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VIA TELECOPIER (202/502-1755)

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

Re: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

I am a member of Kaye Scholer LLP and an active bankruptcy practitioner in the Los Angeles community for over 25 years. My colleague, Ashleigh Danker, is a counsel at Kaye Scholer, and an active bankruptcy practitioner in the Los Angeles community for over 16 years. We are familiar with the proposed Federal Rule of Appellate Procedure 32.1 ("FRAP 32.1"), including the Committee Note thereto, which would permit citation of unpublished judicial dispositions in legal proceedings.

Based upon our personal experience in practice and our understanding of the concerns raised by a number of members of the judiciary, we believe that passage of FRAP 32.1 is a bad idea. In short, you can't "unring the bell." Once an unpublished disposition is cited in a brief, both opposing counsel and the court are forced to research, analyze, and, potentially, distinguish the unpublished disposition. The fact that the unpublished disposition might not be formally recognized as precedent would not change the fact that it is being cited for the purpose of influencing the court's decision and must be evaluated as thoroughly as opinions accorded precedential status. Since unpublished dispositions do not undergo the same rigorous screening as published opinions, citation to these dispositions could skew the results in cases in unintended ways.

In addition, as attorneys who regularly practice in the Ninth Circuit, where the volume of appeals is very high, we are concerned that the Court of Appeals might react to passage of FRAP 32.1 by limiting unpublished dispositions to summary affirmances or denials. While we believe very strongly that unpublished dispositions should not be citable, except for purposes of *res judicata*, collateral estoppel, and law of the case, there is no question that it is extremely helpful for the counsel involved in a particular appeal to know the basis of the court's decision, even if

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the disposition is not accorded the full treatment given to a published opinion. Knowing the basis of an unpublished disposition allows counsel to better explain the result to the client, evaluate whether an error was made, and analyze whether a further appeal might be appropriate. We believe that if FRAP 32.1 were enacted, this valuable tool would be lost in an effort to prevent an even greater harm -- the citation of unpublished dispositions where only the result, and not the language or analysis, has been thoroughly vetted by the deciding court.

Accordingly, we respectfully urge the Committee to withdraw its support for the proposed FRAP 32.1.

Sincerely,

Marc S. Cohen Ashleigh A. Danker