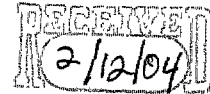


Law Offices of the Federal Public Defender
330 S. Third Street, Suite 700
Las Vegas, Nevada 89101
Tel: 702-388-6577
Fax: 702-388-5819



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

Franny A. Forsman
Federal Public Defender
District of Nevada

Michael J. Kennedy
First Assistant

February 12, 2004

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

03-AP-342

Re: Proposed Revision to FRAP 32.1

To the Committee:

I am writing to encourage the Committee to oppose the proposed new FRAP 32.1 prohibiting circuits from prohibiting the citation of unpublished decisions. I am an Assistant Federal Public Defender assigned to the Capital Habeas Unit, in the Nevada Federal Public Defender's Office. Prior to working as a capital habeas attorney in the Federal Defender's Office, I served for four years as a career law clerk in the United States District Court, Eastern District of Michigan. My experience as a judicial law clerk and appellate attorney in the federal courts forms the basis for my opposition to FRAP 32.1.

There are significant major problems with FRAP 32.1. The rule affords published and unpublished dispositions the same precedential authority. There is no question that the lower courts, including district courts, bankruptcy courts, and agencies within the same circuit, will treat unpublished opinions as controlling case authority. This will place a huge burden on practitioners and the courts. The rule will undoubtedly make legal research more burdensome and expensive for practitioners, as they would be required to locate, analyze, and reconcile unpublished decisions. The rule would also make legal research and opinion construction more burdensome for the courts, and foster speculation among district judges, sister circuits, practitioners, and the public, concerning the resolution of conflicts posed by unpublished decisions that are inconsistent, conclusory, and ambiguous. The circuit courts who share these concerns, will most likely resort to summary dispositions (especially in criminal cases, which has serious due process implications) because of the increased time necessary to craft published opinions in routine cases.

The Committee should not adopt FRAP 32.1 because of its increased burden on practitioners and the courts and because the issue can only be appropriately resolved by the individual Circuit courts.

Sincerely,

Randall S. Lockhart
Assistant Federal Public Defender