United States Court of Appeals
for the Ninth Circuit
LLOYD GEORGE UNITED STATES COURTHOUSE
333 LAS VEGAS BOULEVARD SOUTH
LAS VEGAS, NEVADA 89101

03-AP-327

February 10, 2004

JAY S. BYBEE
United States Circuit Judge

Transmitted via facsimile; original sent via U.S. Mail

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

Dear Mr. McCabe:

Many of my colleagues have commented on proposed Federal Rule of Appellate Procedure 32.1. At the risk of sounding redundant, I join my colleagues who oppose a rule that would require our court to permit citation of unpublished opinions.

I am writing from a slightly different perspective from most of my colleagues: I was appointed to the Ninth Circuit less than a year ago. Yet, in my relatively short experience on the court, I readily see the wisdom in our current rule forbidding the citation of an unpublished opinion for its precedential value. I offer some brief thoughts.

An unpublished opinion, which we commonly refer to as a "memorandum disposition," is an efficient means for disposing of a case that does not raise novel questions of law. Our unpublished opinions are typically between two and four pages and advise the parties of the grounds on which we decided the case. These dispositions are written for benefit of the immediate parties to the action, not for other panels of the court, other circuits, attorneys, or parties to other litigation. Thus, for example, a typical memorandum disposition does not recite the facts or procedural history of the case, except as necessary to explain the grounds for our decision, because we assume that the parties know the facts and procedural history. A memorandum disposition will cite cases, but none of the cases will represent

out-of-circuit decisions because, if the court must rely on the reasoning of other courts, then the question being discussed must be novel, the opinion represents new law in the circuit, and the opinion ought to be published.

Permitting parties to cite these brief decisions, as proposed FRAP 32.1 would do, will not bring more consistency or clarity to the law. By its nature, a memoranda disposition does not give other panels of our court or attorneys who wish to cite the memoranda the context in which to understand the decision. Such decisions are not drafted for the guidance of the court in future cases and may mislead rather than guide, resulting in *less* consistency in the administration of the law.

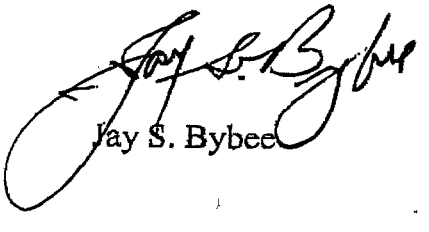
If proposed FRAP 32.1 were adopted, panels might respond–as have some other courts–by issuing a simple "Affirmed" or "Reversed." That response would not, of course, promote additional consistency or clarity in the law, nor would it give the parties any notice at all of the reasons for the court's judgment. If, in our current practice, there are inconsistencies between decisions decided by memorandum dispositions, such inconsistencies would remain in a regime that encouraged the court to issue a judgment without any rationale.

Finally, I think it is quite unlikely that if proposed Fed. R. App. P. 32.1 were adopted that judges on our court would draft longer opinions. Indeed, if we had to draft a full opinion in every case filed in our court, the court would have to take steps to reduce the substantial caseload we currently carry.

I urge the Committee to reconsider the proposed rule and to reject it.

Thank you for considering my comments.

Sincerely yours,



Jay S. Bybee