United States Court of Appeals
for the Ninth Circuit
U.S. FEDERAL COURTHOUSE
550 WEST FORT STREET, ROOM 667
BOISE, IDAHO 83724-0040

03-AP-129

Chambers of
STEPHEN S. TROTT
United States Circuit Judge

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January 8, 2004

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

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

Dear Mr. McCabe:

With all respect to those supporting proposed Rule 32.1, rarely have I seen a proposal "to improve justice" more misguided and as devoid of merit as the proposal to allow the citation of unpublished opinions in the material submitted to us by lawyers in support of their claims. Based on my twenty-three years as a litigator and now fifteen years as a federal judge, this counterproductive proposal will not only not accomplish any positive result, it will measurably set us back in the discharge of our duties expeditiously to settle disputes according to the rule of law.

In the first place, our uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do not make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable. Practitioners simply do not need memorandum dispositions to make their legal points: published opinions will do.

Second, no two cases are so factually and procedurally alike such that equal protection and due process will be denied if we do not add other "similar" unpublished cases to the scale.

Third, a huge percentage of our unpublished dispositions are decided based upon a deferential standard of review. We do not decide whether an appealed act was legally perfect or not, just whether it was (1) an abuse of discretion, (2) clearly erroneous, (3) arbitrary and capricious, (4) supported by substantial evidence viewed in the light most favorable to the winner, etc. Because the latitude given trial courts and administrative agencies and juries is appropriately broad, and because our review in most cases is deferential, such dispositions are essentially worthless as precedent or as persuasive in other cases. Our specific task is not to say whether what was done was perfect and without flaw, but whether it was "off the wall." Contradictory district court decisions on an issue often fall into the no abuse of discretion either way category. This is the way appellate courts work, most often with a deferential standard of review. When the issue is one of law and we do review de novo, we use established principles found in published cases; and if we refine the law or make or acknowledge new law, we do not decide the case in a memorandum disposition: we publish an opinion.

In other words, to us, memorandum dispositions as precedent or persuasive are useless and worthless in the process of deciding new cases. We do not need them, and their citation will only add to the huge caseload we have and bog us down even more in extraneous clutter as we read and consider stuff of no value, and I repeat, no value. I have never seen a memorandum disposition that I needed in order to decide other "like cases." They just don't exist. Moreover, as lawyers engage in what amounts to a snipe hunt as they chase down memorandum dispositions to include in their briefs, it is the client who will suffer, paying for wasted billable hours. This proposal is a classic case of a "cure" in search of a phantom disease.

Thanks for considering my views.

Sincerely,

Stephen S. Trott
Circuit Judge