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TO		FAX NUMBER	PHONE NUMBER
Mr. Peter G. McCabe Secretary Committee on Rules of Practice and Procedure Administrative Office of the United States Courts		202-502-1755	202-502-1820
FROM	David B. Walker	PHONE NUMBER	202.719.3578
DATE	February 17, 2004	PAGES TO FOLLOW	3
USER NUMBER	9183	CLIENT NUMBER	78869.0003

MESSAGE

Please accept the attached Opposition to Proposed Federal Rule of Appellate Procedure 32.1.

Please contact the undersigned with any questions.

Please contact 202-719-3578 if you do not receive this facsimile in its entirety.

February 17, 2004

By Facsimile

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The undersigned former law clerks of the United States Court of Appeals for the Federal Circuit strongly oppose the adoption of proposed Federal Rule of Appellate Procedure 32.1. Each of the undersigned previously served as a law clerk to a Judge on the Federal Circuit, a position that involved performing legal research in support of the judicial decision making process, as well as assisting the Judges in reviewing the briefs and records on appeal for cases pending before the Court and in preparing the first draft of nonprecedential and precedential opinions. As such, we are well positioned to comment on the potential affect of the proposed Rule 32.1 on the efficient and timely administration of justice before the Federal Circuit.

As explained in more detail below, the proposed rule, which would allow the citation of nonprecedential dispositions before the United States Courts of Appeals, would adversely affect the administration of justice by, *inter alia*, causing the misallocation of judicial resources, delaying issuance of precedential opinions, increasing the issuance of judgments without an accompanying opinion, and otherwise unnecessarily burdening litigants with, for example, additional (and unfruitful) research. At a minimum, we believe that the decision of whether nonprecedential opinions may be cited (by courts and litigants) should be left to the sound discretion of each circuit court as provided for in their respective local rules.

If implemented, proposed Rule 32.1 will cause the Courts of Appeals to misallocate their already scarce resources. The Federal Circuit currently designates certain opinions as nonprecedential because of its large, and very complex, caseload, which includes some of the most difficult cases (*e.g.*, patent appeals) heard by the Courts of Appeals, and because it simply is not possible to issue a precedential opinion in every appeal. Moreover, because some of the issues are subject to de novo review, it is not at all uncommon that the decisions in those cases are inherently factbound. This reduces dramatically the precedential value of such decisions. Significantly, the practice of issuing nonprecedential opinions permits the Judges of that Court to focus their efforts on writing authoritative and comprehensive opinions in important and precedent-setting cases. These precedential opinions, which require a great deal of effort, careful consideration, close attention to the precise wording of the opinions and detailed research, provide crucial and binding guidance on broader issues of law to the lower tribunals and agencies from which the Federal Circuit hears appeals. Nonprecedential opinions do not require the same amount of time or effort because they do not constitute binding precedent and, therefore, can be prepared more quickly without concern about their impact on future cases. Ordinarily, they are relatively short because they are

written for the parties (who already know the relevant facts), provide only an abbreviated review of such facts and the law, and provide a method for prompt disposition of cases while briefly explaining the Court's rationale. In short, nonprecedential opinions do not contain new legal principles and add little, if any, clarity to the body of the law.[1]

Furthermore, Proposed Rule 32.1 would have the undesirable effect of retroactively permitting citation of nonprecedential opinions previously issued by the Federal Circuit, and other Courts of Appeals, despite the previous rules in some of the circuits barring their citation. As discussed above, such nonprecedential opinions were not prepared with the same degree of care and consideration for their impact on future cases as precedential opinions. As a result, "morphing" these opinions into citable precedent was never intended by certain of the circuits in which they were issued. This conversion could have unforeseen effects on the development of the law when zealous advocates seek to extend the application of nonprecedential opinions to different factual situations. Because the extensive body of non-precedential opinions previously issued by the Courts of Appeals cannot be corrected to rectify this problem, particular care should be taken to avoid the detrimental retroactive application of any new rule.

Although the Advisory Committee believes that the proposed rule will not affect the allocation of judicial resources because each circuit may determine by local rule that nonprecedential opinions do not constitute binding precedent, we respectfully believe that the Advisory Committee is incorrect. We are convinced that the Judges of the Courts of Appeals will devote more of their scarce time and resources to the writing of nonprecedential opinions if they may be cited and relied upon by both litigants and lower tribunals. Even if a local rule states that such opinions are not binding, litigants and lower tribunals will naturally think that statements by three circuit judges are deserving of significant weight when, in fact, nonprecedential opinions are deserving of no weight. Even if the Committee is correct, there is little benefit and potentially significant confusion in creating a rule where Courts of Appeals must permit citation of nonprecedential opinions but can selectively and nonuniformly determine what weight those opinions will have once cited. This would lead to the same inconsistency among the Courts of Appeals and difficulties for attorneys practicing before multiple circuits that the proposed rule seeks to rectify. To the extent that the Courts of Appeals are to have discretion over the weight to be assigned to nonprecedential opinions, they should also be able to entirely bar their citation to avoid misguided research into opinions that can be cited but will not given any precedential weight.

When the Judges inevitably devote more time to the writing of nonprecedential opinions, this will cause one or more, and most likely all, of the following to occur: (1) delay in the issuance of nonprecedential opinions, (2) delay in the issuance of, and/or the devotion of less time to, precedential opinions, and (3) an increase in the issuance of judgments without an opinion. Based on our experience, all three of these outcomes are unwarranted and should not be promoted without a compelling benefit, which has not been demonstrated.

Finally, we believe the proposed rule will also negatively affect litigants because their counsel will feel compelled, and perhaps will be compelled by ethics rules, to expand significantly the scope of their research to include nonprecedential opinions. Such expanded research will significantly

[1] Pursuant to Federal Circuit Rule 47.6(c), within 60 days of the issuance of a nonprecedential opinion, any person (and not just the parties) may request that the Federal Circuit re-issue the opinion in precedential form.

increase litigation costs with no benefit to the litigants. (In this regard, the Federal Circuit has issued many thousands of nonprecedential opinions since its inception in October 1982.) In addition, nonprecedential opinions are harder, and often more expensive, to locate then precedential opinions. As a result, the proposed rule would favor litigants with greater resources and impose significant disadvantages on poor litigants not only through increased costs but also because of resulting delays in the issuance of opinions that would, in some cases, include monetary awards or other relief.

Thank you for your time and consideration of these comments.

Respectfully submitted,

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