LAWYERS

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

KELLI L. SAGER
DIRECT (213) 633-6821
kellisager@dwt.com

SUITE 2400
865 SOUTH FIGUEROA STREET
LOS ANGELES, CA 90017-2566

TEL (213) 633-6800
FAX (213) 633-6899
www.dwt.com

February 12, 2004

VIA TELECOPIER No. 202-502-1755
and U.S. Mail

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

Re: Opposition to Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to comment on the proposed Federal Rule of Appellate Procedure 32.1. After much reflection and discussion with colleagues about this proposed rule change, I have come to the conclusion that it would have a very negative impact on the federal courts and those of us who spend a great deal of time representing clients before those courts.

I have been practicing law for almost nineteen years, and a significant part of my practice is in federal court, including many cases before the Ninth Circuit Court of Appeals. I also serve as a lawyer representative for the Central District of California, and will co-chair this District's lawyer representative committee next year. Through my professional activities and my contacts with other lawyers who regularly appear in federal court, I am familiar with the overwhelming workload faced by the judges in the Ninth Circuit. Adoption of the proposed Rule inevitably will impose an extraordinary burden on the appellate court, as judges are faced with the prospect of writing publishable opinions in every case that comes before the Court. This burden will be passed on to the litigants whose cases are before the Court, in the form of ever-increasing delays in having matters heard and adjudicated.

The alternative for the Circuit judges – simply designating all decisions as "published," and therefore of precedential value – has disasterous implications. For better or worse, practicing attorneys look for significance in every word of a published decision, and the

particular language used (or absent from) a decision literally can change the result in a given case. The process through which published decisions in this Circuit currently are prepared and finalized is an exacting one, and takes into account the need to provide guidance to the trial courts as well as to practitioners on issues that arise in a wide variety of factual situations. There is no question that decisions that are not currently designated as "published" do not and cannot possibly go through this careful vetting process. Consequently, my natural inclination to want the benefit of using unpublished decisions that may benefit my client in a specific case are far outweighed by the concerns I have about the precedential impact of written opinions that may correctly and succinctly explain the result in one case, but were never intended to be broadly applied.

For these reasons, I would urge the committee to reject the proposed rule. If there is additional input that you would like from me, or if there are any questions that I can answer about this matter, please let me know.

Sincerely,

Kelli Sager

Kelli L. Sager
Davis Wright Tremaine LLP

KLS:ks