United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
February 19, 2004

03-AP-502

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

From the perspective of a career law clerk on the Eleventh Circuit Court of appeals, I am concerned about the implementation of the FRAPAdvisory Committee's proposed New Rule 32.1, which would permit parties nationwide to cite unpublished federal appellate opinions. My concern is that proposed New Rule 32.1 would actually impede the disposition of appellate cases and thereby work a hardship on both courts/judges and litigants. Consequently, forcing circuit courts that have decided against citation of unpublished opinions to do so, seems to be an unnecessary usurpation of their authority to decide cases and publish opinions as they deem best for their respective circuits without a counterbalancing benefit to litigants, the purported beneficiaries of New Rule 32.1.

As the federal circuit courts of appeal have grappled with a burgeoning number of appeals to be decided in an efficient manner, affirmances without opinions and unpublished opinions have proved to be effective ways to resolve expeditiously appeals that do not present novel issues of law. That is, these cases appropriately do not become circuit law because they are decided by determinative precedent, and they are not intended to be used for reasoning or argument in future cases. There simply is no need to continue to fill bound volumes, multiplying at an astounding rate nationally, with redundant case law. Published opinions generally are so designated because they present either first-impression issues for a particular circuit or a permutation on circuit law as yet undecided. Many published opinions involve complex and sophisticated issues of law.

With an ever increasing number of merits opinions to write, circuit judges necessarily must apportion their time and that of their law clerks for the most effective and efficient use. The majority of opinion-drafting time is appropriately spent on carefully composing published opinions that will become circuit precedent. These opinions are "fine tuned" not only to decide the case for the specific litigants involved but also to become the determinative circuit precedent for the legal issue(s) in future cases. In the composing process, each sentence of the legal analysis must be tested and measured in this far-reaching crucible, an extraordinarily painstaking and time-

consuming process.

In contrast, because unpublished opinions are resolved on existing precedent, there is no need to spend the amount of time on them that circuit judges and their law clerks spend on published opinions. Frequently, unpublished opinions are based upon memoranda or draft opinions by circuit staff attorneys. Opinions designated as "unpublished" or "non-precedential" in order to accord litigants expeditious decisions are not subjected to the refinement of published opinions because the law has been established as to the specific legal issues raised. Therefore, they may contain language that is imprecise or misleading to litigants and, consequently, cause time-consuming problems in future cases when appellate courts have to distinguish unpublished opinions when they are cited.

The Eleventh Circuit ranks third among the circuits in appeals terminated. The individual active judges in our circuit, however, write more merits termination opinions than any other circuit----in excess of 800 per active judge annually. Of these opinions, the majority are unpublished, but this circuit does not make these unpublished opinions available to West's Federal Appendix, WestLaw, Lexis, or other databases. Unpublished opinions are provided by the court to only the litigants in a particular case and are not generally available, even to district judges. Consequently, unpublished opinions are effectively unavailable in this circuit. If litigants became able to cite unpublished opinions in briefs and other court filings on a national basis, as New Rule 32.1 would permit, then an unfair or unequal access situation as to the unpublished opinions in our circuit would be created, a problem apparently unanticipated by the Advisory Committee in formulating proposed New Rule 32.1.

Additionally, more time would need to be devoted to writing these opinions which are not currently intended to be the rationale for future cases. The result would be delay, not only of the production of these opinions but also that of precedential, published opinions, because spending more time on unpublished opinions would encroach upon the time now given to published-opinion composition. The cumulative delay in the resolution of both published and unpublished cases would not be a desirable result for litigants, particularly for those litigants at the lower end of the socio-economic stratum. This inefficient delay in disposition of appeals, particularly, unpublished appeals, which currently have a relatively expeditious decision time, would then severely impede the strained resources for the courts and poorer litigants.

Significantly, allowing the citation of unpublished circuit opinions strikes at the autonomy of the circuits that have made a considered determination that citation of unpublished opinions is not workable for deciding effectively and efficiently non-precedential opinions in their circuits. Because the federal circuits vary as to population, and, consequently, number of appeals, proposed New Rule 32.1 does not affect the circuits equally, although it facially purports to be evenhanded, and the Advisory Committee touts it as creating uniformity in appellate practice nationally. That is,

circuits having distinctly larger numbers of appeals are more adversely impacted if they have to spend inordinately more time in drafting unpublished opinions, delaying their production and disposition rate for both published and unpublished opinions, than less populous circuits with fewer appeals.

All federal and state courts have local rules dictating practice in their courts, and appellate attorneys regularly comply with the different court rules in the courts in which they practice, an integral part of being a litigator. The FRAP Advisory Committee in Washington should not foist proposed New Rule 32.1 by fiat on circuit courts of appeal in the guise of uniformity of practice for litigants when actually the result will be to delay disposition of published and unpublished opinions and further strain resources for both courts and litigants, the latter ostensibly being the intended beneficiaries. Furthermore, in the Eleventh Circuit, the ability to cite unpublished opinions does not equate with the ability to obtain these opinions.

Proposed New Rule 32.1 also would impose the view of the removed and remote Advisory Committee on the autonomy of circuit courts that have decided that the best and most efficient way to administer and decide the large number of appeals requiring merits opinions is not to permit citation of unpublished opinions in their respective circuits. Each circuit should be able to establish its own rules of practice, and litigants should comply with the rules of the respective circuits rather than the circuit courts of appeal being forced to accommodate practicioners. For all of these reasons, proposed New Rule 32.1 is ill-advised and should not be implemented nationally.

Thank you for your time and consideration.

Respectfully submitted,

Mary Eugenia Gates