WILLIAM W SCHWARZER
SENIOR UNITED STATES DISTRICT JUDGE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 522-4660
FAX: (415) 522-4632

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

Re: FRAP 32.1

I write in opposition of the proposed Rule 32.1. My opposition is based on my experience as a frequent designee on the Ninth Circuit Court of Appeals as well as on other courts of appeals.

The Committee Note focuses primarily on the treatment of unpublished opinions after they are written, and I acknowledge that it makes an appealing case. My concern is the effect of the proposed rule on judges *while* they are writing opinions: Although the proposed rule does not require a later court to treat an unpublished opinion as precedent, knowing that an opinion may be cited for its persuasive value impacts the author. The Committee Note assumes that where the court of appeals does not treat its unpublished opinions as precedent, the new citation rule would not lead judges to spend more time on them. That assumption will not invariably be true.

The problem is that a future litigant may wish to cite an unpublished decision if, for instance, it discusses a fact pattern superficially similar to the one the litigant faces. The unpublished opinion might appear persuasive based on its facts even though a more careful and nuanced drafting of the opinion would have revealed circumstances that make the cases distinguishable. And, because an authoring judge cannot foresee how an opinion will be viewed and applied in a future case presenting a superficially similar fact pattern, judges writing under the regime of the proposed rule will always have to consider what persuasive effect might be given to their opinion.

The Committee Note implies that judges need not be overly concerned about future litigants citing their unpublished decisions. It contends that even under the proposed rule, litigants will be loathe to cite unpublished decisions—and courts will not take such citations very seriously—because citing such cases constitutes a tacit admission that no published and authoritative case supports the litigant's position. This assertion does not appear sound. As I mentioned above, an unpublished decision may be attractive not because it announces a principle of law not declared elsewhere (indeed, such a case would seem to merit publication), but rather, because it deals with a fact situation facially similar to the one at bar. The fact that no published case treats a fact pattern similar to the case at bar is not normally a weakness for either party, so the deterrent value of the "unpublished" label will be small in such instances. Indeed, a simple electronic search confirms that litigants do, in fact, cite to unpublished decisions as persuasive authority with some regularity in circuits that allow it, and that courts do sometimes reckon with those citations.

Knowing that an opinion may be cited for its persuasive value will therefore lead the author to write with an awareness of its implications. However, because judges in heavily burdened courts of appeals do not have time to write a precise and nuanced opinion in every case, the likely consequence of the proposed rule will be to force judges to write "opinions" which are no more than terse, conclusory statements of their decisions. This will ensure that they will not be cited but will do little to enlighten—and perhaps reassure—the parties about the decision of their case.

Furthermore, the Committee Note's observation that court rules allow litigants to freely cite to

other nonprecedential materials is not entirely apposite. The citation of nonjudicial sources does not implicate judicial resources in the way that citation to unpublished opinions does. The court system need not worry that the possibility of citation will impede the efficient authorship of legal treatises, law review articles, newspapers, or advertising jingles. The authors of the latter two sources probably give no thought at all to the possibility of being cited in court, while the authors of legal treatises and law review articles—who write in the expectation of being cited—thoroughly research and carefully write for their audience. Allowing citation of unpublished opinions presents a special problem of judicial efficiency which the Committee ought to treat with caution.

William W Schwarzer