United States Court of Appeals
for the Ninth Circuit
827 United States Courthouse
1000 SW Third Avenue
Portland, Oregon 97204-2902
503-326-8390
Fax 503-326-8399

Chambers of
Otto R. Skopil
Senior Circuit Judge

January 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 Rule Change to F.R.A.P. 32.1**

Dear Peter:

It is a pleasure once again to write to you. We have a long and treasured relationship, spanning through my many years on the Magistrate Committee and, more recently, on the Long Range Planning Committee. You have been a wonderful friend and a valuable asset to the courts.

I am not much engaged these days in surveying the operations of the federal courts. I was alerted, however, to the proposed change to Rule 32.1 that would allow unrestricted citation to unpublished dispositions. You may recall that this was an issue identified by the Long Range Planning Committee for future study and assessment. The Committee acknowledged in the commentary on recommendation 37d, "Not all appellate decisions warrant publication and citation for precedential purposes," and the Committee advocated that "clear standards" and "a uniform set of procedures" be developed regarding publication and citations of judicial decisions. The Committee on Rules of Practice and Procedure has proposed in Rule 32.1 a clear and uniform standard. Unfortunately, the proposed rule is a step backwards, and one that I fear will harm the judiciary.

As you know, the Judicial Conference in 1964 recognized the sheer volume and the increasing cost of appeals forced us to give up the practice of issuing published opinions in every case. In cases controlled by established precedent or involving only erroneous legal rulings, we are compelled to write short memorandum dispositions

solely to inform the parties of the decision and why. In my circuit, an appropriate memorandum disposition contains little or no factual background, and just enough law to justify the outcome. It is not written for anyone except the litigants and their attorneys. Of course, in their quests for expanded markets, the publishing firms, aided by the ease of computer access, began to publish our "unpublished" decisions. It is perhaps not surprising that there is now a "push" to allow these decisions to be freely cited and, I predict, eventually to mandate that they be treated as precedential.

We have already lost control of the distribution and publication of our unpublished decisions. We should retain control, however, of the use of those decisions. Attorneys apparently seek to cite unpublished decisions to us because they believe the decisions are either persuasive or precedential. I my view, our unpublished dispositions are not suitable for citation for either reason because they are not written for those purposes. Neither attorney nor the court can determine with certainty whether an unpublished decision is on point or distinguishable.

If the proposed rule is adopted, we will either have to start writing more comprehensive dispositions that are suitable for citation or we will write less so that the decision has no value and will not be cited. The former will harm the court because giving greater treatment to unpublished dispositions will slow the decision making process and lead to delays in issuing published opinion. The latter will undermine public confidence in the judiciary and lead to increased litigant resentment.

Finally, the proposed rule creates unnecessary burdens on judges, attorneys, and litigants. Judges and staff will work harder to write "citeable" dispositions and to read and evaluate the numerous unpublished dispositions cited in briefs. Attorneys will undoubtedly be compelled to expand their research to review all opinions, both published and unpublished, and to include them in their work product. Litigants, of course, will have to pay for this additional attorney work or proceed pro se and hope they can muster the resources to locate all of the relevant "unpublished" opinions.

I have always believed the federal judiciary is obligated to provide a judicial process assuring the litigants the highest quality of justice in the shortest period of time, and at the least expense to the litigants and taxpayers. The proposed change of

Rule 32.1 would ignore this obligation. It would be impossible to maintain the same quality of justice and the same per judge productivity. It would also result in a longer period of time to disposition, increased attorney's fees and taxpayer expenses for additional judges.

I know the proposed rule is controversial. I also know that you will give my comments and others that are submitted full and complete consideration. I am confident that your report to the Committee will, as always, seek the very best for the judiciary.

Sincerely,

Otto R. Skopil, Jr.