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To the Appellate Rules Committee:

I write to urge adoption of FRAP 32.1. I have previously submitted my thoughts as testimony to the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet both orally and in writing. I will only note here three areas of concern and address a fourth.

First, Citation is necessary for the democracy to operate. It is the potential for citation that causes members of the democracy to monitor the decisions of the courts. They do so for self-protection. Any issue, no matter how small, may become a source of controversy once the judiciary determines it. The resulting constituencies, which may seem to many insignificant, not only serve to protect instant individual litigants, but advance significant issues to the consideration of appellate courts and executive or legislative branches. No-citation rules sedate the concern of these court watchers because decisions do not become law for all. Worse still, constituencies that might have rallied around an affected individual turn away lest a court's error become citeable.

Second, Citation is the method by which our judiciary, even our entire society, learns as a whole. Any person may write a comment regarding a judicial opinion. By modern research techniques any comment containing its citation can be discovered if there is a chain of citation. If there is compelling logic in that comment, a court considering the earlier opinion may decide a new case another way. Judges accepting the new logic must criticize the old authority cited to it, underscoring the importance of such a contribution for the future. Over time we can expect our knowledge base to identify right, and clarify why error was wrong. In this way it can truly be said that any person, even long after death, can improve our law, and that our law is improved by the contributions of our entire community. In short, no-citation rules operate as a ban on enlightenment.

Here, I feel compelled to argue that no-citation rules make our national goal of Liberty and Justice for All impossible of attainment. Why? Because such a condition can only happen when all of our people come to so know and love a just law so dearly that none of us are tempted to evade it. That can only happen when we, as a community, have developed and inculcated an infinitely just and granular law. The path to that messianic condition is that law be discussed throughout the community and input regarding improvement of the law be solicited from it. Publication and citation keep that process in motion, and give us hope that we shall, one day, achieve such a high state. To the contrary, no-citation rules sedate concern about the developing law, stifling discussion and input.

Third, many comments have suggested that no citation rules benefit indigent litigants. Can it really be said that a criminal defendant is better off not being able to cite an appellate decision holding that the acts he is charged with committing do not constitute a criminal offense at the arraignment stage? Just how much time is required in most cases to isolate such a case? Is that defendant better off going through trial and trusting that at some point an appellate court might reach the same result in his appeal? Who among those suggesting that no citation rules benefit the indigent would, as the judge, feel comfortable denying a criminal defendant the opportunity to cite exculpatory appellate decisions? Wouldn't they feel that in so doing they were compromising basic American values? Is the situation any different for indigent civil litigants?

Finally, I would like to argue that no-citation rules enter the area of protected free speech such that their validity can only be determined after their purpose, the efficacy of their operation in achieving that purpose, and less burdensome alternatives are evaluated.

According to Judge Kozinski, district, bankruptcy and magistrate judges cannot be trusted to differentiate the respect to be accorded the legal reasoning of published opinions signed by three judges from legal reasoning contained in unpublished opinions signed by three judges.

Judge Kozinski insists it is necessary to ban mention of the latter class altogether to protect the public from this presumed inability of our judges to evaluate precedent. But the broad sweep of the rule he justifies on this basis is an interference with free speech. It is viewpoint based because it bans the viewpoint of the judiciary, our law. And it is content based because it bans true attribution of reasoning, which defeats the right of litigants to argue for equal treatment. Whether or not Judge Kozinski's purpose in banning citation of unpublished rules should justify such a rule, alternatives achieving the same purpose that are less intrusive on free speech ought to be proved ineffective before such an intrusive rule is maintained.

This committee expressly determined that judges may be trusted with the authority to determine how precedent or persuasive authority is to be applied, and I strongly concur with that placement of trust. Because that trust may be placed in judges, there is at least one alternative less intrusive upon our notion of free speech than a no-citation rule. Rather than marking certain opinions as published or unpublished, or the like, judges could add a legend to the opinions. Nothing in the new rule prohibits the 9th Circuit from marking any class of opinions with a legend truthfully advising readers of the conditions under which it was made.

Were that done, I am quite sure that a heated constituency would rapidly form calling upon Congress for sufficient resources to operate our appellate courts properly.

All of this makes one point. Citation of opinions make certain that citizens carefully monitor the goings on of the Judiciary.

To conclude, even if the appellate judiciary should fail under the unproven load imposed by making all cases citeable, I would rather that consequence than to allow our system to fail because our leaders chose to abandon core values like freedom of speech, equal protection and respect for the individual at issue in this debate. March of Folly, by Barbara Tuchman, chronicles civilizations that destroyed themselves by betraying core values in the name of expediency, and I would rather the United States not join their ranks.

Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.

FRAP 32.1 is essential to preserve the integrity of not only our judicial system, but our entire system of government.

Sincerely,

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Chairman
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