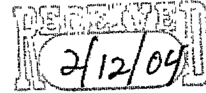
United States Court of Appeals
For the Seventh Circuit



03-AP-335

Chambers of
Kenneth F. Ripple
United States Circuit Judge
208 United States Courthouse
South Bend, Indiana 46601

February 12, 2004

The Honorable Samuel A. Alito
Chair, Advisory Committee on the Federal Appellate Rules
United States Court of Appeals
Room 357, 50 Walnut Street
Newark, NJ 07101

Dear Sam:

I write in support of the Committee's proposed Rule 32.1. Although I have one reservation about one aspect of the provision, the general thrust of the proposal will have a salutary effect on practice in the courts of appeals.

The simple fact of the matter is that unpublished orders do exist and are decisions of the courts that issue them. They provide helpful guidance to the resolution of similar cases in the future. Judges do rely on them. Indeed, just last week, a staff attorney presented the panel with a memo in a case for decision under Rule 34 that cited many unpublished orders of the court as help in coming to a resolution of the matter before us. Under the present rule, the parties were not permitted to cite this material nor were we allowed to rely on it in our order. Certainly, if we are going to rely on this material as an internal reference source (and it would indeed be artificial to suggest that a judge ought to forget what he or she did in January when confronted with the same situation in February), I see no reason why the parties ought not be able to cite and comment on the material.

Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. Although circuit judges are supposed to issue a published opinion whenever they encounter an issue upon which there is no precedent, the fact is that they do not always do so. We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order. I see no reason why we ought not be allowed to consider such material, and I certainly do not understand why counsel, obligated to present the best possible case for his client,

should be denied the right to comment on legal material in the public domain. Indeed, there is perhaps no better testimony as to the importance of this material than the fact that the Supreme Court of the United States has seen fit on occasion to grant certiorari in cases resolved by unpublished order.

There is, moreover, a wholesome, and perhaps necessary, discipline in our ensuring that unpublished orders can be cited to the courts. In essence, the arguments against allowing citation of this material stress the need for a method of handling expeditiously the high volume of cases that come through the courts of appeals. Allowing counsel to cite this material will go a long way toward ensuring that unpublished orders meet at least minimal standards of completeness and frankness. It also will help to ensure that the courts of appeals issue such dispositions only when there is no controlling circuit precedent. In short, relegating this material to non-citable status is an invitation toward mediocrity in decision-making and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered. Public accountability requires that we not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves.

Although I believe that the general thrust of the rule is salutary, there is one aspect of the draft that needs a second look by the committee. Many unpublished dispositions are in the area of prisoners' rights and habeas corpus. In these matters, the prisoner often is acting pro se. It is my understanding that, in many jurisdictions, prisoners are not afforded, for security reasons, access to the internet. It would indeed be an uneven playing field to permit governmental defendants and respondents to cite unpublished orders to the court while a whole class of litigants does not have access to the material. Requiring the government to provide copies of the cases that it has cited will not solve this problem because it places, understandably, no obligation on the government to furnish the prisoner with decisions that arguably support his position. With advances in automation, it may be quite possible to afford prisoners access to this material through electronic means. Alternately, it might be possible to afford them access in other ways. Indeed, perhaps this problem is best addressed in some manner other than a national rule.

I appreciate very much the opportunity to comment on this proposed rule. I wish you and your colleagues the very best as you continue your work.

Sincerely,

Kenneth F. Ripple

KFR:tw

cc: Peter McCabe, Esquire