

Chambers of
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United States Court of Appeals
for the Ninth Circuit
United States Courthouse
940 Front Street
San Diego, California 92101-8919

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February 11, 2004

03-AP-403

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

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

Dear Peter:

I write to oppose the adoption of proposed F.R.A.P. 32.1.

After careful consideration by our Ninth Circuit Rules Committee, input from the Bar, and extensive discussion by our court, our circuit adopted Circuit Rule 36-3, a copy of which is enclosed.

This Rule precludes the citation of unpublished dispositions and orders except (i) when relevant under law of the case, res judicata, or collateral estoppel; (ii) "for factual purposes such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case;" or (iii) in a request for publication, or a petition for rehearing to bring to the court's attention "a conflict among opinions, dispositions, or orders."

For the reasons so ably put forward by a number of my colleagues, I oppose adoption of a rule of unlimited citability. Instead, I commend to the Committee for their consideration a rule akin to our circuit's rule of limited citability, which I believe strikes a reasonable compromise. Our Rule 36-3 has worked well for us.

Sincerely,

David R. Thompson

DRT:jc

cc: Judges of the Court of Appeals for the Ninth Circuit
Enclosure

CIRCUIT RULE 36-3

CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

- (a) **Not Precedent** : Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.
- (b) **Citation** : Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.
- (I) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
 - (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
 - (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.
- (c) **Attach Copy** : A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix. (*New Rule 7/1/2000*)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 36-3

Please note that Circuit Rule 36-3 has been adopted for another limited 30-month period, beginning January 1, 2003 and ending July 1, 2005. (Rev. 01-01-2003)