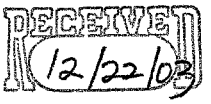
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
125 SOUTH GRAND AVENUE
P.O. BOX 91510
PASADENA, CALIFORNIA 91109-1510



CHAMBERS OF
FERDINAND F. FERNANDEZ
UNITED STATES CIRCUIT JUDGE

December 4, 2003

626/583-7121
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03-AP-061

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

Re: Proposed FRAP 32.1

Dear Mr. McCabe,

I am writing because I believe that proposed Federal Rule of Civil Procedure 32.1 regarding unpublished dispositions is a thoroughly bad idea and that it will punch a hole in one of the few dikes judges have to protect themselves from innundation by the ever rising tide of litigation that besets the court system. Moreover, it will, no doubt, increase the costs to litigants and the delays which already afflict our system.

There are many problems with the proposed rule. For example:

(1) Judges will have to spend a good deal more time going over the content and precise wording of proposed unpublished dispositions because others will do so for sure. Any judge who has labored over a published decision knows how easy it is for language to come back and haunt the court system at a later time. Unpublished dispositions have, at least, allowed for less writing precision and, therefore, greater speed in production. The Committee suggests that because district court opinions, law review articles, and the like can be cited, it is difficult to justify the refusal to consider unpublished dispositions. In fact, most of the other materials have had a great deal of effort directed to their production,

phrasing, polishing, etc.; they have taken a great deal of time and effort to produce. That is precisely what unpublished dispositions should not require. At any rate, unpublished decisions from a judge's own circuit will tend to gather more force, just as district court decisions, which are not precedential, are often treated with more respect than other materials.

(2) Moreover, judges will need to keep up with unpublished dispositions in their own circuits at least because, again, the dispositions will almost inevitably assume a law-establishing status. Even if they do not, their very citeability will require judges to be generally familiar with that body of material.

(3) Unpublished dispositions are, essentially, designed to dispose of a single case and to speak to the parties, who are well-steeped in the nuances of the case. Thus, again, their use in other cases can lead to unintended effects. It is one thing to write a decision for the purpose of speaking only to the individuals then before the court; it is quite another thing to write a decision intended to speak to other individuals also.

(4) Lawyers will have to seek out, read, consider the effect of, and cite unpublished decisions or risk claims of malpractice and ineffective assistance of counsel. That must, of necessity, increase transaction costs, which will, ultimately, be borne by lawyers' clients or by the government.

(5) Judges, also, will then have to read the cited unpublished cases or risk improper performance of duty.

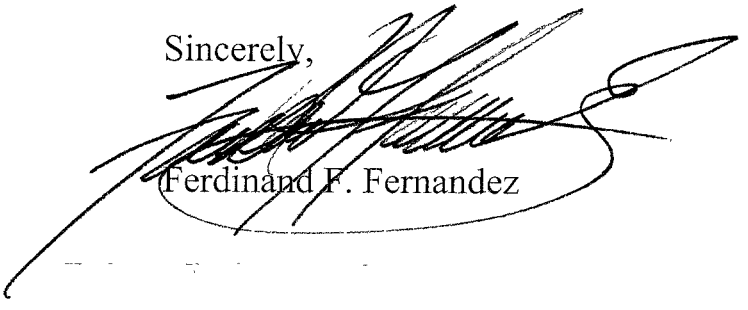
(6) Also, there is no provision for limiting the backward reach of the proposed rule. Thus, thousands of unpublished dispositions which were not written, or joined in, with an eye toward citeability will now become citeable.

(7) Finally, I doubt that attorneys who practice in more than one circuit are unduly put upon by the difference in citeability rules. It's pretty easy to check; surely easier than reading a myriad of unpublished dispositions.

In sum, requiring courts to consider unpublished decisions will increase the social costs of our system at many points: at the time of decision preparation; at the "keeping up with the law" phase of the legal enterprise; at the stage of giving

advice to clients; at the briefing stage; at the brief review and analysis stage; and, in a final closing of the loop, at the stage when a new decision is to be written. I hope this misguided attempt to force courts to allow the citation of unpublished decisions will be stopped before it goes any further.

Sincerely,



Ferdinand F. Fernandez