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December 19, 2003

VIA FACSIMILE AND MAIL

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: *Opposition To Proposed FRAP 32.1*

Dear Secretary McCabe:

I am writing on behalf of my firm to voice opposition to proposed Federal Rule of Appellate Procedure 32.1 (the "proposed rule"). As I explain below, the proposed rule will hinder the effectiveness of our judiciary, impose needless costs on both the public and private sectors, impede efficient access to controlling precedent, and create uncertainty.

Some appellate decisions are significant because they (1) create new rules of law, (2) apply existing rules to facts significantly different from those stated in prior decisions, and (3) advance, modify, or criticize other existing decisions. The vast majority of decisions, however, apply settled law to routine factual matters. Recognizing that not all decisions are of equal legal significance, it makes little sense to compel our judiciary to treat them alike. Yet this is precisely what the proposed rule does, at a terribly high cost to the effectiveness of our judiciary.

Currently, decisions of limited legal significance, i.e., those not warranting publication, can be directed to the parties of the case, all of whom are familiar with the record and the facts. The court can write a succinct opinion focusing directly on dispositive legal issues. By contrast, when an opinion is written for a national audience, considerably more time and effort are required to craft the legal discussion to make it meaningful to parties unfamiliar with the factual context of the matter and the applicable law.

By allowing citation to all decisions, the proposed rule will increase the time and cost of preparing what had previously been a routine disposition. The proposed rule will likely stretch judicial resources to the breaking point, and -- perhaps ironically -- divert important

judicial resources to the least legally significant matters. At minimum, there would be an additional backlog in the rendering of all decisions.

Further, the proposed rule will create an overwhelming body of largely valueless legal precedent. Judges and their staffs, attorneys, and pro se litigants will need to sift through endless cases because every decision has equal precedential value and may have an applicable fact pattern. Libraries, deluged with case reports, will be forced to absorb significant expense as they are required to increase the size of, and space allocations for, their collections. Notably, pro se litigants, who do not have access to computer assisted research, will have no practical means of accessing or digesting this enormous body of cases citable as precedent.

Finally, the proposed rule would create confusion. At present, both California's appellate court and the Ninth Circuit, in which California sits, issue published and non-published opinions. The proposed rule would eliminate the symmetry between our state and federal systems, confound practitioners and pro se litigants regarding what cases are citable as precedent, and subject practitioners and pro se litigants to the risk of sanctions when inevitable mistakes are committed.

In sum, the proposed rule would impose additional weight on our already overburdened legal system. A more logical approach would be the creation of a national rule that prohibited the citation of decisions unless they were designated for publication by the issuing court.

Very truly yours,

BENEDON & SERLIN

Gerald Serlin