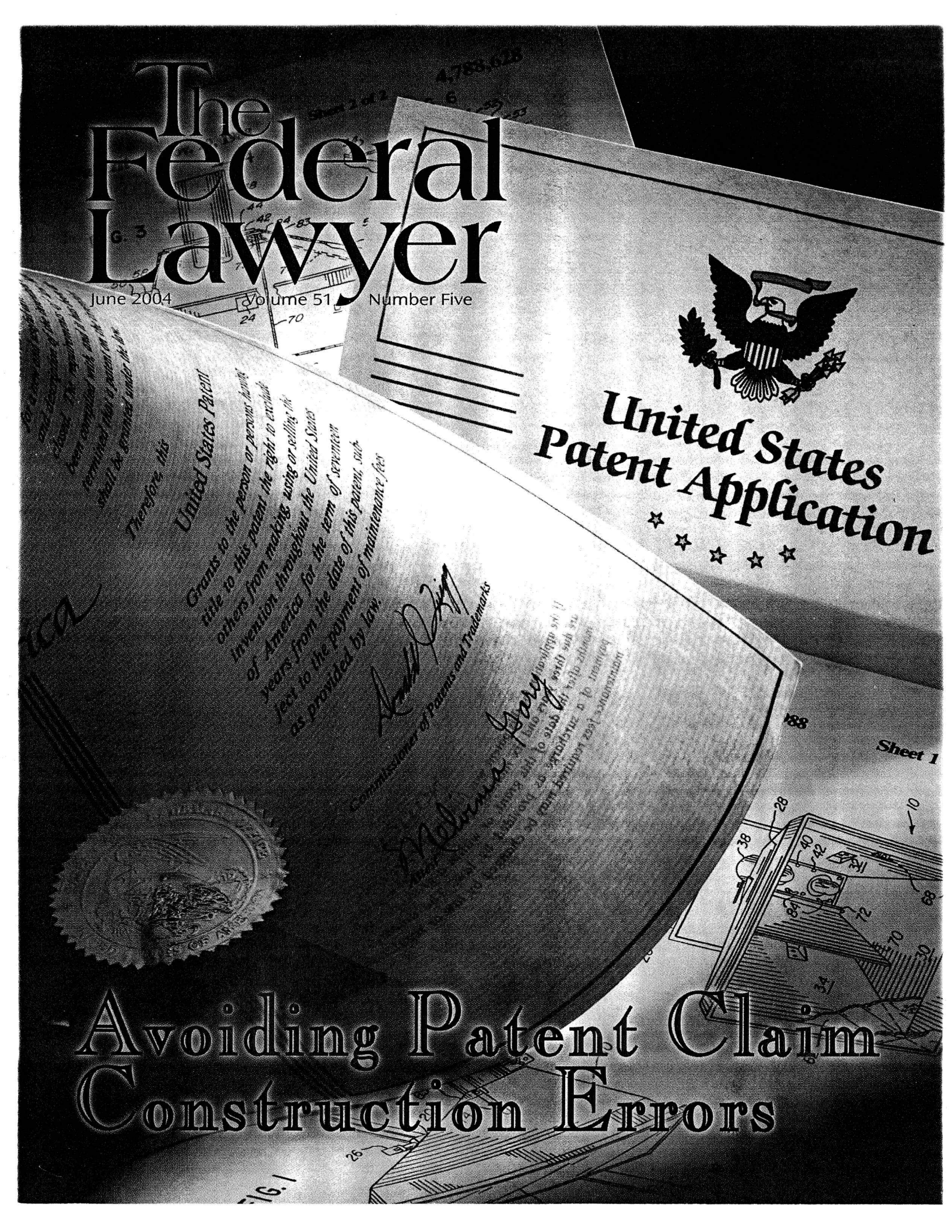
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Avoiding Patent Claim Construction Errors

In Opposition To

Proposed Federal Rule of Appellate Procedure 32.1

By Hon. Alex Kozinski

EDITOR'S NOTE: ON APRIL 14, 2004, THE U.S. JUDICIAL CONFERENCE ADVISORY COMMITTEE ON APPELLATE RULES VOTED IN FAVOR OF PROPOSED FEDERAL RULE OF APPELLATE PROCEDURE 32.1, WHICH WOULD LIFT PROHIBITIONS OR RESTRICTIONS ON THE CITATION OF UNPUBLISHED OPINIONS. THE PROPOSED RULE HAS PROVOKED SUBSTANTIAL COMMENTARY FROM FEDERAL JUDGES AND LAWYERS ACROSS THE COUNTRY. THIS LETTER WAS WRITTEN EARLIER THIS YEAR TO THE COMMITTEE OPPOSING PROPOSED RULE 32.1.

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 on Appellate Rules 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.

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 pre-empted 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. 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. 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." 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; 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, the 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.

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. A good 40 percent of the Ninth Circuit's unpublished dispositions — some 1,520 — were issued as part of our screening program in 1999. That number increased to 1,800 in 2002 and to 1,998 in 2003. This means that these dispositions were drafted by the court's central staff and presented to a panel of three judges in camera, with an average of five or 10 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. 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 (memorandum dispositions), but all too frequently the judges will 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 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 5,000 in 2002. It is difficult enough to do so for 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 instances — fewer than 12 that I can recall during 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 published opinions — 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.

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.

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.
>
> 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 Proper-

ty 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). 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.

The advisory committee note repeats 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.

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). 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 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.'" (Footnote omitted, emphases added.)

The reasons for the bar's concern are best expressed by 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 memdispos outnumber published cases by a factor of 7 to 1. *See* Kozinski & Reinhardt, *supra*, at 44. 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 or her reputation — and to avoid malprac-

tice suits — 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.

Daniel B. Levin, *Fairness and Precedent*, 110 Yale L.J. 1295 (2001). (Footnotes omitted.)

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*. 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.

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." 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].").

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. 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). 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 unpub-

lished 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 pre-empt 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] Lawyers 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." 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 or she was somehow confused and couldn't pick his or her 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 18 years, and I remember no such instance, nor can a number of my most senior colleagues whom I have asked. In fact, during 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 longtime 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.

The advisory committee note also makes some reference to the fact that noncitation rules put lawyers in "a regrettable position," 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," 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.

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. **TFL**

Hon. Alex Kozinski is a judge on the U.S. Court of Appeals for the Ninth Circuit.