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03-AP-422

By Facsimile and U.S. Mail

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Rule 32.1 to the Federal Rules of Appellate Procedure

Dear Secretary McCabe:

I write to urge rejection of proposed Rule 32.1 to the Federal Rules of Appellate Procedure which would require courts to permit the citation of unpublished dispositions. As demonstrated below, the proposed rule is ill-advised for practitioners, their clients and the efficient administration of justice.

As a practitioner, I find the prospect of citation to unpublished dispositions daunting and troublesome. Were Rule 32.1 the law, I would feel professionally obligated to bring any relevant unpublished disposition to the attention of the court before which I was practicing. I cannot overemphasize how greatly this would expand the scope of my research. Instead of being able to consult a manageable set of published opinions, practitioners like myself would instead be forced to scour literally thousands of unpublished dispositions for potentially relevant language. This increased burden would produce at least three undesirable effects.

First, because practitioners in many cases would simply be unable to wade through the vast expanse of unpublished and published opinions in a timely fashion, they would be forced to seek extensions of time they would otherwise not require. This would not only waste practitioners' time and energy (and cost their clients money), it would create needless work for the judges who review and rule on these motions.

Second, increasing practitioners' workloads would necessarily add to the already high cost of appellate litigation, an increased cost which the litigants themselves would be forced to shoulder. Although increased billable time would be a hardship for corporate clients, it would be an insurmountable hurdle for those individuals who can already scarcely afford the cost of legal representation.

Third, if citation to unpublished decisions were permitted, practitioners would feel compelled to discuss those decisions in their pleadings. Given the space constraints imposed upon most filings, permitting citation to (and necessarily discussion of) unpublished decisions would leave practitioners less room to discuss and analyze published decisions. A well-reasoned discussion of *controlling* authority is often an indispensable tool for judges and their law clerks, one that would become diluted were it to include a discussion of unpublished dispositions. This is why the Advisory Committee's attempt to draw a distinction between citability and precedential value is completely unworkable in practice – if a source of authority *can* be cited, then the conscientious lawyer *must* consult it. Moreover, there is simply no reason a practitioner would cite a decision by a court other than for its precedential value.

Nor would the pitfalls associated with Rule 32.1 adversely affect only practitioners and their clients. The proposed rule would inevitably result in the courts of appeal allocating significantly more time to unpublished dispositions: Conscientious judges would devote greater time and attention to the precise language used in opinions disposing of run-of-the-mill cases. The necessary corollary to this is that those same judges would be forced to *reduce* the time and attention spent on matters of much greater importance, *viz.*, matters of first impression, en banc cases, and the like.[1]

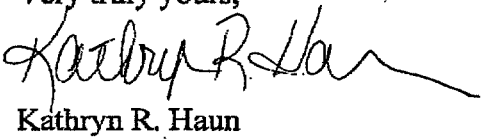
Lastly, I would like to respond to the Advisory Committee's suggestion that the absence of a uniform rule regarding the citation of unpublished dispositions poses a burden to lawyers practicing in more than one circuit. As a practitioner with matters in multiple jurisdictions, I already have an obligation to familiarize myself with the rules of the circuits in which I practice, as those rules govern everything from timing to form of briefs. It thus creates no additional burden to review a particular circuit's rule with respect to the citation of unpublished authority. Even were I not already required to consult the local rules, discerning a particular circuit's rules governing citation to unpublished dispositions is quite simple: one need look no further than the face of the disposition which unambiguously reveals whether it may or may not be cited as authority. In any event, whatever the burden of keeping track of the local rules regarding citation to unpublished opinions, it clearly pales in comparison to the additional

[1] Greater judicial attention to unpublished dispositions would also translate to greater delays in their resolution. Instead of having to wait mere weeks from the time of oral argument to disposition, litigants would instead be forced to wait up to a year or more for a decision.

burden, noted above, that I would incur if the proposed rule were to be enacted and I became professionally obligated to research and review the body of unpublished dispositions.

For the foregoing reasons, I strongly urge the Committee on Rules of Practice and Procedure to reject proposed Rule 32.1.

Very truly yours,



Kathryn R. Haun

KRH:kbb