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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: Proposal to Alter Rules for Nonpublication of Certain U.S. Court of Appeals Decisions

Dear Mr. McCabe:

I am writing to endorse the views expressed by the Honorable Jerome Farris in his letter to you of January 15, 2004 (copy enclosed), on the above-referenced subject. I am currently in practice as a partner at the law firm of Palmer & Dodge LLP in Boston, Massachusetts. Although I am not a litigator, I am and remain interested in the effective and economical administration of our federal court system.

During my time as a law clerk to Judge Farris in the early 1990s, I observed first-hand the extraordinary caseload imposed on the judges and staff of the Ninth Circuit, and I came to understand the importance to that court of being able to efficiently dispose of the many appeals that turned solely on matters of well-settled law. Among other benefits to the court, the nonpublication rules saved time and resources with Judge Farris' chambers that otherwise would have been allocated to galley proofing and other editorial tasks involved in publishing these unremarkable decisions on the record. In addition, those rules served as a measure to control the proliferation of needless pages in the Federal Reporter.

I believed then and remain convinced now that the current regime for nonpublication of Ninth Circuit decisions strikes a good balance between the court's interest in efficient administration and litigants' interest in obtaining a full and fair hearing on their matters. I would hesitate to radically alter a system for nonpublication of appellate decisions that has worked so well for so long.

Please do not hesitate to contact me if you feel that I can be of additional assistance to you in this matter.

Sincerely,

Antonio D. Martini

cc: Hon. Jerome Farris (w/out attachment)

United States Court of Appeals
For the Ninth Circuit

Jerome Farris
Circuit Judge
Telephone: 206/553-2672
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United States Courthouse
Suite 1038
1010 Fifth Avenue
Seattle, Washington 98104

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,

Jerome Farris