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VIA FACSIMILE AND ELECTRONIC MAIL

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

Dear Mr. McCabe:

I have been observing the public debate about the adoption of proposed Federal Rule of Appellate Procedure 32.1 in the media.[1] Having read the arguments, I would suggest that the two sides may be talking past each other. Opponents of the rule predict dire consequences if the rule is adopted in those circuits that now have local rules prohibiting citation of unpublished opinions, while supporters of the rule point out that local rules that are consistent with the proposed federal rule have worked well in those circuits that have adopted them. Both sides may well be right.

I believe this seemingly genuine disagreement could easily reflect different realities of practice in different parts of the United States. Frequently, federal practice is heavily influenced by the local culture of the legal community in the states where the federal courts are located. While the federal courts across the nation operate according to a relatively consistent set of

[1] See, e.g., Edward Lazarus, The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions Why It Will Be Harmful http://writ.news.findlaw.com/lazarus/20031127.html. (opposing the proposed rule); Howard Bashman, How Appealing http://appellateblog.blogspot.com/2004_02_01_appellateblogarchive.html#107664576068916003 and http://appellateblog.blogspot.com/2004_02_01_appellateblog_archive.html#107655537613229529 (supporting the proposed rule).

written rules, the legal cultures in various parts of the country are quite different. The difference in local rules may thus may reflect different realities in how lawyers perform their functions. The distribution of the circuits that maintain a strict non-citation rule appears to confirm this seeming intuitive conclusion. I doubt it is by accident that the three regional circuits that maintain such local rules are the Second, the Seventh and the Ninth--which contain Chicago, New York, and Los Angeles, respectively. And, of course, the Federal Circuit--which also maintains a strict non-citation rule, is a nationwide court, with substantial litigation growing out of these cities. As most litigators are aware, these cities are home to some of the most aggressive legal communities in the country. Rules that might work well in places such as Washington, D.C., Philadelphia, Boston and Atlanta, may not work well in New York or Los Angeles.

The citation of unpublished opinions is precisely the kind of practice that would be subject to such regional variations. An occasional citation to an unpublished opinion that is truly relevant may cause no harm and may, in fact, advance the proper resolution of a case. But, as anyone who reads unpublished opinions on a regular basis is aware, they are also capable of abuse. If unpublished opinions are aggressively mined for stray phrases that *sound* helpful when taken out of context, they can be the source of real mischief. If their use is pushed to the limits of what is arguably ethical, they can be the source of considerable confusion. And, because there are so many of them, it can often be very difficult to distinguish them or argue that they are not on point. Much ink, and many pages of briefs, can be wasted in trying to persuade a court to ignore the supposedly relevant phrase or passages. In other words, if some measure of common sense is employed, citation of unpublished opinions may be no problem at all; but in the hands of lawyers accustomed to scorch-the-earth litigation, they can cause serious problems.

If my analysis is correct--and I believe it is--this may be an area best left to local control. The judges of those circuits where strict non-citation rules are in force know their own legal communities and are probably in the best position to judge whether repealing or relaxing the rule is going to promote the efficient conduct of litigation or impede it. The strong differing views on this issue may well reflect the reality that lawyers behave differently in different legal communities, and those judges who fear repeal of the strict non-citation rule are no doubt responding to their experiences with the lawyers that regularly appear before them.

I have obtained a fair amount of experience in various federal courts over the last 24 years, having worked for a federal agency, in the Civil Division of the Justice Department and for many years in private practice, so think I do know a fair amount about litigation in the federal courts across the country. And I do believe that my assessment of what's going on may explain the sharp division of views on this issue. If I am correct about this, then it would seem to follow that the proposed national rule allowing the unrestricted citation of unpublished opinions is a bad idea. This may be a matter best left to the various circuits to work out for themselves.

Perhaps, over time, as technology changes, as federal practice becomes more homogenized nationwide, the four circuits that have strict non-citation rules will modify or repeal their rules. But it seems like something that should occur from the bottom up by evolution, not by fiat from Washington. In light of these observations, I strongly encourage the committee not to adopt the proposed rule at this time. Perhaps the matter should be revisited in a few years when the rule truly reflects a national consensus, which does not appear to be the case at this time.

Sincerely,

/s/

Thomas M. Barba