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Law Offices of the Federal Public Defender

330 S. Third Street, Suite 700

Las Vegas, Nevada 89101

Tel: 702-388-6577

Fax: 702-388-6261

Franny A. Forsman
Federal Public Defender
District of Nevada

John C. Lambrose
Chief, Appellate/Habeas Division
Michael Pescetta
Chief, Capital Habeas Division

Michael J. Kennedy
First Assistant

03-AP-303

February 9, 2004

Via Facsimile- (202) 502-1766
Regular 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

Re: *Proposed Revision to FRAP 32.1*

To the Committee:

I am writing to oppose the adoption of the proposed new FRAP 32.1 prohibiting the circuits from preventing citation to unpublished opinions. I am the Federal Public Defender for the District of Nevada. Prior to my appointment as the Federal Defender, I was a partner in a law firm and specialized in appellate practice; prior to that I was the Supervising Staff Attorney for the Supreme Court of Nevada. This experience is the basis for my comments.

My primary objection is based upon the burden and the disadvantage which the new practice will place upon appointed counsel, particularly CJA panel attorneys, who are often sole practitioners. The Ninth Circuit issues thousands of unpublished opinions and competent counsel would be required to research and analyze those opinions in order to effectively represent their clients. They would be required to pay the cost of electronic research and to expend significantly increased time. If the lawyer is appointed, the CJA fund would be required to reimburse the lawyer for those fees and costs. Defense counsel must engage in the additional research because the government undoubtedly will be citing to unpublished opinions with its far greater resources.

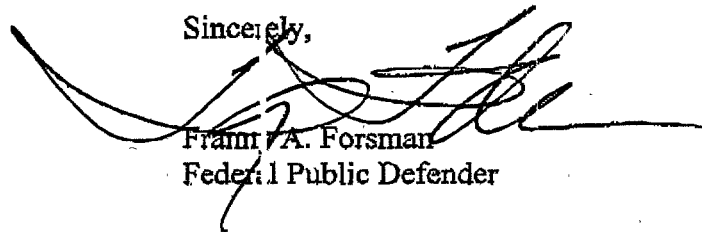
There is a second reason, though, why the Rule is not a good idea. I was a Staff Attorney and a Supervisor for an appellate court. In my experience, opinions which are not published are not published for a reason. They are often not well-reasoned and frequently contain

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insufficient factual or procedural background to permit useful analysis. Yet, in order to provide effective assistance of counsel, I would be required to search these opinions to find any issue which may conceivably assist my client.

I urge you to permit the issue to be decided by each Circuit and not to adopt the new rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank A. Forsman', is written over the typed name and title.

Frank A. Forsman
Federal Public Defender