UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CHAMBERS OF
CARLOS TIBURCIO BEA
U.S. CIRCUIT JUDGE

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January 12, 2004

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

Dear Mr. McCabe:

I write to voice my opposition to the proposed rule change to allow citation of unpublished opinions, FRAP 32.1.

This is not the first time a change of this sort has cast shadows on the effective functioning of courts on which I have served. A few years ago, while I was on the California Superior Court bench, the California legislature considered AB 1165 to change California Rule of Court 977, thereby to allow the citation of State court unpublished decisions. The proposed change brought forth near-unanimous opposition, and the Bill died in Committee.

The basis of the overwhelming opposition to the proposal was that:

(1) the unpublished decisions of the Courts of Appeal in California were crafted with a view to their remaining unpublished because the issues presented were already well decided and further writing on the subject would do nothing but perhaps confuse the already well-established rule, as lawyers would frantically attempt to distinguish the former cases with the latter case.

(2) in view that they would not be published, cited and followed, such unpublished decisions were drafted simply to decide the issues of the particular

case, and not to give guidance for future cases. The writers of the unpublished decisions did not engage in the time consuming work of distinguished other cases or in expressing principles upon which other cases could be decided.

(3) judges had quite enough cases to read and research as it is; a fresh supply of opinions drafted expeditiously, but not intended to stand as precedent, would make matters worse. If anything, matters have already become worse without the addition of unpublished decisions.

All the considerations that applied to the California state controversy apply-in spades!-to federal appellate courts.

There are some who argue that since the proposed rule does not require unpublished cases to be accorded precedential value, there is no more danger in citing to them than there is in citing to Law Reviews or, an increasing favorite, Internet sites. With respect, I disagree with this analysis. A Law Review or an Internet site may deal with a general question and provide some background that may be useful, but seldom, if ever is accepted as a basis for deciding a case.

On the other hand, a written opinion in a case has a much greater impact because it promises to present issues that have already been thought about-if not thought through-and a resolution. By its very nature, it is likely to be taken more seriously, if for nothing else than to be distinguished.

Further, it is naive to think that district judges will totally ignore a memorandum disposition ("mem-disp") signed by three circuit judges, even if those circuit judges spent very little time on the writing of the opinion because it was decided in a screening panel setting.

For all these reasons, I would like to add my name to those who oppose the proposed Rule 32.1. Thanking you for your consideration of my views, I remain,

Very truly yours,

Carlos Bea

Carlos Tiburcio Bea
United States Circuit Judge