HORVITZ & LEVY LLP

2/2/04

03-AP-232

January 27, 2004

Peter Abrahams
David M. Axelrad
Frederic D. Cohen
Jon B. Eisenberg
David S. Ettinger
Andrea M. Gauthier
Daniel J. Gonzalez
Ellis J. Horvitz*
Barry R. Levy*
Stephen E. Norris
Lisa Perrochet
Mary-Christine Sungaila
John A. Taylor, Jr.
Mitchell C. Tilner
S. Thomas Todd
H. Thomas Watson
Julie L. Woods

Wendy S. Albers
Karen M. Bray
Curt Cutting
Orly Degani
William N. Hancock▲
Loren H. Kraus▲
Jason R. Litt
Patricia Lofton
Gina McCoy
Kim L. Nguyen
Bradley S. Pauley
Jeremy B. Rosen
Katherine Perkins Ross
Nina E. Scholtz
Tracy L. Turner
Jason T. Weintraub
Robert H. Wright

*A Professional Corporation
▲Of Counsel

Main Office
15760 Ventura Blvd.
18th Floor
Encino, CA 91436-3000
Tel: (818) 995-0800
Fax: (818) 995-3157

Bay Area Office
1970 Broadway
Suite 1200
Oakland, CA 94612
Tel: (510) 452-2581

www.horvitzlevy.com

Mr. 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: **Proposed F.R.A.P. 32.1**

Dear Mr. McCabe:

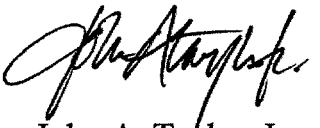
I am an appellate practitioner at California's largest civil appellate law firm. I have been a partner of the firm since 1997, and am a certified appellate specialist. I am also current chair of the California State Bar Appellate Courts Committee and a member of the Los Angeles County Bar Appellate Courts Committee, both of which are submitting comments in opposition to proposed Federal Rule of Appellate Procedure 32.1. I write separately to emphasize a couple points.

First, the proposed rule imposes significant new research burdens on attorneys (and their clients in the form of attorney fees) without any benefit of corresponding magnitude. The Advisory Committee Note ignores this burden, arguing that if implemented, the new rule will instead "relieve attorneys of several hardships," including the supposed hardship of having "to pick through the conflicting no-citation rules of the circuits in which they practice." Proposed Fed. R. App. 32.1 advisory committee note, at 35 [hereafter Advisory Committee Note]. But the Advisory Committee Note repeatedly emphasizes that the various circuit courts remain free to decide whether unpublished decisions should be given any precedential value. Advisory Committee Note, *supra*, 30, 33. So instead of having to pick through "conflicting no-citation rules" when citing unpublished cases from different circuits, attorneys will now have to pick through "conflicting precedent rules" governing the citation of such decisions. For example, some circuits may enact local rules providing that unpublished decisions have no precedential value in that circuit, regardless of source. Others may refuse to give precedential value only to their own

unpublished decisions. Still others may allow their own unpublished decisions to be given precedential value, but not give precedential value to unpublished decisions from other circuits which have contrary rules. The permutations and potential conflicts are numerous. Thus, far from removing an imagined conflict hardship, the proposed rule creates a new, more significant one.

Second, I am also gravely concerned that if the new rule is enacted, unpublished decisions will no longer provide any discussion regarding how and why the court reached its decision, but instead federal appellate courts will merely state "Affirmed" or "Reversed" in their unpublished decisions. Many circuit court judges have warned they will be forced to take this approach rather than devote the enormous amount of time necessary to ensure that their unpublished opinions include no language that could be misconstrued or misapplied in future cases. Any increase in the number of "memdispos" that resolve appeals without addressing the arguments of the parties and explaining how the court reached its result will be extremely demoralizing to both the appellate bar and their clients. In my own practice, I have found that nothing is more discouraging than having devoted months of effort to reviewing a trial record, researching the issues, and crafting an appellate brief, only to receive a one or two paragraph decision that does not consider and address all the legal arguments that have been made. When I was a judicial clerk working for the Fifth Circuit Court of Appeals, we made a concerted effort to ensure that even our unpublished decisions addressed all of the arguments asserted by the parties, and explained how the court had reached its result. I strongly oppose a new rule that would provide a coercive new incentive for circuit courts to issue even more cursory decisions than are already being written.

Very truly yours,



John A. Taylor, Jr.

JAT:mmg