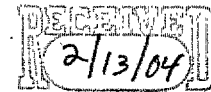




UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

401 WEST A STREET, SUITE 2000
SAN DIEGO, CALIFORNIA 92101-7908



Via Email

03-AP-350

CHAMBERS OF
M. MARGARET MCKEOWN
U.S. CIRCUIT JUDGE

TEL: 619.557.5300
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February 12, 2004

Mr. 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 FRAP 32.1

Dear Mr. McCabe:

I write to suggest that the issue of whether unpublished dispositions can be cited requires more than a "one rule fits all" solution and that the question of citation should be left to the individual circuit courts of appeal.

The Ninth Circuit's approach to unpublished dispositions serves to illustrate my point. In July 2000, the Ninth Circuit amended Circuit Rule 36-3 for a limited 30-month period. The amended rule, which added a third basis for citation, provides for citation of unpublished dispositions in the following circumstances:

- (i) "when relevant under the doctrine of 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."
- (iii) "in a request to publish a disposition or order" 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."

In December 2002, the court extended the rule for another 30-month period. Although we sought public comment in connection with the extension, interest was limited. The comments filed favored continuation of the Ninth Circuit's approach. Only one letter advocated wholesale citation. In short, there was no groundswell among lawyers or judges to expand the rule or to permit unfettered citation.

This result was no surprise to me. Like many of my colleagues, I am a frequent participant in panels and discussions with members of the bar throughout the circuit. These meetings provide an opportunity to learn from the lawyers and solicit their suggestions on matters related to practice within the circuit. I can fairly state that the lawyers have disparate views on the citation of unpublished dispositions.

Indeed, our circuit's experience with the tailored rule confirms that it works well and that there has been little occasion for lawyers to bring unpublished decisions to the court's attention with respect to claimed conflicts. In requests for publication, counsel typically argue that publication is appropriate because the disposition establishes or clarifies Ninth Circuit law on a specific issue. These requests are rarely granted because, in keeping with our rule concerning the format and content of unpublished dispositions, the dispositions do not in fact establish or clarify circuit law. Publication is of no value.

With 12,000 cases filed last year and growing, the Ninth Circuit has found a comfortable middle ground in the citation controversy. The court's effort to adopt an expanded citation rule on an experimental basis was a sound approach in terms of judicial administration. After almost three years, data from our "case laboratory" now tells us that, from all measures, the amended rule works well for the court, lawyers, and litigants. A rigid national rule would undermine our ability to respond to our circuit's unique and evolving needs.

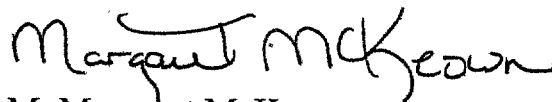
The Committee's prediction that restrictive citation "may spawn satellite litigation over whether a party's citation of a particular 'unpublished opinion' was appropriate," Committee Note at 34-35, is pure speculation. Ninth Circuit Rule 36-3 has spawned no such litigation and is unlikely to do so.

One final thought. The suggestion that citation will "mak[e] the entire process more transparent," Committee Note at 35, is puzzling at best. The decisions are a matter of record. Unpublished dispositions are publicly available at courthouses, on databases, in the Federal Appendix, and on various Internet sites.

Citation does nothing to enhance transparency. Additionally, as several of my colleagues have pointed out, the regrettable consequence of a rule like proposed FRAP 32.1 would be an upsurge of one-word dispositions in cases that do nothing to establish or clarify circuit law. An increase in summary dispositions would do little to make the judicial process more transparent.

In sum, I favor letting each circuit adopt its own citation rule. Thank you for considering my comments.

Regards,

A handwritten signature in black ink that reads "Margaret McKeown". The signature is written in a cursive, slightly slanted style.

M. Margaret McKeown
United States Circuit Judge

MMM/wlb

cc: Judges of the United States Court of Appeals for the Ninth Circuit