The Federal Circuit Bar Association
BENCH & BAR

03-AP-409

February 13, 2004

By Messenger

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The Federal Circuit Bar Association ("FCBA") is a national organization comprised of approximately 2,600 attorneys and judges who are interested in practice before the United States Court of Appeals for the Federal Circuit. While we have not polled our members on the proposed rule change, it is likely that most practicing attorneys in the FCBA would prefer the issuance of precedential opinions by the Federal Circuit. It does not follow, however, that the FCBA is in favor of the adoption of proposed Federal Rule of Appellate Procedure 32.1. Without additional funding and resources, the adoption of such a rule would adversely affect the timing and quality of judicial opinions. If the choice is between timely, high-quality opinions, some of which are non-precedential, or all opinions having precedential value with less time and effort spent on them, the FCBA prefers the former. For those reasons the FCBA is strongly opposed to the proposed rules change.

If adopted in the current resource environment, proposed Rule 32.1 will have a negative impact on the Courts of Appeals as they strive to improve the administration of justice in the federal court system. Addressing the issue facing the Federal Circuit, this Court has a large caseload of complex questions of patent law. Time constraints alone require the Court to follow the practice of issuing non-precedential opinions in those cases which have issues that are confined solely to the parties and do not add to the body of law. The criteria that each Court of Appeals must follow is to prepare and publish clear and authoritative precedential opinions in complicated or multi-issue cases which provide guidance to all lower tribunals, be they courts or administrative bodies. To require all cases to be precedential would negate the present system that the Federal Circuit and other Courts of Appeal have created amidst an ever increasing caseload and limited resources.

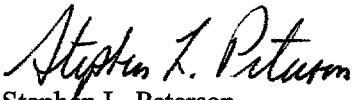
Such an approach could cause delays in the preparation and issuance of important decisions which do have precedential value. At the same time, it almost certainly would lead the Courts to issue more judgments without any opinion in order to conserve judicial resources.

Although practicing attorneys might well conclude, if judicial resources were not limited, that adoption of the proposed rule would assist them in their practice, there are other consequences of such a change. One would be the necessity to expand legal research to include non-precedential opinions. This would lead to additional costs and thus could favor litigants with greater resources. To add some context to this point, statistics from the Federal Circuit for the period October 1, 1996 through September 30, 2003 indicate that there were 2807 non-precedential opinions issued by the Court. In that period 1,875 precedential opinions were issued, and there were 1,150 judgments issued without opinions. In addition, many thousands of l non-precedential opinions were issued by the Federal Circuit prior to October 1, 1996.

In summary, with their limited resources, the FCBA believes the proposed rule provides no significant or meaningful assistance to the Courts of Appeals. To the contrary, such a rule would greatly diminish a proven system of case management which has enabled the Courts of Appeals to provide litigants with timely decisions in furtherance of the proper administration of justice.

We appreciate the opportunity to present the views of the Federal Circuit Bar Association.

Respectfully submitted,



Stephen L. Peterson
President