UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

03-AP-
026

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

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

Dear Mr. McCabe,

As an active judge of the Ninth Circuit Court of Appeals when it adopted its local rule that precludes the use of "unpublished" decisions as authority in briefs and opinions, I reluctantly agreed to the rule as one of necessity. Triage, as the result of the post 1970 increase in federal appeals, was bringing the quality of written decisions down to an embarrassing level. Staff written memoranda were being hastily recycled into dispositions and filed. These ill considered and poorly written efforts soon turned up in appellate briefs as lawyers fed them back to the court as precedent. Most, if not all of our judges, came to believe that it was necessary to reduce the flow of substandard decisions, written only to correct legal error, and never intended to contribute to the growth of the law.

In a perfect world, every case would be decided by a carefully crafted published opinion. That perfect world, if it ever existed, has been overwhelmed by events. The most significant such event, more or less predictably, turned out to be the routine appeal, not only of every criminal conviction, but the compound appeal of the conviction and the sentence, and all collateral attacks, at taxpayers' expense. The metastasis of appeals having little or no factual differentiation, little or no legal merit, and requiring little or no legal research, resulted in a cottage industry in the federal courts. The cost and volume can be verified by simply

referring to the annual growth of the Administrative Office budget for the payment of attorney fees. The cost in the quality of legal writing is equally obvious to any sapient reader of the "unpublished" decisions.

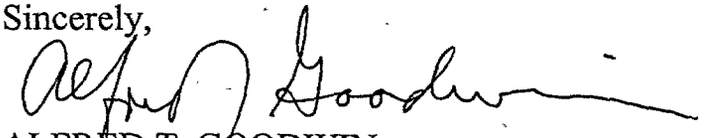
It is safe to predict that if "unpublished" memoranda are given precedential status, they will proliferate in briefs. Overworked and understaffed courts will respond to the resulting mischief by affirming more cases without an opinion (AWOP). The trend is already established in some circuits, (see Table S-3. U.S. Courts of Appeals–Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission...)

If lawyers and judges have to choose between the evils of AWOP and the evils of "unpublished" memoranda, many would choose the AWOP. Other than the loss to the public of accountability, AWOPs produce little harm. On the other hand, "not for citation" cases which can be found by electronic research, will be found, and will be cited. They already create a major dilemma for the conscientious lawyer.

A careful lawyer will spend billable hours searching out and analyzing every decision remotely relevant to a point the lawyer is briefing. Much of this time, and expense to clients, will have been wasted, when upon complete analysis, the "unpublished" citation turns out to be as empty of precedential value as the panel thought it was when it consigned the decision to the "unpublished" bin. But if the profession opens these memoranda to citation in briefs, they will be cited. Opposing parties will repeat the process, adding to the din of the uninformed. Downstream, judges and their staffs will repeat the same futile rooting about in the flotsam and jetsam of "unpublished" material hoping, most often in vain, to find a usable truffle to go into a string citation. The law's delay will enhance its odious affinity with death and taxes, and no client will benefit.

Please don't let this "reform" happen.

Sincerely,



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