

03-AP-261



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02/03/2004 03:45 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed Rule 32.1

2/3/04

I write in opposition to proposed Rule 32.1. The appellate courts are already overburdened, and the proposed rule will contribute to the problem. Unpublished dispositions are an important tool, because they allow appellate judges to communicate the reasoning of a decision to the parties without taking the time to develop a statement of fact and law that meets the high standards of a published opinion. By eliminating this option, the proposed rule will have three effects. First, some conscientious judges will spend more time on routine cases that merit unpublished dispositions, delaying the resolution of cases that present important questions of law. Second, some judges will continue to follow their current practices, allowing the release of unpublished dispositions without exercising much supervision over the language. The result will be conflict and confusion in circuit law. Third, some judges will resort to summary affirmances, denying parties the opportunity to understand the reasons for an appellate decision.

The burden addressed by the rule is insignificant. It is no trouble for an appellate lawyer to learn and follow the circuit rules on citation of unpublished decisions. The rule is reprinted on each disposition as it appears in Westlaw. Further, citation rules are just like every other local rule (e.g., brief length, margins, font, etc.). These rules often diverge, but following the different regimes presents no real practical problems.

Given this fact, the proposed rule will create more problems for appellate lawyers than it will solve. When attorneys have a case in a circuit that precludes citation of unpublished dispositions, they know they can focus their research on published opinions. If they have to look at every decision that comes out of the court, that would massively multiply the number of authorities that have to be reviewed. And for every lawyer who finds an unpublished disposition that supports his or her position, on the other side of the case will be an attorney who needs to distinguish that disposition. The lawyer playing defense will be at a perpetual disadvantage, because unpublished dispositions rarely include enough factual and legal detail to identify relevant differences.

The circuit rules on this subject were developed by judges acting in good faith and seeking to devise the best rules given the procedures and workloads prevailing in their courts. There is no reason to override these nuanced local judgments with a blunt national rule.

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