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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed FRAP 32.1

03-AP-372

Attached is a copy of the letter I mailed to Mr. McCabe on Friday, February 13, 2004. Thank you for your consideration of my comments.

Arthur G. Scotland, Administrative Presiding Justice

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California Court of Appeal, Third Appellate District

February 13, 2004

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 FEDERAL RULE OF APPELLATE PROCEDURE 32.1

Dear Mr. McCabe:

"Be careful what you wish for."

Although trite, this warning is particularly appropriate with respect to proposed Federal Rule of Appellate Procedure 32.1, which would allow unpublished federal and state appellate opinions to be cited in federal courts.

Unwise and unfair is a simple way of describing the proposal, which is why California's Judicial Council and the California Legislature have repeatedly rejected similar proposals to allow unpublished appellate court opinions to be cited in state courts for persuasive value or as precedent.

Proposed rule 32.1 is unwise because it would unduly burden litigants and the courts, and delay the resolution of cases, for no likely benefit. I say this with great confidence and conviction based upon my experience as a trial attorney, appellate attorney, trial judge, and appellate justice.

Simple math demonstrates the problem. Annually, California's intermediate appellate courts file approximately 13,000 opinions. About seven percent, meaning a little over 900, are published to serve as legal precedent. Making all 13,000 opinions *each year* citable would impose a staggering burden on conscientious counsel and courts to weed through thousands and thousands of decisions so as not to overlook any that might be useful in some way. And so it would be with the multitude of unpublished federal court decisions.

Conscientious counsel and courts would feel compelled to carry out this search even though there is little likelihood unpublished opinions would be helpful. After all, in California, opinions are not published for good reason--they involve settled issues of law and do not meet the criteria set forth in California Rules of Court, rule 976(b), which states: "No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion: [¶] (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; [¶] (2) resolves or creates an apparent conflict in the law; [¶] (3) involves a legal issue of continuing public interest; or [¶] (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

Proposed rule 32.1 is unfair because it favors wealthier parties with the resources to undertake the costly burden of wading through thousands of unpublished opinions to come up with a helpful decision. By disadvantaging litigants with limited resources, the proposed rule would add fuel to the complaints of those who believe that the rich are treated more favorably by our courts than the poor.

It also is unfair in another sense because, for those able to afford the search through unpublished opinions, proposed rule 32.1 would dramatically increase the cost of litigation for very little benefit. If anything, our judicial system should be exploring ways to reduce costs in order to increase access to the courts.

Because it would be a serious mistake to implement it, I join the chorus of opposition to proposed rule 32.1.

Cordially,

Arthur G. Scotland
Presiding Justice