



Law Offices of the Federal Public Defender
201 West Liberty Street, Suite 102

Reno, Nevada 89501-2027
Tel: 775-784-5626
Fax: 775-784-5369

Franny A. Forsman
Federal Public Defender
District of Nevada

Michael J. Kennedy
First Assistant

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

February 13, 2004

03-AP-383

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 Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing to express my opposition to proposed Rule 32.1 of the Federal Rules of Appellate Procedure, which would prevent any federal circuit court from prohibiting citation to legal opinions that court has deemed unworthy of publication. This rule would only serve as an additional burden on already overburdened courts, and as yet another interference with judicial discretion in an era in which judicial discretion is seemingly under constant attack.

Some judicial opinions are unpublished for a reason they often contain poor factual development and less-than-thorough legal reasoning. Unpublished opinions are, however, a necessary part of our court system. Courts review thousands of cases a year. Many if not most of these cases, however, are of little or no precedential value, and courts simply do not have the time or resources to issue lengthy and thorough written opinions for each of them. Nonetheless, it is important to the individual parties in these case to understand why they won or lost, so the court will issue an opinion but choose not publish it because it does not break new legal ground or resolve issues or questions of any importance to the legal community at large. Requiring courts to allow citation to these opinions will likely have one of two results: courts will be forced to devote valuable time and expense to make sure every opinion they issue is worthy of publication, or, more likely in a large circuit like the Ninth Circuit, courts will simply issue one-sentence or otherwise summary opinions in such cases, leaving attorneys on both sides with no idea of why or where their arguments failed.

Requiring courts to allow citation to unpublished opinions also places a large and unnecessary burden on attorneys, including government-paid panel attorneys. In order to meet their duties of effective representation, attorneys would be required to research every single opinion the court issues, even those that are of so little widespread value that they were not even deemed worthy of

publication by their authors. Likewise, district courts would feel compelled to treat such opinions with deference and, because attorneys are allowed to cite them, give them the same weight they give published opinions despite the fact that the issuing circuit itself does not view them as equal in authoritative value.

Finally, the circuit courts differ greatly from one another in their sizes, caseloads, availability of resources, and subject matters of their cases. The decision of whether to allow citation to, and therefore reliance on and influence of, unpublished opinions should thus rest with each individual circuit.

I appreciate the time and consideration you are no doubt giving to this important matter, and I thank you for allowing me to share my views.

Sincerely,



Ellen Callahan
Assistant Federal Public Defender