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Standing Committee on Rules of Practice and Procedure
Advisory Committee on Appellate Rules
1 Columbus Circle, NE, Ste. 4-170
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Members of the Committees:

I write to comment on proposed Federal Rule of Appellate Procedure 32.1, which would allow citation to the unpublished and non-precedential opinions of all federal appellate courts.

I oppose the adoption of such a rule, in large part because of the compelling reason of which the Committee is no doubt already aware – namely, that the federal Courts of Appeals are inundated with cases for all of which they cannot provide binding opinions. Some 80% of all appeals today are resolved through a type of order which falls under the rubric of "unpublished" and/or "non-precedential" opinion.[1] Crafting opinions in which each sentence must be reviewed not only for its correctness but also for the consequences it might entail, and to do so for each appeal, is beyond the power of the Courts of Appeals as they are currently constituted. There is no dispute that federal appellate judges already make extraordinary efforts to do the jobs they do. There is simply no way they could quintuple their workload.[2]

The Notes of the Advisory Committee on Appellate Rules, however, imply that this argument is not well-taken:

> [The Rule] does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about

[1] For the purposes of this comment, I will use the words "unpublished opinion" to mean the same thing as the phrase "written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like" as that phrase is used in Rule 32.1(a).

[2] While many proponents and opponents of Rule 32.1 agree that more judges should be appointed to the federal appellate bench, no such expansion of the Courts of Appeals is imminent nor is such an expansion a condition to the adoption of Rule 32.1.

> what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the citation of judicial dispositions that have been designated as "unpublished" or "non-precedential" by a federal or state court – whether or not those dispositions have been published in some way or are precedential in some sense.

To paraphrase in a way that I hope is accurate, the response to opponents of the Rule would be: "The Rule allows courts to continue deciding 80% of all federal appellate cases through unpublished or non-precedential opinions. It will not affect the courts' workload."

This argument, however, relies on a false assumption – namely, that all unpublished opinions can be cited in their current form with no or little modification. This is simply not the case. First, the fact that judges in some circuits have determined that the unpublished opinions *that they have written* should not be cited is a strong indicator that there is a difference between these unpublished opinions and the binding, published precedent which all courts freely allow litigants to cite.[3] Unless one believes that such judges have prohibited citation of unpublished opinions for an improper reason, such as to shield from scrutiny unprincipled or arbitrary decisions,[4] one must admit that different treatment implies difference in substance. Judges know whether the opinion they are writing will be binding, published precedent or an unpublished opinion, and will vary the content of the opinion according to the purpose for which it will be used.

In what ways are unpublished opinions different? There are a myriad of answers to this question and no doubt the Committee has received most of them. Some proponents of the Rule argue that unpublished opinions are different only in the quality of the legal issues they seek to resolve; in other words, unpublished opinions are used to decide the "easy" cases.[5] But that only

[3] That some circuits allow unpublished opinions to be cited does not undermine the argument. This is merely a determination by the judges of those circuits that the opinions they write can withstand the scrutiny that citation may bring. Presumably, those circuits draft unpublished opinions with an eye to their rules on citation. Similarly, circuits that prohibit the citation of unpublished opinions write their unpublished opinions with those rules in mind. Because Rule 32.1 requires all circuits to allow the citation of their unpublished opinion, it forces judges in circuits that prohibit the citation of unpublished opinions to radically change the way they write their opinions.

[4] Such a belief is not only insulting to the federal judiciary, but is also supported by no hard evidence. While some proponents of Rule 32.1 have hinted at "anecdotal" evidence, I have seen no references to specific examples of such behavior by any federal appellate judge.

[5] A variant of this argument is that allowing the citation of unpublished opinions will make no difference in practical terms because most unpublished opinions are "easy" cases in which there is already ample precedent. This begs the question of why proponents would make such strenuous efforts to put into effect a rule which the Committee admits is controversial, over the opposition of a substantial portion of the bench and bar. Surely,

gives an incomplete picture for unpublished opinions are also different in their comprehensiveness. Unpublished opinions often lack a detailed explanation of the facts and legal debate in the case, presumably because the intended audience of unpublished opinions, the parties to the case, already knows these things. If an unpublished opinion is to be cited, and used, in another case, it is incumbent on the court writing an unpublished opinion to provide this context, which requires a great deal of time and thought.

Imagine a panel of appellate judges who are faced with a case which they believe is distinguishable from prior precedent, but in a way which is not novel or noteworthy and therefore decide that an unpublished opinion is sufficient to resolve the case. If the panel is part of a circuit in which unpublished opinions are not citable, its task is relatively easy – it may briefly explain its reasoning, including one or two sentences explaining why the case is distinguishable. However, if the panel is part of a circuit in which published opinions are citable, its task is more arduous – it must now carefully delineate the facts of the case and explain in greater detail why this case is distinguishable from precedent. If it fails to do so, there is a risk that in the future, an unscrupulous lawyer or a lawyer who has not done a thorough job of researching the case law will be able to create the impression of a split within the circuit where none exists.

The implementation of Rule 32.1 will likely lead to one of two results -- neither attractive. First, judges may attempt to spread their limited time and resources more evenly among all their cases. Given that most federal appellate judges already report that they are overworked and overstretched, the most likely result of this will be that none of their opinions receive the amount of care they deserve. Alternatively, federal appellate judges may resort to a tool that is already at their disposal and that is already being used in the busiest circuits – issuing orders that resolve an appeal but lack any reasoning whatsoever. The use of such judgment orders entails significant costs, because the parties of a particular case are given no indication of the basis upon which their case was decided and further insulates the disposition from review from the Supreme Court. At the same time, proponents of Rule 32.1 will not gain any of the benefits they seek since such judgment orders will carry little citation value.

At the base of this debate may be some confusion about what it is Rule 32.1 seeks to do. This confusion is encapsulated in the words of one proponent of the Rule, who argues that "There is something intrinsically troubling about nullifying the precedential value of so many properly adjudicated cases and, thus, in essence, creating a giant reservoir of 'second-class'

allowing the citation of unpublished opinions must make a difference to the lawyers who seek to cite such opinions. In any case, the United States Supreme Court has felt compelled to discuss unpublished district court opinions, which would not be binding even if published, and certainly not on the Supreme Court. See, e.g., Wilson v. Layne, 526 U.S. 603, 616-617 (1999). It is difficult to imagine that district court judges, magistrate judges and bankruptcy judges could any more easily ignore unpublished circuit court opinions.

decisions." However, it is not "properly adjudicated cases" which hold precedential value and which are to be cited by future litigants; it is the words of the court in adjudicating those cases. Those words are drafted to accomplish certain goals. If the authors, by design, make the words insufficiently comprehensive to be cited, then they ought not to be cited, no matter how proper the adjudication.[6]

This is the reason why "the 'unpublished' opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the 'unpublished' opinions of the Seventh Circuit cannot be cited to the Seventh Circuit," or why "parties [may] bring to a court's attention virtually every written or spoken word in existence except those contained in the court's own 'unpublished' opinions." The court that wrote those opinions has determined that its writings, its words, cannot withstand such scrutiny. Rule 32.1 is not merely "an extremely limited" rule which seeks to allow litigants to refer to opinions which are already available to the public. Rule 32.1 seeks to do nothing less than take the words of appellate court judges and use them in ways that those same judges did not intend. None of the arguments in favor of Rule 32.1, of which I am aware, is sufficiently compelling to override a judge's own determination of the uses for which his or her words are fit. For that reason, I urge you not to adopt proposed Federal Rule of Appellate Procedure 32.1.

Sincerely,

Nhan Vu
Assistant Professor of Law

[6] The addition of the description of unpublished opinions as "second-class decisions," adds nothing to the argument. Unpublished opinions are things, not persons; there is nothing unjust about differentiating between them in ways that give less credence to one than the other.