THE STATE BAR OF CALIFORNIA
— COMMITTEE ON APPELLATE COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

03-AP-319

February 10, 2004

Via E-Mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The State Bar of California's Committee on Appellate Courts ("Committee") opposes proposed Federal Rule of Appellate Procedure 32.1.[1] As explained below, the Committee believes the justifications given by the Advisory Committee Note for the proposed rule are far outweighed by the mischief that would likely result upon its implementation.[2]

The Advisory Committee Note fails to address the destabilizing influence the proposed rule will likely have on existing law in the various circuits. The courts of appeal have two major functions – error correction and building the precedential law of the circuit. As has been explained in numerous letters from circuit court judges in opposition to the new rule, the language in published decisions is carefully crafted to achieve both purposes – i.e., not just to decide the case at hand correctly, but to ensure that the general rule of law is accurately presented and that a loose turn of phrase cannot be incorrectly applied in subsequent litigation. Unpublished decisions, while closely scrutinized before publication to ensure a correct outcome, cannot also be fine-tuned to achieve the latter purpose because of limited judicial resources. In addition, unpublished decisions often do not include a detailed statement of facts and procedural history of the case, so practitioners cannot meaningfully distinguish apparently broad statements of law that appear controlling, but are inaccurate outside the narrow factual context presented. The citation of unpublished decisions is thus likely to mislead trial courts and create new uncertainties regarding formerly established precedent.

[1] The Committee's comments on other proposed amendments to the Federal Rule of Appellate Procedure are contained in a separate letter.

[2] For the reasons stated in the Advisory Committee Note, two members of the 16-member Committee support proposed rule 32.1.

The Advisory Committee Note defends the new rule by inappropriate analogy, asserting: "It is difficult to justify prohibiting or restricting the citation of 'unpublished' opinions . . . [where] law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles" may all be cited without restriction. Proposed Fed. R. App. 32.1 advisory committee note, at 34 [hereafter Advisory Committee Note]. An obvious distinction, however, is that unlike unpublished decisions, there is no risk these other materials will be mistaken for the law of the circuit or given undue weight by the lower courts or litigants.

Moreover, the authors of these materials have, by definition, decided they were of sufficient quality to merit publication. Many of them, such as law reviews and treatises, were specifically written with the hope and expectation that they would be cited by lawyers in briefs and by courts in appellate decisions, and are therefore thoroughly researched and carefully written. But federal judges cannot decide cases without some sort of written opinion, and unpublished decisions are not written with future citation in mind. Thus, even where the author of an opinion has specifically decided it is *not* worthy of citation, the proposed rule would eliminate any ability by federal circuit judges to control the "publication" of their decisions.

Another important distinction is that allowing the citation of "law review articles, treatises, newspaper columns" and the like does not threaten to impede the authorship of such materials, whereas the proposed rule would have exactly that effect with respect to unpublished opinions. In that regard, the Advisory Committee Note fails entirely to address the practical impact the proposed rule would have on the functioning of the federal appellate courts. Circuit court judges cannot respond to the rule by devoting greater time to the precise wording used in resolving routine cases, since under that approach the resolution of appeals by an already overburdened judiciary would quickly grind to a halt. Thus, rather than continuing to explain their decisions to litigants, judges may instead resolve appeals where an unpublished decision is appropriate with a simple "Affirmed" or "Reversed" disposition. (Judges Richard A. Posner and Alex Kozinski have both predicted this will be the unintended consequence of the proposed rule.) That approach would be extremely demoralizing to appellate practitioners, who often devote months to the process of reviewing the record, researching the legal issues, and crafting their briefs – and deserve to know which arguments were accepted or rejected by the appellate court, and an explanation why.

Further, such summary dispositions will undermine the confidence of the litigants regarding the fairness of the appellate process. Where no explanation of reasons is provided, unsuccessful litigants have no reason to believe their arguments have even been considered, or that the appellate process is not completely arbitrary. In addition, such an approach would virtually eliminate the ability of litigants to seek rehearing on the ground that the court misunderstood their arguments – since no explanation of how or why the case was decided a certain way would be provided.

The Advisory Committee Note suggests that the new rule "is extremely limited" because it does not require unpublished decisions to be given precedential value. Advisory Committee Note, *supra*, at 30. But where unpublished decisions can be cited, as a matter of prudence and

professional ethics lawyers will have to treat them as a significant source of authority regardless whether they are treated as controlling in a particular jurisdiction. It is questionable whether unpublished decisions – a huge percentage of which involve a deferential standard of review – have any value as precedent or as persuasive in other cases. But particularly in those circuits that choose not to give unpublished decisions any precedential weight, the new rule will impose substantial new research burdens on attorneys without conveying any comparable tangible benefits.

Statistics from the Ninth Circuit suggest unpublished cases outnumber published cases by a factor of more than 5 to 1, and that the universe of potentially citeable Ninth Circuit decisions would expand by 48,000 cases just from 1990 to 2002 if the rule is adopted. The Advisory Committee Note implies that researching this expanded body of law will not pose a problem for lawyers or impose greater research costs on their clients (without significant benefits) because, where a published opinion already supports a contention, parties "have an incentive not to cite 'unpublished' opinions." Advisory Committee Note, *supra*, at 34. But even where a published decision states the applicable rule of law, attorneys will feel compelled to search for unpublished decisions involving that issue in a factual context more closely aligned with their case, or which phrases the legal principle in terms more favorable to the case at hand than language in similar published decisions. Furthermore, since a large percentage of unpublished cases are in the substantive areas of habeas corpus, immigration, and social security, the increased cost of searching unpublished decisions will fall disproportionately on clients least able to bear those expenses, giving government lawyers with greater resources a significant edge over the most disadvantaged private litigants.

The Advisory Committee Notes asserts that far from burdening appellate practitioners, the proposed rule will actually help them by eliminating conflicting rules between circuits regarding the citation of unpublished opinions that "have created a hardship for practitioners, especially those who practice in more than one circuit." Advisory Committee Note, *supra*, at 35. But the proposed rule does little or nothing to eliminate this problem because, as previously noted, circuits remain free to decide what precedential value, if any, to give unpublished decisions. Advisory Committee Note, *supra*, at 33 ("Rule 32.1(a) does not require a court of appeals to treat its 'unpublished' opinions as binding precedent.") Thus, the proposed rule merely shifts the circuit conflict from the issue of whether unpublished opinions may be cited to the issue of whether such opinions have any precedential value, or how much. The purported "hardship for practitioners" not only remains, but will likely be aggravated under the new rule.

Likewise questionable is the assumption that eliminating all restrictions on the citation of unpublished decisions will eliminate "litigation over whether a party's citation of particular 'unpublished' opinion was appropriate," which the Advisory Committee describes as "satellite litigation" that serves "little purpose, other than further to burden the already overburdened courts of appeals." Advisory Committee Note, *supra*, at 34-35. Even assuming such "satellite litigation" is occurring, which is doubtful, by liberally expanding the circumstances in which unpublished decisions can be cited, the proposed rule expands, perhaps exponentially, the likelihood of collateral litigation regarding the precedential value of "a particular 'unpublished'

opinion" cited by a party. Such "satellite litigation" will far exceed any litigation occurring at present over the generally clear-cut issue of whether the decision should have been cited in the first instance.

For all these reasons and for others stated in the numerous opposition letters that have already been submitted by judges and lawyers, the Committee opposes proposed Federal Rule of Appellate Procedure 32.1.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

John A. Taylor, Jr., Chair
State Bar Committee on Appellate Courts

cc: Members, State Bar Committee on Appellate Courts
Saul Bercovitch, Staff Attorney, State Bar of California

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON APPELLATE COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

February 10, 2004

Via E-Mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

The State Bar of California's Committee on Appellate Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Appellate Procedure, and appreciates the opportunity to submit these comments.*

Rule 4

The Committee supports in part an amendment to Rule 4(a)(6) proposed by the Advisory Committee on Appellate Rules, and suggests certain modifications to the proposed amendment.

Under Rule 4(a)(1)(A), an appellant must appeal a judgment or order within 30 days after its entry. Rule 4(a)(6) permits the district court to reopen the time for noticing an appeal on the motion of an appellant who has missed the deadline because he did not receive prompt notice of entry of the judgment or order in question. The proposed amendment to Rule 4(a)(6) would substantively alter the Rule by changing (1) the circumstances qualifying as the threshold failure to receive notice, and (2) what triggers the deadline for bringing the motion.

The Committee supports the amendment as it relates to number (1), but proposes a somewhat different approach as to number (2). Generally, the Committee understands that the proposed amendment is intended to add clarity and certainty to the circumstances in which Rule 4(a)(6) comes into play; part (1) appears to achieve this goal, but part (2) does not.

* The Committee's comments on proposed Federal Rule of Appellate Procedure 32.1 are contained in a separate letter.

1) Proposed amendment affecting the circumstances qualifying as the threshold failure to receive notice.

The Rule presently allows a motion to reopen the time for noticing an appeal when the appealing party was entitled to but did not timely receive notice, without further defining the term "notice." The amendment would specify that the notice to which the Rule refers is "notice under Federal Rule of Civil Procedure 77(d)." This change would appear to achieve the desired goal of eliminating litigation, confusion, and possible circuit splits on that issue. Therefore, the Committee supports this part of the proposed amendment.

2) Proposed amendment affecting what triggers the deadline for bringing the motion.

The Rule presently sets a time limit for bringing a motion for additional time to file the notice of appeal "within seven days after the moving party receives notice of the entry." The proposed amendment would change this time limit to "within 7 days after the moving party receives *or observes written* notice of the entry *from any source.*" (Emphasis added.) The Committee believes this change would increase rather than decrease litigation, and would result in confusion and possible circuit splits regarding proper application of the revised Rule.

The proposed new requirement that the triggering notice be "written" appears to be an improvement over the present version of the Rule. The Rule currently refers to "notice" as triggering the seven-day deadline without stating whether that notice must be in writing. Some circuits have held that the notice must be written (*e.g., Bass v. U.S. Dept. of Agriculture*, 211 F.3d 959, 963 (5th 2000) (collecting cases)), while others such as the Ninth Circuit have held that oral notice is a sufficient trigger if the "quality of the communication" makes it "the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rentao, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). The amendment cures this conflict – as well as hair-splitting regarding when oral notice is the equivalent of written notice – by starting the clock only upon "written" notice of the judgment or order to be appealed.

However, the requirement that the notice be written does not eliminate all ambiguity or potential for litigation over when the time for bringing a motion under the Rule has begun to run. For example, it is not clear whether an e-mail is a "written" notice. *Cf., Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("she also received numerous phone calls, voicemail messages, written correspondence, and e-mail from fans through her professional e-mail account").

Another proposed change to the Rule actually introduces new ambiguities. Specifically, under the proposed amendment, the seven-day clock begins running when the moving party "receives *or observes*" notice "*from any source.*" (Emphasis added.) This appears to be an expansion of the circumstances under which the time to bring a motion starts to run. Because the proposed amendment opens the door to more informal methods of receiving notice, it introduces new uncertainties regarding when the time for bringing a motion under the Rule has begun to run.

Factual disputes regarding whether notice has been "observed" are likely to arise when a party opposing a motion under this section tries to show that the moving party had "observed" a notice that he had not "received." If, for example, the moving party's counsel can be shown to have looked at the docket in the court's office, or to have visited a website on which the docket is posted, the court might have to determine whether he or she actually focused on the line item indicating entry of the judgment or order.

It appears, then, that in attempting to bring greater clarity and certainty to the Rule's application, the proposed amendment gives with the right hand but then takes away with the left. The amendment requiring the triggering notice to be "written" should instead be coupled with the requirement that the moving party has actually received a piece of paper containing the notice, rather than merely "observing" the notice in some unspecified manner subject to dispute. Receipt of written notice is objectively determinable and less prone to difficult factual determinations than mere observation, which can be fraught with difficulties of proof.

The Committee believes that a better approach would be to tie the triggering event for filing a motion, like the circumstances qualifying as the threshold failure to receive notice, to the well-defined event of notice under Federal Rule of Civil Procedure 77(d). Specifically, the Rule should be amended to require that the motion be filed within a specified time after notice under Federal Rule of Civil Procedure 77(d) has been given. This change, like the other part of the amendment discussed above, would add clarity and certainty to the Rule, rather than re-injecting the uncertainty that the first part of the amendment was intended to eliminate.

The Committee therefore recommends that the proposed amendment should allow a party to bring a motion to reopen the time to file a notice of appeal only if:

> "the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party is given notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed, whichever is earlier."

Rules 28, 32, and 34, and new Rule 28.1

The Committee generally supports the proposed changes to Rules 28, 32, and 34, and new Rule 28.1, all concerning cross-appeals. In particular, the Committee recognizes that the proposals succeed in providing clarity, collecting in one place all the provisions concerning the subject matter of cross-appeals, eliminating inconsistencies among various Circuit local rules, and adding new provisions to fill in existing gaps, all worthy goals. The Committee does have one reservation about the proposals and suggests a modification to new Rule 28.1(e) to address its concerns.

These concerns relate to the disparity in the total permitted length of briefs as between the appellant on the one hand and the cross-appellant on the other. Under the proposals, the first party appealing – labeled the "appellant" – is permitted a maximum of 14,000 words with respect

to both its opening, principal brief and its combined response and reply brief – the third in the four-part briefing sequence. This accounts for a total of 28,000 words. In contrast, the appellee/cross-appellant is permitted just 16,500 words for its combined principal and response brief (the second in the four-part sequence) in which it must include its main contentions on appeal, and 7,000 words for its reply brief, for a total of 23,500 words.

This disparity may be based on an assumption that cross-appeals are generally protective in nature, so that a cross-appellant requires fewer total words than the main appellant to both respond to the appeal and present his or her arguments on cross-appeal. But many cross-appeals raise issues independent of the main appeal, and it cannot be assumed that such independent issues can be adequately addressed in fewer total words. Even where the briefs on both sides focus on related issues, the cross-appellant's combined principal and response brief may need to address in greater detail issues that have been treated only superficially in the appellant's opening brief. Additionally, the statement of the case in the appellant's opening brief may mischaracterize the evidentiary record, or state the facts under the wrong standard of review, requiring a factual and procedural statement in the appellee's combined response and principal brief that is equal to or exceeds the length of the same section in the appellant's opening brief. The permitted word count disparity applicable to the respective briefs filed by the appellant and cross-appellant may thus be arbitrary and unfair in many, if not most, instances. The result could be a race to the courthouse in order to file the first notice of appeal, thereby becoming the "appellant" and gaining an advantage in the total allowed length of briefs.

Consequently, the Committee proposes a modification to new Rule 28.1(e) that raises the word count limitation applicable to the appellee's combined principal and response brief (the second in the four-part sequence) from 16,500 to 21,000 words, with a corresponding change in the page limitation. This change would provide equitable treatment of the parties, who are each raising affirmative claims on appeal, in the permitted, total length of briefs, providing each a total of 28,000 words. With this change, the Committee fully supports the proposed changes to Rules 28, 32, and 34, and new Rule 28.1.

Rule 35(a)

The Committee fully supports the proposed amendment to Rule 35(a), which governs when an en banc hearing may be ordered. The language of the current rule has led to inconsistencies between the circuits on what constitutes a majority of the court for purposes of determining the number of votes necessary for a hearing or rehearing en banc. Under the current rule, some circuits have adopted the "absolute majority" approach, while others follow the "case majority" approach, leading to undesirable geographic inconsistencies. The Committee recognizes that the motivating force behind the amendment to Rule 35(a) is to provide uniformity among the circuits, and believes this is a commendable goal which can be achieved through the proposed amendment.

Additionally, the Committee agrees with the majority of the Advisory Committee on Appellate Rules that the case majority approach is the more desirable method to adopt. Under

the case majority approach, the majority of judges who are eligible to participate in the case decide whether a panel decision should be reviewed en banc. This procedure seems fair and simple to understand and calculate. As for the absolute majority approach, the Committee is troubled by the fact that the disqualification of a judge is essentially deemed as a vote against granting an en banc hearing because the disqualified judge is included in the base calculation of active judges on the court. Thus, the absolute majority approach runs contrary to the purpose of a judge recusing him/herself because the judge's recusal is treated as a vote against review. Moreover, complaints seem to arise in absolute majority circuits when the majority of voting judges have favored review, but due to the disqualification of some judges, reconsideration was denied.

Therefore, the Committee supports the amendment to Rule 35(a) and the adoption of the case majority approach.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

John A. Taylor, Jr., Chair
State Bar Committee on Appellate Courts

cc: Members, State Bar Committee on Appellate Courts
Saul Bercovitch, Staff Attorney, State Bar of California

HORVITZ & LEVY LLP

Peter Abrahams
David M. Axelrad
Frederic D. Cohen
Jon B. Eisenberg
David S. Ettinger
Andrea M. Gauthier
Daniel J. Gonzalez
Ellis J. Horvitz*
Barry R. Levy*
Stephen E. Norris
Lisa Perrochet
Mary-Christine Sungaila
John A. Taylor, Jr.
Mitchell C. Tilner
S. Thomas Todd
H. Thomas Watson
Julie L. Woods

Wendy S. Albers
Karen M. Bray
Curt Cutting
Orly Degani
William N. Hancock▲
Loren H. Kraus▲
Jason R. Litt
Patricia Lofton
Gina McCoy
Kim L. Nguyen
Bradley S. Pauley
Jeremy B. Rosen
Katherine Perkins Ross
Nina E. Scholtz
Tracy L. Turner
Jason T. Weintraub
Robert H. Wright

*A Professional Corporation
▲Of Counsel

Main Office
15760 Ventura Blvd.
18th Floor
Encino, CA 91436-3000
Tel: (818) 995-0800
Fax: (818) 995-3157

Bay Area Office
1970 Broadway
Suite 1200
Oakland, CA 94612
Tel: (510) 452-2581

www.horvitzlevy.com

March 8, 2004

VIA E-MAIL & U.S. MAIL

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

Dear Mr. McCabe:

I understand that the Advisory Committee on Appellate Rules has scheduled hearings on Proposed FRAP 32.1 at its April 13, 2004, meeting in Washington, D.C. I respectfully request an opportunity to testify in my capacity as Chair of the California State Bar Appellate Courts committee.[1] I am also a member of the Los Angeles County Bar Appellate Courts Committee. Both committees have submitted comments regarding the proposed rule.

As the Committee is no doubt aware, appellate lawyers in California have a particularly vital interest in this proposed rule and I believe that it would be helpful to the committee's deliberations to hear our views on an issue that we consider central to the efficient and effective operation of the federal courts in California and elsewhere
in the country.

I appreciate the Committee's consideration of my request.

Very truly yours,

/s/

John A. Taylor, Jr.

JAT:mmg

1/ **State Bar Mandated Disclosure**: The position taken by the State Bar of California's Committee on Appellate Courts is only the position of that Committee, and is not to be construed as representing the position of the State Bar of California or its overall membership. Committee activities relating to that position are funded from voluntary sources. Expenses incurred in connection with my testimony at the hearing in Washington D.C. will not be paid by the State Bar of California or any of its committees or sections.