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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

03-AP-353

Via FedEx

Re: Proposed Amendment to Federal Rules of Appellate Procedure, Rule 32.1

Dear Mr. McCabe:

As a lawyer in private practice with 25 years of civil litigation experience, I write in opposition to proposed FRAP 32.1.

In the 9th Circuit, the jurisdiction in which I practice, the workload of the Court of Appeal is such that adoption of proposed FRAP 32.1 would almost certainly increase the number of one-word dispositions, and thus hide from litigants the reasons for the result in their cases. From the point of view of the litigants, their attorneys, other interested parties, the bar, and the public generally, this would be a significant negative development, and it should not be fostered by an unnecessary "reform."

Moreover, the proposed rule would increase the burden of litigation – requiring lawyers for rich and poor alike to spend time and resources researching, parsing, arguing and responding to arguments concerning the unpublished opinions already issued–opinions which, *in the judgment of their authors*, would be unreliable and potentially misleading if applied to other cases. By increasing the burden for litigants, it will also increase the advantage that well-healed litigants already enjoy in relation to their poorer adversaries. Again, this is not a result we should foster with an unnecessary "reform." Reform should lead us in the opposite direction.

The burdens that would be created by proposed FRAP 32.1 would not be confined to the research process. If my adversary cites Shakespeare in a memorandum to the trial court, I don't worry that the trial judge might mistake the citation for a statement of the applicable law, but if FRAP 32.1 were adopted, I would have that worry whenever my adversary cited an unpublished opinion, and I would need to respond to that concern in my papers, using time and space that would be better used for more important issues. Moreover, as an attorney bound to zealous advocacy, if I found an unpublished opinion that seemed to favor my cause, I would do what I could to remind the trial judge that this unpublished opinion was issued by the judges who sit on the court that will be reviewing the trial court's decision on appeal. Thus, in addition to its other faults, proposed FRAP 32.1 would create substantial and persistent potentials and incentives for confusion regarding authority –which is not something to be done lightly or for too little reason.

Very truly yours,

Stephen R English

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