03-AP-375

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Mr. Peter G. McCabe
Secretary of the Committee on
Rule of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am the senior appellate attorney in the Federal Public Defender's Office for the Eastern District of North Carolina headed by Thomas P. McNamara. Mr. McNamara has asked me to write this letter to express our office's opposition to proposed Federal Rule of Appellate P. 32.1. This rule would erode the certainty and consistency of federal case law and, at the same time, significantly increase the burden on lawyers who represent indigent clients on appeal. By opening up a vast, poorly integrated body of unpublished decisions for appellate citation and review, the rule will create an uneven playing field for poor litigants and will compromise the quality of appellate advocacy and adjudication. The proposed rule is worse than a solution in search of a problem; it is a solution that will create problems where none currently exist.

The Rule Would Inevitably Require Unpublished Dispositions To Be Treated As a Significant Source of Authority.

- The Advisory Committee has suggested that the new rule is "extremely limited," because it does not dictate the precedential weight courts must afford to unpublished dispositions. The proposed rule allegedly does no more than require that unpublished dispositions be treated like any other source of potentially persuasive authority, such as law review articles, which may be cited, but will be given a weight equal only to their persuasive force.

- This justification misunderstands the perspective of practitioners. If unpublished dispositions *could* be cited, lawyers would have no choice but to treat them as a significant source of authority. As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating. Even if courts did not regard unpublished dispositions as controlling, lawyers would still be obliged to afford them significant weight in practicing before circuit courts.

- Moreover, no matter the perspective of the Court of Appeals, district courts, bankruptcy courts, and agencies within the same circuit would likely treat them as controlling. These lower courts will be extremely reluctant to ignore what three judges of the Court of Appeals appear to have done. That is why it makes perfect sense to permit the citation of other precedents, but not unpublished dispositions of the Court of Appeals to the lower courts of that circuit.

Unpublished Dispositions Would Muddy the Law and Burden Its Practice.

- Therefore, if unpublished dispositions *could* be cited, practitioners would have to treat them as a significant source of authority. This would pose a significant number of foreseeable problems for practitioners.

- Most obviously, expanding the universe of what can be cited will significantly expand the burden and expense of legal research. Rather than limiting research to those published opinions in which the Court of Appeals authoritatively discusses the law, practitioners would be obliged to review the many thousands of unpublished dispositions in search of potentially relevant language.

- This burden will not fall equally on all practitioners and litigants. Many lawyers, especially those who represent indigent clients, still do not have ready access to computer assisted legal research services such as Lexis or Westlaw which provide the only practical means for searching the huge number of unpublished opinions issued each year. Lawyers without access to such services will be restricted to a substantially narrower universe of authority than more well-funded adversaries. This problem promises to be especially acute in the context of criminal cases where the government's prosecutorial resources are essentially unlimited.

- It goes without saying that this inequity will only be compounded in the case of incarcerated litigants proceeding pro se who have absolutely no ability to discover and tap into the pool of unpublished authority. Thus, this rule would build an element of systematic unfairness into the appellate process by creating a separate body of authority which many poor or disadvantaged litigants would be unable to exploit.

- In truth, little if any of those unpublished cases would provide a relevant source of new authority because courts do not rely upon unpublished opinions to articulate new legal principles. However, as unpublished dispositions are often written in imprecise terms, and there are literally thousands of them, it will be relatively easy for lawyers to discovery apparent support for their position.

- Unpublished dispositions will, however, often be misleading as a source of authority Because the dispositions are often unclear about the facts and procedural history of the case, it will be harder for practitioners to distinguish the cases in a meaningful way. Therefore, apparently broad propositions of law contained in unpublished dispositions may appear controlling, yet be an inaccurate statement of the law.

- In many circuits, unpublished dispositions are written by staff with little editorial control from the judges over the actual wording. Allowing their citation, especially to the lower courts of that circuit, may therefore be highly misleading.

Proposed Rule 32.1 Would Either Delay the Resolution of Cases or Increase the Prevalence of Summary Affirmances.

- Of course, circuit court judges - aware of these problems - would respond to Proposed Rule 32.1 in one of two ways, neither of which would benefit practitioners.

- *First*, conscientious judges would pay greater attention to the precise wording used in opinions resolving routine cases. This increased attention would not alter the disposition of these cases, which have already been resolved unanimously by the panel. However, it would greatly delay their resolution. Already, overburdened circuits often take well over a year to a resolve a case from the start of briefing to disposition. That time would likely increase substantially, as judges would be required to devote more time in crafting the dispositions for routine cases.

- *Second*, rather than waste judicial resources on routine cases, many judges would likely avoid explaining their decision to the litigants and therefore resolve the case by summary disposition. This would avoid the problems that come from permitting unpublished dispositions to be used as authority but it would likely be quite unsatisfactory to the parties before the case who would be denied even a brief explanation of the rationale underlying the court's decision. Litigants, for whom the stakes on appeal are often very high, should be entitled as a matter of simple fairness to know why a court reached the decision it did. However, if the proposed rule is implemented, there will be both temptation and incentive for the courts to keep unpublished decisions as brief and oracular as possible.

- Such summary dispositions erode the quality of justice not only because they are unsatisfying and unenlightening to the parties but also because they seriously undermine a

litigant's ability to pursue his case beyond the decision of the appellate panel. Without some discussion of the basis for the decision, litigants would be crippled in their ability to file meaningful motions for rehearing or rehearing en banc since such motions often explicitly require the litigant to identify a specific legal flaw or oversight in the reasoning of the opinion. The same handicap would apply to a litigant seeking review in the Supreme Court by way of a petition for a writ of certiorari.

This Matter Should Be Decided Locally.

- The Advisory Committee also suggests that the absence of a uniform rule poses a burden to lawyers who practice in more than one circuit. But the absence of a uniform rule is not a problem specific to unpublished dispositions. Moreover, the use of local rules - as is the current practice - is both less burdensome and more justified in this context.

- Figuring out what can and cannot be cited is quite easy; it's written right on the unpublished disposition itself. The burden of knowing the correct citation rule is thus much less in reviewing unpublished disposition, than it is dealing with the many other local rules that commonly govern the content of briefs, excerpts of record, and time limits.

- Moreover, there is more justification for having local citation rules than there is for having local rules governing the formats of briefs. The federal circuits differ considerably in the size and content of their caseloads. The problems of the D.C. Circuit are very different from those of the Fifth, Ninth, and Eleventh Circuits. If the judges of those circuits believe they can best keep control over the law of the circuit by prohibiting citation, it is a very bad idea to take away their authority in that regard.

For the foregoing reasons, the Office of the Federal Public Defender for the Eastern District of North Carolina urges the committee not to recommend the proposed rule to the Judicial Conference.

Sincerely,

THOMAS P. McNAMARA
Federal Public Defender

G. ALAN DuBOIS
Senior Appellate Attorney