UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CHAMBERS OF
MILTON I. SHADUR
SENIOR JUDGE

CHICAGO, ILLINOIS 60604

December 18, 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: Fed. R. App. P. ("Rule") 32.1

Dear Peter:

It's a pleasure to be in touch with you again, albeit this time in writing and at a distance (unlike the regular opportunities that we had to meet periodically during my decade as a member and then chairman of the Evidence Rules Committee). This letter is occasioned by my having learned recently of the consideration now being given to a proposed Rule 32.1.

Because large District Courts such as the one on which I sit create the danger that we judges may operate somewhat like separate solar systems, with little occasion for the exchange of views and ideas, some of us here in our District have taken to meeting for lunch weekly on a less structured basis than our monthly meetings of the entire court. This past week my colleague, Judge Robert Gettleman, mentioned the new proposed Rule 32.1 during that luncheon session, and because of my experience with and interest in the question I asked him to provide me with a copy of his December 11 letter to you--and he has graciously done so.

As you may or may not know, since taking senior status I have added to my retention of a full civil and criminal calendar here in the District Court by sitting regularly by invitation with Courts of Appeals around the country three or four times a year. Up to now I've sat from time to time with a majority of those circuits, and next year I'm scheduled to add to the list as the result of a recently-received invitation from the new Chief Judge of the Sixth Circuit.

That experience has of course exposed me to a number of variants of circuit rules that limit opinion publication or citation or both. It seems to me that Bob Gettleman's letter has

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dealt on a balanced basis with a number of the competing considerations in that respect, and I like my good colleague have come out on the side of those who would continue the present policy of allowing "dealer's choice" on a circuit by circuit basis, rather than enacting a Procrustean rule that binds all circuits. But I'd like to add three comments that stem from my practical and first-hand exposure to the problem:

1. As chance would have it (serendipity seems to strike with surprising frequency in the judging business), only last week I had occasion (together with the other members of the appellate panel with whom I had sat) to consider--and to reject--a request by a litigant for the publication of the work product that our panel had chosen to treat as an unpublished and uncitable order--a memorandum disposition. That case had originally resulted in a published opinion, but on motion for reconsideration we came to a different result as to part of our remand order, although I (who had authored the original opinion) wrote a short dissent in that respect. There was a perfectly legitimate reason for giving the case such nonprecedential value: We all agreed that the one area of the opinion on which we did not share total agreement was really impacted by the special circumstances of the case before us, and all of us held the view that it would be undesirable to create circuit precedent under the circumstances. If the now-proposed Rule 32.1 were in effect, that deliberate and reasoned determination on our part would have been foreclosed. And I cite that only as one of the numerous kinds of situations in which the alternative that would have been blocked by the new rule can represent a sensible choice.

2. Because one of the considerations that leads to the distinction between published and unpublished opinions is the legitimate desire to avoid the added work required to give full-bore treatment to every case, very often a disposition of the latter kind will begin with some statement such as "Because the litigants are entirely familiar with the factual background of this case, we will

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CHICAGO, ILLINOIS 60604

eschew any discussion in those terms except as our later legal analysis may require it." That then is followed by a reasoned exposition of the applicable law--probably shorter than would have been the case with a full-blown published opinion, but reasoned nonetheless. If dispositions of that nature were to be made fully citable as precedent, the proper development of the law in later cases could be warped materially. Both the lawyers and the judicial panels in later cases would have no principled way to determine whether the earlier case should or should not be followed as precedent for the current case, because they would necessarily be unaware of the similarities or differences between the factual matrices of the earlier and later cases--the kind of factor that forms the basis for either distinguishing or failing to distinguish earlier caselaw. Whenever I think of that analytical process, I'm reminded of the late Edward Levi's wonderful short book Introduction to Legal Reasoning, which remains one of the most insightful treatments of the subject that was produced during the last century.

3. What I've just described is a jurisprudential concern--and, I think, an important one. But let me add something about the major increase in workload that would necessarily accompany any requirement for universally citable opinions. When I sit with a Court of Appeals, it is most often for a three-day session to enable me to fit that appellate work into my full calendar in the District Court, while the appellate judges with whom I sit are of course committed to a full week's caseload. Typically we will have six cases a day on our calendars (variations depend on the weighting of cases in terms of their complexity). If I had to do six full-blown opinions to carry my share of the three day workload (and remember that a Court of Appeals judge must correspondingly generate ten opinions for a full week's sitting), rather than having a substantial part of the assignment in the form of work products that the panel finds appropriate for noncitable memorandum dispositions, the work required would be dramatically increased. And absent a corresponding increase in the number of judges available to

UNITED STATES DISTRICT COURT
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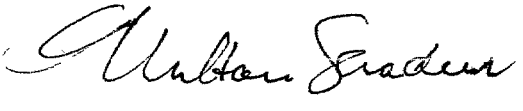
CHICAGO, ILLINOIS 60604

do that work (which as you know is impossible for a number of reasons, even if it were to be deemed desirable as a matter of policy), the inevitable result would have to be a decline in the quality of work--too heavy a price to pay, I believe, for whatever advantages the proposed Rule might be thought to have.

In any case, I recognize that there may be room for differing views on the kinds of issues that I've dealt with here, just as with some of the other matters covered by Judge Gettleman. But the very potential for such differences seems to me to be a powerful argument for leaving the policy judgments to the respective circuits, rather than adopting some bright-line rule (such as that in proposed Rule 32.1) that would be at odds with the reasoned judgment arrived at by any individual circuit.

Again my best personal regards.

Sincerely,



Milton I. Shadur

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