IRELL & MANELLA LLP
A REGISTERED LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

1800 AVENUE OF THE STARS, SUITE 900
LOS ANGELES, CALIFORNIA 90067-4276
TELEPHONE (310) 277-1010
FACSIMILE (310) 203-7199
WEBSITE: www.irell.com

840 NEWPORT CENTER DRIVE, SUITE 400
NEWPORT BEACH, CALIFORNIA 92660-6324
TELEPHONE (949) 760-0991
FACSIMILE (949) 760-5200

January 8, 2004

03-AP-112

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

Proposed FRAP 32.1

Dear Mr. McCabe:

I am the founder and chair of the litigation department of this law firm. I am writing, on behalf of the firm, in response to the solicitation of comments regarding proposed FRAP 32.1.

Set forth below is the text of an article on the subject that will appear shortly in certain portions of the legal press in Southern California. It is principally authored by my partner, Gregory Smith, who chairs our firm's appellate department.

This article generally sets forth the position of our firm on the subject, and I submit it to you as the statement of our collective views. In short, we agree with Judge Kozinski and many others that the proposed amendment is a "bad idea."

"Currently, each federal circuit has its own rule addressing whether and when unpublished opinions may be cited. In the Ninth Circuit, unpublished opinions may be cited only in limited circumstances (e.g., when relevant under the doctrine of law of the case, res judicata, or collateral estoppel, for factual purposes, or in a request to publish a disposition or a petition for panel rehearing or rehearing en banc). Ninth Circuit Rule 36-3. The Advisory Committee on Appellate Rules has proposed FRAP 32.1, which would make unpublished opinions citable as precedent in every circuit. Proposed FRAP 32.1 reads, in relevant part:

> No prohibition or restriction may be imposed upon the citation of judicial opinions . . . that have been designated as "unpublished," . . . unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions . . . .

Proposed FRAP 32.1 is intended to make all written dispositions available as citable precedent. Committee Note, ¶ 8. The proposed rule addresses solely the citation of unpublished opinions: it does not address whether or when a court may issue an unpublished opinion, nor does it control the effect a court must give unpublished opinions. Proponents of FRAP 32.1 argue that unpublished opinions should not be treated any differently from other "persuasive" sources, such as law review articles or treatises. Committee Note, ¶¶ 9-10. Moreover, they note, the proposed rule will "further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public." Committee Note, ¶ 15. Finally, they explain, the proposed rule would unify the circuits' currently conflicting rules regarding the citation of unpublished opinions. Committee Note, ¶ 7. However, serious considerations of judicial efficiency and fairness to litigants militate against proposed FRAP 32.1.

First, the proposed rule would severely reduce judicial efficiency. Currently, just 20% of cases result in a published opinion, while 80% are disposed of with an unpublished order. Committee Note, ¶ 2. In the Ninth Circuit, over 3800 cases are disposed of with an unpublished "Memorandum Disposition," while about 700 result in written opinions. Alex Kozinski and Stephen Reinhardt, "Please Don't Cite This! Why We Don't Allow Citations to Unpublished Dispositions," California Lawyer (June 2000) 43, 44. This proportion is a function of courts' limited resources: judges spend their time and other resources on the complex cases that will make new law or are of particular importance. Edward Lazarus, "The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful" (November 27, 2003), available at

http://writ.news.findlaw.com/lazarus/20031127.html. The remaining relatively routine cases, in which the law and facts are clear, no novel issues are raised, and the appellate courts' role is solely "error correction" (ensuring that the law was correctly applied), are disposed of with unpublished opinions. Id. By designating opinions "unpublished," federal judges can focus their resources on the cases where they are most necessary. Thus, all parties receive a written explanation of why their dispute was resolved as it was, but courts can focus their resources on fully developing the analysis and opinions that will define federal law. Id.

Without the option to designate opinions "unpublished," some courts may shift the resources they spend on complex cases to routine cases. This reallocation will short-shrift the cases that demand more thought, analysis, research and time. It also will create delay: the backlog of cases awaiting a written opinion will only increase as judges, knowing that every opinion will be published, devote more time to each one. That delay will adversely affect poorer litigants, who can least afford to wait for justice. Daniel B. Levin, "Fairness and Precedent" 110 Yale L.J. (May 2001) 1295, 1300-1301. Other courts may simply refuse to issue written opinions in routine cases, thus leaving the parties in the vast majority of cases with no written explanation for the disposition of their dispute. 20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit (online interview with Howard Bashman of "How Appealing"), December 1, 2003, Response to Question 16, available at http://20q-appellateblog.blogspot.com; A. Kozinski and S. Reinhardt, supra, at 44.

Second, making "unpublished" opinions citable as precedent will disproportionately and adversely affect poorer litigants. Currently, all citable opinions are available to all litigants. While poorer litigants may need to research these opinions in bound volumes (available at no charge in law libraries) rather than online (available only at a fee and to those with computer and Internet access), all citable opinions are available in full. By contrast, unpublished opinions are generally available only online, thus limiting access to those litigants who have Internet access and the resources to either pay for a subscription service or search vast amounts of data for free access to unpublished opinions which, even when available, is not always complete or accurate. D. Levin, supra, at 1301. So long as unpublished opinions are not citable, this discrepancy in resources does not affect poorer litigants' ability to present their cases. However, were unpublished opinions to be citable, litigants without Internet access and other resources would be at a distinct disadvantage. While litigants with unlimited resources could (and inevitably would) spend time and money sifting through the mass of unpublished opinions for the proverbial needle in a haystack that might strengthen their argument, litigants without such resources would

not have that option. And because making unpublished decisions citable will quintuple the number of cases available as precedent in the Ninth Circuit, this will be a significant burden even for wealthier litigants. Edward Lazarus, "The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful" (November 27, 2003), available at http://writ.news.findlaw.com/lazarus/20031127.html. Moreover, quintupling the number of precedent-setting opinions will increase the cost (for all litigants and for the court itself) of determining what the law is within the circuit; as formerly unpublished opinions become precedent, they might overrule or otherwise affect current case law.

Finally, the Committee Note argues that "conflicting rules [among the circuits] have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1 is intended to replace these conflicting practices with one uniform rule." Committee Note, ¶ 7. But lack of uniformity among the circuits is not limited to the issue of unpublished decisions, and determining whether any particular opinion is citable is simply a matter of consulting the opinion and the local rules. Indeed, in California, state and federal rules regulating unpublished opinions are consistent; changing the federal rule could only increase confusion among practitioners. Moreover, federal circuits vary greatly in the size and substance of their caseload. Each circuit should be free to control the body of precedent that determines the law within the circuit.

Several prominent judges have publicly argued against the proposed rule. Judges Kozinski and Reinhardt have written, "Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citations of memdispos is an uncommonly bad idea." A. Kozinksi and S. Reinhardt, supra, at 81. Judge Posner has explained, "I don't like the idea of allowing unpublished opinions to be cited, which is another way of saying that I think courts should be permitted to designate some of their decisions as nonprecedential and therefore not worth citing." 20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit (online interview with Howard Bashman of "How Appealing"),

December 1, 2003, Response to Question 16, available at http://20q-appellateblog.blogspot.com....."

Respectfully submitted,

Richard H. Borow

RHB:rls

cc: Ms. Arlene Russell
U.S. Court of Appeals for the Ninth Circuit
Clerk's Office
95 Seventh Street
San Francisco, CA 94103