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January 15, 2004

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 Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

We are writing to offer our collective oppositions to proposed Federal Rule of Appellate Procedure (FRAP) 32.1 which would allow litigants to cite unpublished opinions. We submit this letter with many years of experience in representing parties in litigation and speak on behalf of numerous experienced lawyers who have reviewed this proposal. We are concerned about the impact this proposed rule will have on federal civil litigation practice, and on American jurisprudence generally.

Our practice is primarily in the Ninth Circuit, but we litigate cases throughout the United States. Based upon our experience, proposed FRAP 32.1

would have substantial negative effects, including increasing the time and expense of litigation for both the courts and the litigants.

First, proposed FRAP 32.1 will require courts and attorneys to research and cite massive numbers of opinions which support their position and distinguish those opinions that are contrary. This requirement is an enormous undertaking because of the number of unpublished orders and other written dispositions filed each year. The Advisory Committee Note for proposed FRAP 32.1 provides that "The thirteen court of appeals have cumulatively issued tens of thousands of 'unpublished' opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as 'unpublished.'" Committee Note to proposed FRAP 31.2 at 30, citing Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). In the Ninth Circuit alone, it is reported that there are approximately 3,800 unpublished dispositions per year compared to 700 published opinions. *See* Alex Kozinski and Stephen Reinhardt, "Please Don't Cite This!," *California Lawyer* (June 2000) at 43, 44. The volume of written orders, judgments, and other written dispositions is far greater at the District Court level.

The time and expense for the courts and attorneys to keep current on each of those now non-citable cases would be enormous. Based upon our experience, lawyers would be compelled to research and distinguish or agree with each of these cases. The failure to do so would be unprofessional and court disaster when submitting briefs to the Court. Courts would also feel compelled to review a multitude of unpublished, but citable, cases to determine if any one of them offers guidance on the issue presented.

Second, these unpublished opinions will have unqualified precedential effect. Although the Advisory Committee Notes state that proposed Rule 32.1 is extremely limited and is silent about the effect a court is to give an unpublished opinion, in practice, this proposed rule will make ***all*** judicial opinions precedential. It is unrealistic to believe that a judicial opinion, especially an opinion from a Circuit Court, will not be followed by the District Courts in the absence of contrary authority.

Third, proposed FRAP 32.1 will make the law less clear. Under the current standards in the Ninth Circuit and other circuits around the country, citation to unpublished decisions is prohibited. *See, e.g.,* 9th Cir. Rule 36-3 ("Unpublished dispositions and orders of this Court may not be cited to or by the

courts of this Circuit. . . ."). California state law is in accord. *See* California Rule of Court Rule 977(a) ("An opinion of a Court of Appeal or an appellate department of the Superior Court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any action, . . .") The criteria for publications of dispositions is clear. *See e.g.* 9th Cir. Rule 36-1. Generally, a written disposition may be published only if it establishes, alters, modifies, or clarifies a rule of law, or involves a legal or factual issue of unique interest or substantial public importance. *Id.* As stated by Judges Kozinski and Reinhardt in their article, cited above at 43, writing an opinion for publication is much more difficult than writing an unpublished disposition. For a published opinion:

> The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule and rejecting others. We must also make sure that the new rule does not conflict with precedent or sweep beyond questions fairly presented. [¶] ***While a [Memorandum Disposition] can often be prepared in a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing,***

> ***polishing, revising. Frequently, this process brings to light new issues, calling for further research, which, in turn, may send the author back to square one.***
> (Emphasis added.)

Litigants and courts should be guided by a rule that allows only citation to published decisions. To do otherwise does a disservice to judges at all levels of our judicial system, and undermines the integrity of the judicial process. Far from providing further insight into the development of legal precedent, litigants will be forced to search out and cite to written orders and memoranda, many of which were crafted "in the moment," and solely for the purpose of addressing a peculiar problem or point of procedure in the case. The end result would be to confuse judicial ***precedent*** – focused legal discussion intended to provide useful guidance in future cases – with a one-time solution appropriate only to a given case. Such a result makes the law less clear, not more so.

Lastly, a rule permitting citation to, and reliance upon, unpublished orders and other written dispositions will place an enormous burden on a judicial system that is already overburdened. While civil filings are on the rise in most courts, the number of judges assigned to handle those filings is fixed. Requiring District Court judges to shift through and analyze a mass of unpublished orders and memoranda will push the system beyond the breaking point.

The increased responsibility would be equally borne by our appellate courts, and will eventually lead to the simplistic "Reversed" or "Affirmed" – with little or no explanation for each opinion. By necessity, future litigants will be left with a set of rulings void of substance or analysis, rather than valuable legal precedent.

For all of the above reasons, we strongly urge the Advisory Committee to reject adoption of proposed FRAP 32.1.

Respectfully submitted,

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