

RECEIVED
1/28/04

LAW OFFICES OF MICHAEL A. BRODSKY
3854 NINETEENTH STREET
SAN FRANCISCO CA 94114
TEL: 415-861-2779
FAX: 415-861-2183

03-AP-200

January 19, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington D.C. 20544

Re: Proposed FRAP 32.1

Dear Secretary McCabe:

As a former law clerk for the Ninth Circuit, I write to urge you not to adopt proposed FRAP 32.1, which would effectively prohibit the use of unpublished, non-citable opinions by federal appellate courts.

The Ninth Circuit frequently disposes of cases through the use of non-citable memorandum dispositions. The memorandum disposition is used where the case at hand presents no new question of law and existing precedent directly controls the outcome. The memorandum disposition is meant only to inform the parties of the outcome of the case. Memorandum dispositions should be no more than a few paragraphs in length because there is no need to narrate the facts of the case (the parties already know the facts). There is also no need to offer extended explanations of the application of controlling precedent or distinguish cases relied on by the parties in their briefs because cases selected for memorandum disposition do not require further development of the law in order to decide the case. The court simply announces who won and who lost and cites authority directly on point.

The memorandum disposition is a model of judicial economy because it may be prepared in a few hours and propounded within a few days after a case is taken under submission. Published citable opinions (which the new rule would require in all cases) often take hundreds of hours of research and drafting and may require many months of process before they can be published.

The brief memorandum dispositions that the Ninth Circuit relies on to manage its heavy caseload could not simply be stamped "For Publication" and still propounded in an efficient manner. If memorandum dispositions were citable as precedent of the circuit ingenious lawyers would no doubt resort to the published opinions of the district court from which appeal was taken, selectively recite facts narrated in the district court opinion along with portions of the reasoning of the district judge, and then claim support in the circuit's disposition for a proposition that was not meant to be affirmed or addressed at

all. Published opinions currently avoid this problem by reciting the facts of the case, placing them in context, and reviewing the decision of the district court below while placing it in context. All of this requires many hours of careful drafting and review, which the unpublished memorandum disposition avoids.

Proposed FRAP 32.1 would result in the needless depletion of scarce judicial resources. I urge you to reject proposed FRAP 32.1, and thank you for taking the time to consider my views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael A. Brodsky", with a long horizontal flourish extending to the right.

Michael A. Brodsky