United States Court of Appeals
For the Ninth Circuit

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Circuit Judge
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January 15, 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:

The debate regarding published or unpublished dispositions concerns anyone who is interested in the orderly functioning of the system. To better understand lawyers call for citation of both published and unpublished decisions, Judges must try to look at the issue through the eyes of lawyers.

I assume that lawyers want to cite to all decisions of the Court because

(1) they think that they might find some "gem" to assist their client,

(2) they fear that the Court might not always follow precedent in the unpublished dispositions,

(3) they know that their clients pay a substantial sum to get a court resolution of a dispute and they want a citable disposition to justify the expense,

(4) they fear that less than full scrutiny might be given to issues that are resolved by unpublished dispositions.

There may be other concerns, and each is valid to the proponents of full ability to cite.

It was the massive numbers of matters brought to a court's attention that led to the

practice of unpublished dispositions. Judges appreciate that the law evolves because lawyers consider no issue finally resolved. There should be no action to limit that process, but if all matters required full decisions, the delay would be totally unacceptable or the cost of adding judges and facilities to more promptly resolve matters would be more than the citizenry can bear. Courts therefore, wisely I think, created a process to handle the massive number of case filings by saying in some dispositions little more than we considered that issue before, and our answer today is the same as in our prior decisions.

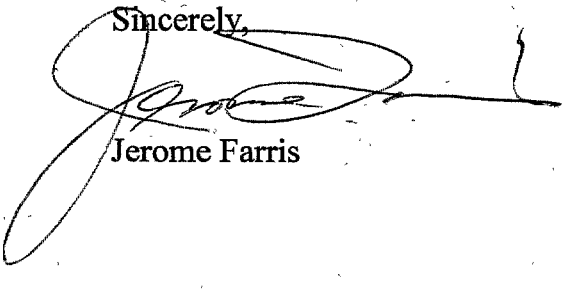
The Ninth Circuit now permits lawyers to mention unpublished dispositions that conflict with other published or unpublished dispositions, in petitions for rehearing and requests for publication. As we expected, there were very few cases cited. Perhaps other circuits should adopt such a practice.

If a rule requiring the ability to cite both published and unpublished dispositions is put in place, the cost of litigation will surely increase along with the delay. Courts will have to respond to this, and the response might be to replace reasoned dispositions (as we now have) with citations to a rule or code. That seems to me less desirable than the current practice. The delay caused by an effort to make all dispositions thorough enough to be adequate for publication would be harmful. Lawyers should take a hard look at what we do now and consider the full effect of a proposed modification before urging a change.

In my experience, non-published dispositions are written for the parties to the litigation and not to enhance the body of law on the issues presented. The losing party should know with certainty that all issues relied upon were considered and resolved. The non-published disposition does that.

I join those who favor a continuation of the practice of not citing unpublished dispositions. I am certainly willing to discuss the matter in more detail if that might be of value.

Sincerely,



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