeed. But there is simply no time or opportunity for the judges to fine-tune the language of the disposition, which is presented as a final draft by staff attorneys.

As the Committee must surely be aware, the precedential effect of an opinion turns on the exposition of the relevant facts (and the omission of irrelevant ones), and the precise phrasing of propositions of law. Yet, given the press of our cases, especially screening cases, we simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent. In other words, we can make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost, but we don't have the time to consider how the language of the disposition might be construed (or misconstrued) when applied to future cases. That process—the process of anticipating how the language of the disposition will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended—takes exponentially more time and must be reserved, given our caseload, to the cases we designate for publication.

The remaining portion of our unpublished dispositions is produced in chambers and so may get somewhat more judicial attention. However, these dispositions suffer from a very different problem. It is an open secret that law clerks prepare bench memos for cases handled in chambers and, after the judges vote on the outcome, clerks frequently convert their bench memos into dispositions by adding a caption and changing the beginning and the ending. Such converted bench memos often contain protracted discussion of the facts—some relevant, some not—and discussion of such noncontroversial matters as the standard of review. To paraphrase Mark Twain, if we had more time, we'd write a shorter memdispo, but all too frequently the judges will (for the reason already explained) not have the time to cut a converted bench memo to its bare essentials, or to check the language for latent ambiguities or misinterpretations.

As a letter to the parties letting them know that the court thought about their case and understands the issues, not much harm is done, even if every proposition of law is not stated with surgical precision. But as a citable precedent, it's a time bomb. The lawyers' art is to analyze precedent and to exploit every ambiguity of language in support of their clients' cases; language that is lifted from a bench memo and pasted wholesale into a disposition can provide a veritable gold mine of ambiguity and misdirection. Yet, with the names of three circuit judges attached, lawyers and lower court judges are often reluctant to assign to it the insignificance it deserves.

Nor is every case suitable for preparation of a precedential opinion. Many cases are badly briefed; many others have poorly developed records. Quite often, there is a severe disparity in the quality of lawyering between the parties. A party may lose simply because its lawyer has not done an adequate job of making a record or developing the best arguments for its position. It is often quite apparent that, with better lawyering, the rationale and perhaps even the result of our disposition might be different—yet we must decide the case on the record and arguments before us. At the same time, however, it's important not to foreclose prematurely a particular line of legal analysis. Issuing a precedent that rejects outright a party's argument may signal the death of a promising legal theory, simply because it was poorly presented in the first case that happens to come along.

There is another important reason why we believe unpublished dispositions are highly misleading as a source of authority. We reach our decisions in three-judge panels, but each panel speaks for the entire court of appeals. In a sense this is something of a fiction because it is impossible for the court as a whole, at least a court of our size, to review and consider all actions by three-judge panels in the thousands of cases we decide every year—over 5000 in 2002. It is difficult enough to do so as to the 700–800 published opinions, yet our judges make an effort to read all slip sheets and consider the various petitions for rehearing in published cases. Indeed, we often provide feedback to each other, and changes are made as a result of such internal deliberations, without actually going en banc. It is thus possible to assert truthfully that our published opinions do represent the view of the full court.

No such claim can possibly be made as to unpublished dispositions. Only in the rarest of instances—fewer than a dozen that I can recall in my time here—did an unpublished disposition become the subject of input from judges outside the panel. Quite simply, unpublished dispositions do not get any meaningful en banc review—and couldn't possibly—and thus cannot fairly be said to represent the view of the whole court. Any nuances in language, any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.

Much of the criticism of the noncitation rule seems to be based on some dark suspicion that appellate judges are creating a body of “secret” law, or that they are using the noncitation rule as a means of ignoring or contravening the law of the circuit, or giving certain parties a special exemption from the law generally applicable to everyone else. My colleagues and I are well aware of these concerns, and we are, frankly, baffled by them. To begin with, there is nothing secret about unpublished dispositions. Though they may not be cited by or to the courts of our circuit, 9th Cir. R. 36-3, they are public records and are widely available through Westlaw, Lexis and other databases. They can be read, examined, discussed, criticized and, on occasion, overturned by the Supreme Court on certiorari. See, e.g., Twentieth Century Fox Film Corp. v. Entm't Distrib., 2002 WL 649087 (9th Cir. Apr. 19, 2002), rev'd by Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041 (2003).

That the Supreme Court sometimes reviews unpublished cases is not, as the Advisory Committee Note suggests, inconsistent with our noncitation rule. Twentieth Century Fox Film Corp. is a perfect case on point. The issue on which the Supreme Court granted certiorari had been previously decided by a published Ninth Circuit opinion that was directly on point. See Cleary v. News Corp., 30 F.3d 1255 (9th Cir. 1994). There was no reason whatever for adding yet another layer of circuit precedent for exactly the same proposition. What Twentieth Century Fox Film Corp. shows, however, is that failing to publish a disposition in no way buries the case; rather, the Supreme Court readily considers whether to review it on cert, and will do so when the unpublished disposition reflects a rule of law about which the Court has doubts.

Moreover, there is no evidence at all that unpublished dispositions are frequently inconsistent with the law of the circuit. We occasionally get complaints about this from lawyers, but never with reference to any particular case. Nevertheless, my colleagues and I were sufficiently concerned about the issue that, several years ago, we undertook a sustained and concerted effort to identify conflicts among unpublished dispositions, or between unpublished dispositions and opinions. I discussed this effort in some detail in my written statement before the House Judiciary Committee on June 27, 2002. I attach a copy of that statement at **Tab 2**, and respectfully request that the members of this Committee read it, as it discusses many of the concerns raised by the Advisory Committee Note to the proposed rule.

The bottom line is that, despite this effort to identify conflicts, despite numerous calls on members of our bar to bring such conflicts to our attention, despite careful scrutiny of anything at all that might look like a submerged conflict among our unpublished cases, nothing whatever has turned up. We are continuing the effort, and are constantly vigilant to the force of this criticism, but we can say with some confidence that if a problem really did exist—if our unpublished dispositions were being used by the judges in the abusive way that critics suggest—it would surely have turned up by now.

In my Judiciary Committee statement, I discuss the process by which we divide cases into those we prepare as citable, precedential opinions, and those we do not. As I explain there, the preparation of an opinion is a difficult and exacting task. It involves not only explicating the result in the case immediately before us, but also taking into account the numerous ways the same legal issue might arise in future cases:

To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must 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 at hand, 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 while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way 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 half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled How To Write It Right by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70–80 drafts of an opinion over a span of several months.)

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. Judges frequently exchange lengthy inter-chambers 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 an unpublished disposition is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Unpublished Judicial Opinions: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 107th Cong. 12–13 (2002) (prepared statement of Hon. Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit) [Tab 2]. We simply do not have the time to engage in this process as to each of the 450 or so cases each judge in our circuit is responsible for every year.

The Advisory Committee Note blithely suggests that judges need not spend extra time on unpublished dispositions, even if they become citable; just draft

them as you do now, it says, and let the lawyers make what they will of them. But that, precisely, is the problem. Restating the same rule of law in slightly different language—language that has no particular significance to the drafters—often raises new and unintended implications. The very fact that different language is used itself raises the inference that something else must have been meant; at least, lawyers are trained and paid to so argue, if it's in their clients' interest.

My colleagues and I thus feel that we could not, in good conscience and consistent with our sworn duty, continue doing what we have been and let things sort themselves out. In my statement before the Judiciary Committee, I described the consequences for our work if unpublished dispositions were to become citable:

If unpublished dispositions 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 while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels—at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% 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 unpublished dispositions to one-word judgment orders, as have

other circuits. None of these is a palatable alternative, yet something would have to give.

Id. at 13 [Tab 2].

The Advisory Committee Note dismisses these concerns by quoting Professor Barnett's glib comment that other circuits have changed their rules as to citability, yet "the sky has not fallen in those circuits." Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. App. Prac. & Process 1, 20 (2002). This is not a serious response. Many of the rule changes have been recent, and most impose some limitations—such as the requirement that there be no published authority directly on point. Moreover, it's much too early to tell the effects of these changes; certainly no comprehensive study has been done. We do know that some circuits have resorted to frequent use of judgment orders, which eliminates the problem, but also gives parties far less information than we do in our unpublished dispositions. I rather doubt that this is a desirable trade-off.

Moreover, circuits differ in size, legal culture and approach to precedent. Our judges, who are well aware of the situation in our circuit, firmly believe that the noncitation rule is an important tool for managing our court's case law and maintaining control over the law of the circuit. Reasonable minds might differ on this, but the Committee should think long and hard—and be convinced that it has very good reasons indeed—before banning a rule that the judges of the court consider to be essential to performing their judicial functions. No such compelling justifications are presented in the Advisory Committee Note.

2. **The Proposed Rule Would Increase the Burden on Lawyers and the Cost to Their Clients, and Impose Severe Disadvantages on Poor and Weak Litigants.**

Taking its cue from the few but vociferous critics of noncitation rules, the Advisory Committee Note seems to assume that these rules are supported only by a few judges, and that lawyers universally oppose them. This is simply not so. Noncitation rules, in fact, enjoy widespread support among members of the bar because many lawyers recognize significant benefits to them and their clients,

though the critics of noncitation rules tend to be very vocal, thus creating the illusion that theirs is the prevailing view.

I say this based on my own experience, having discussed the rule with countless lawyers who appear in the Ninth Circuit and elsewhere, and this is consistent with the experience of most of my colleagues. For example, the Appellate Process Task Force set up by the California Judicial Council, which consists of a distinguished group of judges and practitioners, issued a White Paper in March 2001, concluding that California's noncitation rule ought to be retained. See J. Clark Kelso & Joshua Weinstein, Appellate Process Task Force, A White Paper on Unpublished Opinions of the Court of Appeal (2001) [Tab 3]. Among the chief reasons for its conclusion was the widespread support the rule enjoyed among California judges and lawyers. The Task Force noted the reaction to an earlier suggestion made by Professor Kelso that all court of appeal opinions be citable: "This tentative suggestion triggered a chorus of protests from around the state, from both judges and practitioners, who asserted that 'the nonpublication and noncitation rules are critically important to the court of appeal in preparing and processing its cases and to the practicing bar in litigating appeals.'" Id. at 3 (footnote omitted) (emphases added).

The reasons for the bar's concern are best expressed by Professor Kelso in his later article cited by the Task Force:

[B]oth bench and bar agree the overwhelming majority of unpublished opinions are actually useless for future litigation because they involve no new law and no new, applicable factual situations. Yet if these opinions were published and citable, lawyers would have to search them to confirm that nothing useful was in them, thereby increasing the cost of legal research.

J. Clark Kelso, A Report on the California Appellate System, 45 Hastings L.J. 433, 492 (1994).

Much the same concern is applicable in federal court. The simple fact is that nearly 85 percent of Ninth Circuit cases are decided by unpublished disposition, which means that unpublished cases outnumber published cases by a factor of 7 to 1. See Kozinski & Reinhardt, supra, at 44 [Tab 1]. Once all of these cases

become citable authority, lawyers will be required as a matter of professional responsibility to read them, analyze them and figure out a way they might be helpful to their clients. All of this will take time and money, contributing greatly to the appalling rise in the cost of litigation.

But research alone is only the tip of the iceberg. Because unpublished dispositions constitute a particularly watery form of precedent, allowing their citation will generate a large number of costly and time-consuming disputes about the precise meaning of these authorities. Time and money will be spent trying to derive some advantage from words and phrases that lack the precision of a published opinion. As noted, this will be a fruitless task, because little or no judicial time will have been spent in drafting that language, and thus the perceived nuances of phrasing will mean nothing at all. Yet no lawyer wanting to preserve his reputation—and to avoid being sued for malpractice—will be willing to bypass this source of precedent once it becomes citable.

Nor will the burden fall equally on all litigants. As persuasively discussed in a Yale Law Journal case note analyzing the likely effects of an Anastasoff-like rule, it will be the poor and weak litigants who will be most adversely affected by opening the floodgates to citation of unpublished dispositions:

Although precedent plays a crucial institutional role in the judicial system, the Anastasoff rule, by unleashing a flood of new precedent, will disproportionately disadvantage litigants with the fewest resources. Because even important institutional concerns should give way when they impinge on individuals' rights to fair treatment, courts should not abandon the practice of limiting the precedential effect of unpublished opinions.

....

... Allowing citation of unpublished opinions will have a tremendous ripple effect for both litigants and judges. Because precedent is worthless without reasoning, judges will need to make their logic and reasoning transparent even in unpublished opinions, increasing the amount of time required to dispose of each case. Litigants with the resources to track down these opinions will have a

richer body of precedent from which to draw their arguments, putting them at a systematic advantage over litigants with fewer resources.

....

... While precedent protects important institutional concerns of the justice system, too much of a good thing may pose a danger. The question is not whether precedent is good, but what the optimal amount of precedent is. Abolishing noncitation rules for unpublished opinions would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases.

....

... Noncitation rules for unpublished opinions not only make the judicial system more efficient, they protect the individual right of litigants, particularly the most disadvantaged litigants, to a measure of fairness in the judicial system. The Anastasoff rule would affect litigants at the bottom of the economic spectrum in two ways: First, it would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents.

The literature on unpublished opinions suggests some of the efficiency concerns that motivated the federal courts to limit publication and adopt no-precedent rules for those opinions. The high volume of cases makes the production of fully reasoned opinions enormously costly. In order for federal appellate courts to hear and decide all the cases before them, judges require some mechanism for expeditiously disposing of cases that offer no complicated or new legal question. Unpublished opinions serve this purpose.

These seemingly mundane efficiency concerns raised by defenders of noncitation rules, such as Judges Kozinski and Reinhardt, implicate individual fairness concerns. Giving all cases precedential effect will intensify the caseload pressure on judges and increase delays

in adjudication (a fact Judge Arnold is ready to accept). Clogged dockets will not affect all litigants equally. Poor litigants will be less able to weather the inevitable delays than wealthier litigants. For example, tort plaintiffs unable to pay mounting medical bills will suffer especially badly from busier dockets. This will likely push these poorer litigants into less advantageous settlements in civil cases. In addition, prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets. While all litigants may take some solace in the system-wide utility that a universal principle of precedent might offer, the costs of implementing this system, in terms of justice delayed, will be felt most strongly by those at the bottom of the economic spectrum.

In addition to the problems posed for the poorest litigants by clogged dockets, the Anastasoff rule presents a second problem for these litigants: unequal access to precedent. Limiting the precedential effect of unpublished opinions through noncitation rules ensures that litigants will have equal access to precedent, and thus a fair shot at litigating their cases. Though unpublished opinions are available on commercial databases or through court clerks' offices (and, in four circuits, for free through court websites), finding these precedents, even when they are available for free, requires time, energy, and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants). Judge Arnold worries that litigants may be unable to invoke a previous decision of the court as precedent, even if the case is directly on point, because a previous panel has designated the opinion unpublished and therefore uncitable. A full precedent system would avoid this situation. But even if this proverbial needle in the haystack were available to litigants, only those with the resources to search for it could benefit from it. By putting impecunious litigants at a systematic disadvantage, throwing the vast opus of unpublished opinions into the body of precedent would violate these individuals' right to equal concern and respect.

... The Anastasoff rule ... would not only threaten the efficiency of judicial administration, it would harm the ability of individuals at the

bottom of the economic spectrum to bring their cases. Making all opinions carry full precedential effect will not optimize the amount of precedent. The benefits precedent brings to the judicial system, in terms of predictability, stability, and fairness in adjudication, are distributed among all participants in the system. Likewise, the marginal benefit of the Anastasoff rule would be distributed among all participants in the judicial system. But the costs of the vast increase in precedents are likely to be borne by those litigants on the lowest rungs of the economic ladder. This systematic unfairness to the poorest individuals in the justice system, impinging on their right to present their cases, should prevent courts from mandating that all unpublished opinions carry precedential weight.

Daniel B. Levin, Fairness and Precedent, 110 Yale L.J. 1295, 1295–1302 (2001) (footnotes omitted). I attach a copy of the case note at **Tab 4**.

I respectfully suggest to the Advisory Committee that these fairness concerns are neither exaggerated nor misplaced. They reflect the harsh realities of a costly and overburdened legal system. Lawyers who represent poor and weak litigants overwhelmingly agree. The Committee must not overlook the allocative effects of the rule it proposes to adopt.

3. The Proposed Rule Will Cause Inconsistency Between Federal and State Procedures, Leading to Confusion Among Lawyers Who Practice in Both State and Federal Court.

The proposed rule purports to alleviate confusion among bar members due to differing practices in the various federal circuits. As noted below, this concern is misplaced. It is far more likely that a different confusion problem will be created, particularly in our circuit, because state practice commonly prohibits or limits the citation of unpublished appellate opinions. Given this consistency of practice, neither we nor the state courts have noted widespread violations of these rules. However, if the federal rule were to change, practitioners who appear in both federal and state court would be confronted with inconsistent rules. If one worries about confusion on the part of the practicing bar, this is a far more likely source.

All but one of the states in our circuit (Alaska) now have some sort of noncitation rule. The rule is particularly well accepted in California, where more than half of our lawyers reside. California, moreover, is firmly committed to its noncitation rule, despite occasional suggestions to the contrary. See generally Kelso & Weinstein, Appellate Process Task Force, supra [Tab 3]. And last year, the California legislature refused to adopt a law overruling the noncitation rule in the state courts—largely based on widespread opposition by the bench and bar in the state.

We believe that consistency of practice between the federal and state courts is highly desirable because it saves lawyers the need to look up the precise rules of practice when they move from state court to federal court and back again. Changing the federal rule in this important area will make practice more difficult, and will increase the likelihood of error for the many thousands of lawyers in the Ninth Circuit who practice both in federal and state court. The Ninth Circuit's noncitation rule is consistent with the legal culture in California and the other Western states, and should stay that way. Creating an inconsistency is yet another reason militating against adoption of the proposed rule.

4. The Advisory Committee Note Offers No Persuasive Justification for a National Rule.

Most of the Advisory Committee Note is dedicated to ridiculing or dismissing the arguments supporting noncitation rules, providing virtually no discussion of whether a uniform national rule is advisable or necessary. The Note offers a single sentence: “These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit.” Advisory Committee Note, supra, at 34. The Advisory Committee Note does not reveal what the hardship is, but there is an explanation of sorts four pages later—a sentence followed by two citations:

Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an “unpublished” opinion. See Hart [v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001)] (attorney ordered to show cause why he should not be

disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions].").

Id. at 38.

That's it! The whole justification for a national rule—for seriously interfering with the authority and autonomy of the federal courts of appeals on a matter that they consider vital to their mission—is that lawyers have to suffer “hardship” because they have difficulty “pick[ing]” their way “through the conflicting no-citation rules.”

With all due respect to the Committee, this is just not a serious argument. First, and most important, lawyers do not have to pick their way through anything. Every single unpublished disposition that appears online has a reference to the local rule limiting its citability. The Westlaw version refers to the applicable circuit rule by number, while the Lexis version merely makes reference to the circuit rules in general. See Case Appendix [Tab 5]. Both Westlaw and Lexis have up-to-date versions of the rules online. Unpublished dispositions from the Ninth and Tenth Circuits actually include a footnote with the substance of the rule. See, e.g., United States v. Housel, 2003 WL 22854676, at n.* (10th Cir. Dec. 2, 2003); United States v. Baker, 2003 WL 22852157, at n.** (9th Cir. Dec. 1, 2003) [Tab 5]. The argument that lawyers have difficulty figuring out the applicable rule doesn't pass the straight-face test.

Second, it is wrong to say that noncitation rules are “conflicting.” The Committee Note points to no conflict at all, nor can it. Our Ninth Circuit rule deals only with citation of our memoranda dispositions to the courts of our circuit. It does not prohibit their citation to the courts of other circuits, nor does it prohibit the citation of unpublished dispositions of other courts. The rules of other courts vary somewhat, but there is no conflict between them in the sense that a lawyer would have to violate the rule of one circuit in order to comply with the rule of another. The differences in citation rules simply mean that lawyers will have to read the local rules in whatever circuit they happen to be appearing, but this is true

of all local rules, not merely those pertaining to citation. If that rationale were sufficient to preempt local rules, we would have no local rules at all.

The Advisory Committee Note makes reference to ABA Ethical Opinion 94-386R, apparently to support the proposition that lawyers are confused by conflicting rules. The advisory opinion happens to be referring to a situation where “the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, ‘not for publication.’” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (Rev. 1995), reprinted in [1990–2000 Ethics Opinions] Laws. Manual on Prof. Conduct (ABA/BNA) 1001:233, at :234 (Nov. 15, 1995). That one court chooses to respect another court's noncitation policy hardly seems like a conflict between the rules; rather, it's more akin to the rule of renvoi in choice-of-law. The Advisory Committee Note fails to explain why or how such a rule causes confusion.

ABA Opinion 94-386R does explain that “there is no violation if a lawyer cites an unpublished opinion . . . in a jurisdiction that does not have such a rule, even if the opinion itself has been stamped by the issuing court ‘Not For Publication,’ so long as the lawyer informs the court . . . that that limitation has been placed on the opinion by the issuing court.” Id. In short, if lawyers simply follow the local citation rules of the court where they are appearing, they will have no difficulty staying out of trouble. The Advisory Committee Note's reliance on this ABA opinion is either a mistake or a makeweight.

Third, I find it remarkable that the Advisory Committee Note cites not a single opinion or order in which a lawyer has been sanctioned because he was somehow confused and couldn't pick his way through conflicting local rules on this subject. I have been a judge of the Ninth Circuit—which has one of the strictest rules—for over eighteen years, and I remember no such instance, nor can a number of my most senior colleagues whom I have asked. In fact, in my time here, the number of infractions of the rule have been so few that I could probably count them on the fingers of one hand. Why? Because the rule is crystal clear, and no one—absolutely no one—has any difficulty understanding or applying it.

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001), which the Advisory Committee Note does cite, involved a long-time Ninth Circuit practitioner admitted to the California bar, who was intimately familiar with the rule but was

emboldened by the heady aroma of Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated as moot on reh'g en banc by 235 F.3d 1054 (8th Cir. 2000), to try his luck with that argument in our court. Now that we have rejected Anastasoff, the rule is clear once again, and we have had no further infractions.

At page 38, the Committee Note also drops a veiled hint that noncitation rules might violate the First Amendment. Not surprisingly, the Note provides no authority for this proposition, and doesn't actually come out and claim that there is such a violation—perhaps out of fear of looking foolish.

Briefs and other court papers are not public fora; we apply all manner of restrictions to what lawyers may argue in their briefs—restrictions that could never be applied to other types of speech. We do this because we can and must limit advocacy in order to ensure the fair administration of justice—allowing each side to have its say without undue expense, delay or distraction. The rule prohibiting the citation of a particular kind of authority that the judges of the courts of appeals themselves create, and that they believe would be misleading if used in briefs, cannot conceivably be viewed as a First Amendment violation. Given that numerous states and federal circuits have had citation bans for many years, it is inconceivable that the issue would not have been litigated and resolved by now—if there were really a colorable First Amendment claim to be made.

The Advisory Committee Note also makes some reference to the fact that noncitation rules put lawyers in “a regrettable position,” Advisory Committee Note, supra, at 38, because they can't provide information that might help their clients, but the same argument could be made against page limitations or against the rule prohibiting the citation of overruled authority. The rules of advocacy put limits on the kinds of arguments that both sides may make and, so long as the rules are symmetrically applied, no lawyer or client can claim to be disadvantaged. For every instance where one lawyer is put in the “regrettable position” of not being able to cite an unpublished disposition, another lawyer is being spared having to defend against it. Whether a rule is a good or bad idea cannot be decided by reference to whether some lawyers in some instances will not like it; if that were the test, we'd have no rules or procedures at all.

Equally flimsy is the Advisory Committee Note's suggestion that noncitation rules encourage “game-playing,” id., which the proposed rule will

somehow avoid. I can assure the Committee that there is no game-playing going on now; no one “hints” about what might be in an unpublished disposition. Parties can, of course, lift the rationale of an unpublished disposition, if they choose, and pass it off as their own, but that’s perfectly OK. Adopt FRAP 32.1 and you’ll then see some serious game-playing. Because unpublished dispositions tend to be thin on the facts, and written in loose, sloppy language—and because there’s about a zillion of them out there—they will create a veritable amusement park for lawyers fond of playing games.

Once again, the Advisory Committee Note betrays a serious lack of understanding of how litigation works. Indeed, what I find most remarkable about the Note is how often it uses phrases such as “it is difficult to understand,” “it is difficult to justify” or “it is difficult to believe.” The Note makes no serious effort to justify—or even understand—the noncitation rules it criticizes. Rather, it appears to be a poorly drafted apologia for a conclusion reached on some other basis. I urge the Committee to reconsider its position in light of the serious arguments raised in support of circuit noncitation rules.

Conclusion

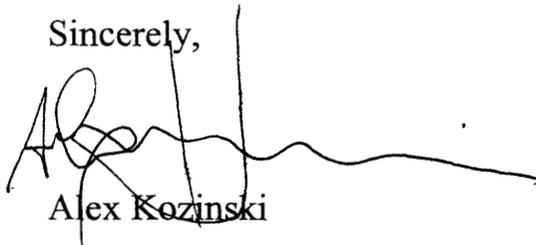
The Appellate Rules Advisory Committee should propose a uniform rule only where lack of uniformity has created genuine hardships among practitioners, or where the proposed rule reflects the widespread consensus of the bench and bar. Proposed FRAP 32.1 meets neither of these criteria. There is no need for it—at least none has been offered by the Committee—and it certainly does not reflect a national consensus. The judges of our court, and of other courts of appeals, believe that the noncitation rule is an important tool in the fair administration of justice within their jurisdictions, and its removal will have serious adverse consequences for the court and the parties appearing before it. Many members of our bar—a substantial majority, we believe—agree. The proposed rule will make litigation more costly, will cause far greater delays, will make life more difficult for lawyers and will further choke off access to justice to the poorest and most disadvantaged of our litigants. The rule may, in fact, have perverse effects, as courts of appeals judges, wary of having their words misused, will tell the parties less and less in cases where they do not publish a precedential opinion.

The Advisory Committee should simply withdraw the proposed rule and move on to other issues. If, however, the Committee believes a uniform federal rule is needed, I can suggest three. First, it may adopt a rule like Ninth Circuit Rule 36-3 as the national rule. That will certainly ensure consistency among the federal circuits, and also with state practice, where the substantial majority of states have some sort of citation ban. Second, the Committee might consider alleviating confusion among lawyers who practice in different circuits—if it really believes there is such a problem—by adopting a rule clarifying that the prohibitions on citation apply only to the courts of the circuit issuing the unpublished disposition, and nowhere else. Third, the Committee might require all circuits to place the precise limits on citability of unpublished dispositions on the front page of such dispositions, as is already the case in the Ninth and Tenth Circuits.

But under no circumstances should the Advisory Committee advance the rule it has proposed. It is a terrible idea and should not be adopted as part of the Federal Rules of Appellate Procedure over the strenuous objection of the bench and bar in those courts where noncitation rules are widely accepted.

I apologize for the length of these comments. They reflect, I hope, my depth of feeling on this subject. I trust the Committee will give them serious consideration.

Sincerely,



Alex Kozinski

AK:kd

cc: Honorable David F. Levi
Peter McCabe

Attachments