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03-AP-439

BY U.S. MAIL AND FACSIMILE (202-502-1755)

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

On behalf of the Office of the Federal Public Defender for the Eastern District of Virginia, I write to comment on the proposed Federal Rule of Appellate 32.1, regarding the citation of unpublished opinions. These comments focus on the impact that the proposed rule will have on federal criminal defense attorneys as practitioners and advocates for our clients.

As a general matter, proposed Rule 32.1 would pose a significant burden to practitioners in courts such as the Fourth Circuit, which disfavors the citation of unpublished opinions except for the purpose of establishing res judicata, estoppel, or the law of the case. *See* Fourth Circuit Local R. 36(c). Far from easing practice, the proposed rule would make legal research more burdensome and it will force lawyers and lower courts to rely upon ambiguous and often misleading dispositions.

As to the first point, 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that the new rule is "extremely limited" because it does not dictate the precedential weight courts must afford to unpublished dispositions. The proposed rule purports to do no more than require that unpublished dispositions be treated like any other source of potentially persuasive authority, such as law review articles, which may be cited, but will be given a weight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 If unpublished dispositions *could* be cited, my lawyers would have no choice but to treat them as a significant source of authority. As a matter of prudence, and possibly of professional ethics and avoidance of malpractice, they simply could not ignore relevant opinions decided by the very court before which they are litigating.

Moreover, even if the Court of Appeals chooses to give little weight to its unpublished decisions, nevertheless the district courts within the Fourth Circuit would likely treat unpublished opinions as controlling. These lower courts will be extremely reluctant to ignore what three judges of the Fourth Circuit appear to have done. As a result, if unpublished dispositions *could* be cited, practitioners would have to treat them as a significant source of authority.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 them.

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 relatively few published opinions in which the Fourth Circuit authoritatively discusses the law, my lawyers and their court-appointed private counterparts would be obliged to review thousands of unpublished dispositions in search of potentially relevant language. While some circuits make their unpublished opinions available on their web sites, as a practical matter, the search engines for those web sites simply do not provide an effective means of searching those opinions as is needed for conducting targeted in-depth legal research. Westlaw and Lexis will be the surest way for practitioners to ensure that their research is thorough, yet these services are extremely expensive for the average Criminal Justice Act (CJA) attorney and may not always be fully reimbursed by the courts. CJA attorneys without access to these services will be restricted to a substantially narrower universe of authority than their counterparts in the U.S. Attorney's Office, for which prosecutorial resources are essentially unlimited.

Further, as unpublished dispositions are often written in imprecise terms, and there are literally thousands of them, it will be relatively easy for some lawyers to discovery apparent support for their position. Consequently, unpublished dispositions may well be misleading as a source of precedent. But at the same time, 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 meaningful ways. Therefore, apparently broad propositions of law contained in unpublished dispositions may appear controlling, yet be an inaccurate statement of the law.

To avoid such problems, circuit court judges will likely take one of two approaches, both of which only hurt the clients whom my lawyers represent. 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. However, it would greatly delay their resolution. My office's experience has been that most of our appeals take an average of eight to nine months to resolve, from the docketing of the appeal to its disposition. In the case of a client who is serving a 12 to 18 month sentence who wins relief on his sentence, for example, any additional delay means that he loses the benefit of his victory.

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. Those of us who practice in the Fourth Circuit already see this in a considerable number of our cases. While this approach would avoid the problems that come from permitting unpublished dispositions to be used as precedent, it is unfair to the criminal defendant, who would be denied even a brief explanation of the rationale underlying the appellate court's decision. Without some discussion of

the basis for the decision, our clients will be crippled in their ability to file meaningful motions for rehearing or rehearing en banc, as such motions often explicitly require the party seeking rehearing to identify a specific legal flaw or oversight in the reasoning of the panel opinion. The same handicap would apply to a client seeking review in the Supreme Court by way of a petition for a writ of certiorari.

Finally, my lawyers' experience with the Fourth Circuit's local rule on the use of unpublished opinions has been that the rule works quite well. As mentioned briefly earlier, Local Rule 36(c) provides that "[c]itation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." However, counsel may cite to an unpublished Fourth Circuit opinion "[i]f counsel believes [that the opinion] has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well" and includes it in the addendum to the brief. In regard to unpublished opinions of other courts, counsel must submit them by separate motion. Fourth Circuit Local Rule 28(b). In my view, these rules work together to provide an appropriate and workable framework for the consideration of unpublished dispositions in light of the types and numbers of the cases handled by the Fourth Circuit and the particular challenges that its caseload create for this particular Circuit.

For the foregoing reasons, the Office of the Federal Public Defender for the Eastern District of Virginia urges the Committee on Rules of Practice and Procedures not to recommend proposed Rule 32.1 to the Judicial Conference.

Sincerely,

Frank W. Dunham, Jr.
Federal Public Defender for the
Eastern District of Virginia

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