FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST SECOND STREET
LOS ANGELES, CALIFORNIA 90012
213-894-2854
213-894-0081 FAX

MARIA E. STRATTON
Federal Public Defender
DEAN GITS
Chief Deputy

CRAIG WILKE
Directing Attorney
Santa Ana Office
OSWALD PARADA
Directing Attorney
Riverside Office

03-AP-199

Direct Dial: (213) 894-4140

January 21, 2004

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

Re: Submitting Comments on Appellate Rules
Proposed Rule 32.1

Dear Mr. McCabe:

As a lawyer assigned to the appellate unit of the Federal Public Defender's Office for the Central District of California, I strongly oppose the proposed rule, because it will adversely affect the quality of my representation of my clients.

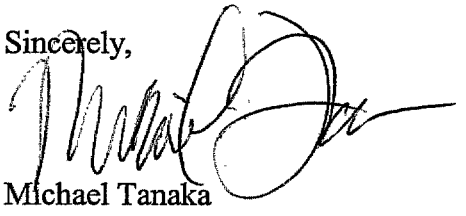
Due to our high caseloads, public defenders do not have the luxury of limitless time for each client. On appeal, a significant portion of that time must necessarily be spent researching the applicable law. The new rule will increase exponentially the universe of case law that must be examined in preparing a brief. Many issues in criminal cases have been litigated hundreds, sometimes thousands, of times in other appellate cases. The dictates of the Sixth Amendment require that competent counsel comb this previously legally insignificant (except to the involved parties) appellate detrius for hidden nuggets that might help his or her case.

The Committee Note suggests that search may not be necessary. As it is, the sources parties may cite are "infinite." The problem, however, is that opinions, unpublished or published, are different than "Shakespearian sonnets and advertising jingles." Judicial opinions form the core of our common law, and courts and litigants will not be free to disregard an appellate opinion, irrespective of whether it was initially designated for publication. The ingrained imperative of stare decisis will not be extinguished by a rule. Any lawyer preparing an appellate brief will have to exhaustively mine unpublished opinions for possible benefit. This will take much time, time that will be taken away from other aspects of my representation.

The proposed rule will also disadvantage individual litigants and defendants in relation to the Department of Justice. Unpublished opinions often will not be persuasive on their own, because they do not contain enough facts. When it is to their advantage, the Department of Justice having litigated virtually all of the criminal cases in the district court, could supply missing facts and add persuasive value to the unpublished case. Individual attorneys and even public defender offices do not have access to the same sources or resources to level the playing field. The proposed rule could allow the Department of Justice to usurp the appellate court's responsibility for documenting the factual (and perhaps, at time, the legal) basis for the decision. And, of course, there would likely be peripheral disputes as to the accuracy and completeness of any supplemental factual representations. Does the Committee really want collateral litigation on the "true" meaning of an unpublished opinion?

I thank the Committee for considering my comments. Please feel free to contact me if there are any questions or the Committee desires an expansion of these brief comments.

Sincerely,



Michael Tanaka
Deputy Federal Public Defender