Nobody
<nobody@uscbgov.ao.dcn>
01/30/2004 03:46 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Submission from http://www.uscourts.gov/rules/submit.html

03-AP-226

Salutation: Mr.
First: John
MI: M.
Last: Nettleton
Org: Starbucks Coffee Company
MailingAddress1: 2401 Utah Avenue South
MailingAddress2: S-LA1
City: Seattle
State: Washington
ZIP: 98134
EmailAddress: jnettlet@starbucks.com
Phone: 206-318-5937
Fax: 206-318-1653
Appellate: Yes
Comments:

RE: proposed FRAP 32.1

I am writing to express my personal view that the Judicial Conference Committee on Practice and Procedure reject the proposed FRAP 32.1. Unpublished judicial opinions should not have precedential value, and the Federal Rules of Appellate Procedure should not be amended to allow citation of unpublished decisions in court filings. This conculsion results from my 12 years of working as a lawyer and law clerk. I also am admitted to practice before the United States Court of Appeals (Nith Circuit) and the United States District Court (Western District of Washington).

My experience first as an appellate court law clerk and then as a trial and appellate lawyer has demonstrated to me the necessity of carefully drafted and tightly reasoned appellate court decisions. I believe that there is no other element as important as this to continuing the vigor and vitality of the common law legal system in which we practice. Where I live and practice (the State of Washington), the Court of Appeals, which is the intermediate appellate court, issues both published and unpublished decisions. Without a doubt, the unpublished decisions are not of the same quality as the published decisions. The unpublished decisions lack the thorough treatment of issues and arguments that one finds in the published opinions. For better or worse (depending on your point of view), our Court of Appeals recognizes that each instance of an appellate correction of a misapplied multifactor balancing test is not a precedent setting event.

After reading many unpublished opinions, I have concluded that when a decision is unpublished, the writing judge does not take the time to frame the issues and facts of the case so that one can distinguish just

how the case fits into the larger body of relevant law. There is no real explanation about why this case matters to the rest of society or what important legal principles or policy decisions require that other, future litigants and members of society be bound by this decision.

There may be noble reasons for allowing citation to unpublished decisions, such as increased scrutiny on all judicial decisions as a means to improve the quality of all judicial opinions and decisionmaking. Proposed FRAP 32.1 may very well encourage better opinion writing and decision-making. I am not optimistic that this will be the outcome of the proposed rule or that this is the proper means for pursuing this goal.

First, there is a very good reason why unpublished decisons lack precedential value. The facts, law of the case, and trial court verdict taken together as a whole do not merit precedential status. An unpublished appellate decision means that expert, experienced common law jurists weren't convinced that sufficient and valid reasons existed for requiring future litigants to be affected by a particular instance of appellate decisionmaking. Very

Second, sufficient resources do not exist to implement the proposed rule. If unpublished decisions can be cited, then more judicial resources will have to be applied to unpublished decisions regardless of the appellate court's view about the precedential value of a case. The federal judiciary contains the world's most talented pool of common law jurists and support staff, but presently it is understaffed to take on the increased workload that this proposed rule would likely require from judges, staff attorneys, and clerks. Congress is unlikely to fund the cost to this implement this rule, and I know of no means by which the federal judiciary could "self-fund" this rule from new and increased judicial system efficiencies.

Finally, I believe that the federal judiciary's appellate resources would be better spent and applied toward efforts and initiatives that either decrease the time that a case spends in the apellate process. As judges and lawyers, we tend tp go deaf to the phrase "Justice delayed is justice denied." But for most Americans -- and litigants, this is a phrase that still resonates with meaning. When deciding to pursue an appeal, low and moderate-income persons often decide that the interest that would accrue during the appeal period and the cost of the supersedeas bond is too high for them to pursue a potentially meritorious appeal. As you can see, this policy concern also implicates important access to justice issues.

I encourage you to reject proposed FRAP 32.1

John
Nettleton

corporate counsel
Starbucks Coffee Company
Seattle, WA
tel
206-318-5937
fax 206-318-7793

submit2: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/submit.html
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1)
Remote Host:
Remote Address: 10.213.201.7
