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January 5, 2004

03-AP-104

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, DC 20544

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

Dear Mr. McCabe:

I am writing to urge the Judicial Conference on Rules of Practice and Procedure to reject proposed Rule 32.1 of the Federal Rules of Appellate Procedure. The proposed rule would require federal courts of appeals to allow litigants to cite unpublished dispositions in their briefs to those courts. The proposed rule would spell the end of summary dispositions of appeals, and this outcome would be an undesirable one for litigants.

At present, the courts of appeals routinely decide cases by unpublished summary dispositions. These dispositions are often cursory both in reciting the facts and in analyzing the law. This cursory treatment of some cases allows courts to expend their limited resources on other cases that present new and important questions of law.

The proposed rule would end this cursory treatment of some cases. Although the rule does not directly prohibit summary dispositions, merely allowing litigants to rely on unpublished dispositions in subsequent cases, as the proposed rule does, will make courts unwilling to dispose of some cases in the cursory manner they do now. Conscientious judges will not want the cryptic recitations of facts and superficial discussions of law currently found in unpublished opinions to confuse the litigants who read them and their colleagues who will use them to decide future cases.

This outcome would be undesirable for litigants. If courts are forced to treat every case with the same care, then they will take even longer than they do now to issue their opinions. In some circuits in which I practice, litigants often wait for two years before the court decides the case. Extending this wait even longer is simply unacceptable.


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Currently, it is left to the discretion of each court of appeals whether it will allow litigants to cite unpublished dispositions. It may be that treating each case with the same level of care will not affect greatly the queue of appeals in some courts of appeals because the caseloads in those courts are not heavy. This is probably why some circuits have adopted rules allowing citation to unpublished opinions, and why other circuits have not. Different caseloads will lead different courts of appeals to adopt different rules to effectively dispose of their dockets. That is precisely how it should be. In this case, one size will not fit all.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Fitzpatrick", with a long horizontal flourish extending to the right.

Brian T. Fitzpatrick