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Peter G. McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
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Dear Mr. McCabe,

I am writing to express my opposition to proposed Rule 32.1, which would require federal courts to allow parties to cite to unpublished opinions. The costs of this Rule decidedly outweigh its benefits, and the Advisory Committee has advanced no good reasons for overruling the wisdom and local knowledge of the various circuits that have established rules limiting citations to unpublished opinions.

The Advisory Committee's main argument in favor of Rule 32.1 seems to be that courts allow citation to a wide range of materials, and there is no good reason for treating unpublished opinions differently. The Committee considers one argument in favor of existing practice, but its inadequate handling of that argument reveals the leading flaw of the proposed Rule. Some argue that Rule 32.1 would induce judges to spend more time crafting unpublished opinions. The Committee responds that this would be so if the proposed Rule required that courts treat unpublished opinions as binding precedent, but it does not do so. The Committee also notes that most unpublished opinions are already widely available to the public.

This ignores a more subtle likely effect of Rule 32.1. Unpublished opinions are unlike other material, besides published opinions, that parties may currently cite: they are written by federal judges acting in their official capacity of adjudicating legal disputes. As such, they have more natural authority than other kinds of

material. Moreover, lower court judges will naturally want to avoid being seen as ruling inconsistently with what circuit judges have done when confronted with similar facts, and hence may want to spend considerable time parsing the language in on-point unpublished opinions. Circuit judges themselves will want to avoid the appearance of ruling inconsistently with unpublished opinions.

In response to these likely reactions to the citation of unpublished opinions, judges may indeed choose to spend more time crafting the language in unpublished opinions, to reduce the chances that citations to those opinions lead to future mischief. Better-crafted opinions might seem like a good outcome, but at what cost? If judges simply spent more time at their jobs, the resulting overall judicial product might indeed improve. However, my sense is that most federal judges already see themselves as stretched to the limit. Thus, if they spend more time writing unpublished opinions, that is likely to come at the cost of less time spent on published opinions, and that would indeed be a very serious cost, as good opinions are extremely hard to write, and require much time and craftsmanship.

Indeed, given those considerations, my own guess is that the likely judicial response to Rule 32.1 would actually be to spend less time on unpublished opinions. Parties are less likely to cite barebone opinions with few facts and fewer statements of law; realizing this, judges will try to ward off the mischievous effects of the Rule by writing barebone unpublished opinions. The costs of the Rule would then fall on the parties in cases with unpublished opinions--a large percentage of federal cases--who will receive less explanation of why the court has decided their cases in the way it has.

The only real positive argument that the Committee makes in favor of the proposed Rule is that it will expand "the sources of insight and information that can be brought to the attention of judges and mak[e] the entire process more transparent to attorneys, parties, and the general public." If judges respond to the Rule as I hypothesize in the preceding paragraph, by writing shorter, less informative unpublished opinions, the entire process would become less transparent, not more. As for expanding the sources of insight and information, most unpublished opinions are misleading sources of insight. Three circuit judges have usually signed them, but that does not mean that three circuit judges have carefully reviewed and considered the language in those opinions. In most cases, they

simply have not, and they cannot and even under Rule 32.1 they will not. Federal judges today simply do not have the time to give such attention to every case before them. That is why we have seen the explosion of unpublished opinions over the last few decades. This is not a pleasant fact to consider, but it remains a fact, and changing the rules will not make it any less of a fact. Lawyers and lower judges will be prone to give these unpublished opinions more weight than they deserve. Current citation rules prevent them from doing that, and rightly so.

One final argument that the Committee advances is that uniformity between circuits will make it easier for lawyers who practice in different circuits to figure out which rule applies in the circuit they are currently arguing before. This is a particularly weak argument for at least three reasons. First, even if one buys the argument that uniformity between circuits is desirable, a national rule against citation of unpublished opinions would do the trick just as well. Second, the hardship that this argument addresses just does not seem that hard. Is it really so difficult for lawyers to figure out the rules of the court before which they are arguing? In writing a brief, doesn't any competent lawyer have the rules of the relevant court available to check and make sure that the brief complies with all of the technical details of the court's rules? The Committee points to no epidemic of sanctions against lawyers for violating the current rules, and I highly doubt it could find more than a few cases at most. Third, even if, contra the last point, one believes there is some relevant hardship in keeping track of the rules of different courts, that still does not necessarily argue in favor of uniformity between circuits. Most lawyers who practice before different courts are probably most likely to practice before federal and state courts in the same region, rather than before different federal circuits. Thus, the uniformity that would benefit most lawyers is uniformity between federal and state courts in the same region. This actually argues in favor of allowing different circuits to set their own rules, which would allow each circuit to take into account the prevailing rules of state courts within their region.

For these reasons, I see little benefit and considerable harm resulting from Rule 32.1 if passed.

Sincerely,

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