Penn Law
UNIVERSITY of PENNSYLVANIA LAW SCHOOL

3400 Chestnut Street
Philadelphia, PA 19104-6204

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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 am writing to urge you not to adopt proposed Federal Rule of Civil Procedure 32.1, which would allow litigants in the federal courts to cite unpublished opinions, in its current form. Based on my experiences as a clerk to a Ninth Circuit Judge, a legal advisor to the vice chairman of the U.S. International Trade Commission, an attorney in private practice and a law professor, I believe that the proposed rule is a bad idea. If it is enacted, the rule would disadvantage poorer litigants, undermine respect for the judiciary, and produce substantial confusion about the state of the law across the United States.

Rather than adopt Proposed Rule 32.1, I suggest that you adopt the exact opposite rule. If you are going to pass a uniform rule across the circuits on the citation of opinions designated as unpublished, that rule should prohibit their citation.

The heavy case load borne by federal judges is well documents and widely acknowledged. Circuit courts deal with this heavy case load is many ways, including disposing of most cases using an unpublished or memorandum opinion. The Ninth Circuit, the nation's largest, disposes of about 80 percent of its cases through memorandum opinions. Most of the 4000 unpublished opinions produced by the Ninth Circuit each year are very short, with little discussion of the facts and law and a cursory statement of the rationale for the holding. These cases can be handled with short opinions because the judges are unanimous in their view that the outcome is straightforward and the case does not raise any novel legal issues.

Although these opinions are short and currently cannot by cited by subsequent litigants, they play an important role in the administration of justice. The short rationales provided by the courts in memorandum opinions let the litigants know that their arguments have been heard and addressed by the court. They thus help maintain respect for the judiciary.

The proposed rule threatens to undermine this respect because many judges will respond to the proposed rule by writing even shorter memorandum opinions. Such opinions will give no assurance to the litigants that they have been heard.

And for what? The proposed rule is likely to have almost no effect on the outcomes of these cases. The cases that are designated for unpublished disposition are done so because the judges agree on the result and do not find that there are any issues that would merit a precedential decision.

The proposed rule will also disadvantage poorer litigants. The poor are already at a disadvantage in litigation against wealthier litigants. The proposed rule will exacerbate their disadvantage because wealthier litigants can more easily afford to sift through the unpublished opinions to look for gems to cite. For many poor litigants, the costs of creating or rebutting such arguments are likely to be beyond their reach.

Memorandum opinions not only aid the litigants, they also help the courts and the legal system by allowing the judges to focus on writing published opinions. Such opinions raise novel legal issues and serve as legal precedent. In our common law system, the law is written through those judicial opinions and it is understood by reading them.

Most dangerously, the rule risks undermining the role of precedent. By placing more emphasis on opinions that have received or will receive little attention from judges, the rule increases the legal significance of words that were not intended to have significance outside the existing dispute. This will only create greater legal uncertainty and more opportunity for crafting clever but incorrect arguments.

Finally, if you are intent in allowing memorandum opinions to be cited, I suggest that you allow each circuit to adopt its own rule. If some circuits allow memorandum opinions to be cited and others do not, then there will be a natural experiment. This experiment will be closely watched by lawyers and judges and a uniform rule can later be drafted.

Thank you very much for the opportunity to comment on proposed FRCP 32.1.

Very truly yours,

Michael S. Knoll

Michael S. Knoll
Professor of Law, University of Pennsylvania Law School, and Professor of Real Estate, the Wharton School