United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

03-AP-054

Chambers of
Robert W. Gettleman
Judge

(312) 435-5543

December 11, 2003

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

Re: Proposed FRAP 32.1

Dear Peter:

I'd like to offer a few observations from a district judge's perspective on the proposed Federal Rule of Appellate Procedure 32.1, which would preclude any prohibition or restriction on the citation of unpublished opinions. Although I appreciate the good intentions behind this proposed rule, and the frustration that practitioners and district judges sometimes feel when they are unable to utilize an unpublished opinion that they perceive as being helpful in a particular case, I've concluded that the proposed rule would be a mistake.

Perhaps there was a time when the citation of unpublished opinions could have been regarded as a harmless indulgence, one that could be given whatever weight a reviewing judge concluded it deserved. That time, however, has long since passed. The caseloads of our courts of appeals have increased to the point where it would be virtually impossible for the judges of those courts to devote the care and attention to the thousands of unpublished opinions that are issued each year that would be required if they are regarded as having any precedential, or even "persuasive" value. As I understand it, our largest circuit, the Ninth, issues approximately 4000 unpublished opinions a year, compared to only about 700 published opinions. In the Seventh Circuit, the numbers are 784 unpublished opinions to 598 published opinions. With the caseloads growing, we must assume that the number of unpublished opinions, if not the ratio of unpublished to published, will continue to grow.

The inevitable result of Rule 32.1 would be, in my opinion, the gradual elimination of reasoned unpublished opinions in favor of summary dispositions without any reasoning. There is simply no way that our courts of appeals have the resources to write opinions in every case that would have a full exposition of the facts, a full examination of precedent, and a full discussion of the rationale of the decision given the reality of the numbers. If they were to try it, I'm confident in predicting that their product would be one of inferior quality. I am afraid that we would probably see instead dispositions from the courts of appeals which read something like, "Having carefully considered the record and the briefs and arguments of the parties, the court affirms [reverses and remands] the judgment of the district court."

Having practiced law for 25 years before taking the bench, and now in my tenth year as a district judge, I know how important unpublished opinions are to the litigants and the courts being reviewed. Even though these orders are often brief (sometimes they are not), and although the reviewing court's rationale is not as thorough as we expect from fully published opinions, these unpublished rulings are crucial in: explaining to the litigants how and why the reviewing court reached its decision; exposing errors of fact or law by the court of appeals that can be brought to the attention of the panel or the full court; and explaining to the district judge the reasons his/her decision has been affirmed or reversed. Summary dispositions would not serve any of these functions. Summary dispositions would, instead, be a disservice to the litigants as well as to the judge whose decision is being reviewed.

There is one other reason I believe proposed FRAP 32.1 would be a mistake. Each circuit, just like each district, has its own culture and traditions. I see no reason to have a national rule that intrudes upon this type of local rule-making. What works for the Seventh Circuit may not work for the Ninth. It is interesting to note that most states have judicially imposed "do not cite" rules of one type or another. They differ from state to state, just as they differ from circuit to circuit. I see no reason to put the federal circuits in a straight jacket when the states are not.

Although I agree with the observations of some that occasionally courts of appeals issue as unpublished opinions important ruling that should be citable – if for no other reason than to dispute their rationale or to point out conflicts within the circuit or among the circuits – these occasional errors can be addressed by allowing the litigants, and perhaps expanding that to the lower courts, to petition the courts of

appeals to fully publish such opinions. Perhaps such requests should go to the entire court rather than just to the panel that issued the opinion. In short, there are less drastic methods of addressing the problem of erroneously unpublished opinions than enacting a uniform rule that intrudes upon local rule-making and encourages summary dispositions.

For these reasons, I respectfully submit that proposed FRAP 32.1 should not be adopted.

Very truly yours,

Robert W. Gettleman

Robert W. Gettleman
United States District Judge

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