A Partnership Including Professional Corporations
2049 Century Park East
Los Angeles, CA 90067-3208
310-277-4110
Facsimile 310-277-4730
www.mwe.com

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Washington, D.C.

Stephen A. Kroft
Attorney at Law
skroft@mwe.com
310-551-9381

McDERMOTT, WILL & EMERY

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January 13, 2004

03-AP-101

VIA FACSIMILE AND REGULAR MAIL

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: Opposition to Proposed FRAP 32.1

Dear Mr. McCabe:

I write to express opposition to proposed Federal Rule of Appellate Procedure 32.1, which would permit citation of unpublished opinions of the United States Courts of Appeal. While I am aware that many members of the bar share my views, the views expressed here are mine alone, and do not necessarily reflect the views of others or of my law firm.

I am a trial and appellate lawyer in the Los Angeles office of McDermott, Will & Emery. I have practiced civil litigation and intellectual property law before the United States District Courts and the United States Courts of Appeal for more than 35 years. I have twice served as chair of the Central District of California Lawyer Representatives to the Ninth Circuit Judicial Conference and, from 1999 through 2002, I served as a member of the Ninth Circuit Judicial Conference Executive Committee. In addition, from 1992 to 1995, I served as a member of the Ninth Circuit Advisory Committee on Rules of Practice and Internal Operating Procedures. I am also a member of the California Academy of Appellate Lawyers. I believe, therefore, that my background provides me a broad perspective pertaining to the merits of proposed Rule 32.1.

I oppose proposed Rule 32.1 for many of the reasons previously expressed to you by other, thoughtful opponents of the proposed rule. In sum, the benefits of such a rule are slim, and the potential burdens to both the judiciary and appellate litigants are great. Unpublished dispositions rarely contain the type of rigorous thought and analysis that would be persuasive to a seasoned federal judge, so making them citable -- even as "precedent" -- is unlikely to affect the result in all but a miniscule number of cases. Conversely, it is not fanciful to imagine that judges who do not wish their unpublished decisions to be cited as precedent will eliminate even the modicum of

reasoning currently expressed in those decisions, so that the only information litigants would receive about the reasoning underlying the disposition of their individual case is (i) a short recitation of facts and contentions and (ii) the disposition -- an entirely unsatisfactory result for the parties. And it should be remembered, after all, that it is the parties to an appeal disposed of by an unpublished disposition who have the greatest stake in encouraging as full an exposition as possible of the court's determination of their disputes -- not the legions of attorneys who may seek to cite the unpublished disposition in ways and for purposes not intended by the authors.

Thank you for your consideration.

Very truly yours,

Stephen A. Kroft

SAK/zen