United States Court of Appeals
UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

03-AP-290

Chambers of
ARTHUR L. ALARCÓN
United States Circuit Judge

(213) 894-2693

February 6, 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

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

Dear Mr. McCabe:

I write in opposition to proposed Rule 32.1. My opposition is based on my experience as a member of the United States Court of Appeals for the Ninth Circuit for more than twenty-four years.

Because of the dramatic increase in our caseload, we have adopted various procedures to identify cases that do not require publication because they rely on the law of our circuit, or present a factual scenario that is analogous to a published decision of this court or the Supreme Court. Our criteria for publication is set forth in Ninth Circuit Rule 36-2. It reads as follows:

> A written, reasoned disposition shall be designated as an OPINION only if it:
> (a) Established, alters, modifies or clarifies a rule of law, or
> (b) Calls attention to a rule of law which appears to have been generally overlooked, or
> (c) Criticizes existing law, or
> (d) Involves a legal or factual issue of unique interest or substantial public importance, or
> (e) Is a disposition of a case in which there is a published

> opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
> (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
> (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

If an appeal does not meet this criteria, we will issue an unpublished disposition which is not binding precedent pursuant to Ninth Circuit Rule 36-3, unless it is relevant under the doctrine of the law of the case, res judicata, or collateral estoppel. Before we issue an unpublished disposition, we review counsel's written and/or oral arguments, and conduct an independent research of the applicable jurisprudence. If we decide, the appeal does not require publication because it does not meet the standards set forth in Rule 32-2, we prepare a brief, reasoned disposition informing the parties of the bases for our disposition. We do not summarize the facts in detail, the standards of review, or discuss in length the circuit authority that dictates the result we reach, since we are writing solely to apprise the litigants of our disposition of the appeal.

Accordingly, our unpublished dispositions do not decide novel legal questions, nor do they contain a full recitation of evidence presented below so that they can be relied upon as being analogous to facts presented in a subsequent appeal. For these reasons, our unpublished decisions have no precedential value. Proposed Rule 32.1 would change our present procedures drastically. Permitting the citation of unpublished dispositions would compel us either to spend needless time in drafting unpublished dispositions to explain the underlying facts to lawyers, who do not represent a party to the appeal, and set forth and explain in detail legal propositions that are not in dispute. This proposed rule would place an intolerable burden on our present complement of judges.

Our circuit up to now has resisted adopting a rule permitting the entry of a judgment of affirmance without opinion. See Federal Circuit Rule 36 ("The court may enter a judgment of affirmance without opinion . . . .); see also Eleventh Circuit Rule 36-1 (permitting an affirmance without opinion under certain circumstances).

We have not adopted comparable rules because we believe the parties are entitled to a brief explanation of our reasoning based on existing circuit law decided on comparable facts. To require us to write dispositions that will permit non-parties to cite our unpublished dispositions will force us to reconsider our opposition to affirmances without opinions.

I urge the Committee to vote against proposed FRAP 32.1 and let each Circuit determine how to meet its responsibilities in dealing with an ever increasing appellate case load.

Sincerely,

Arthur L. Alarcón

Arthur L. Alarcón