03-AP-121

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Arlington, VA 22203-2212

January 7, 2004

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

Dear Mr. McCabe:

I oppose the proposed Federal Rule of Appellate Procedure Rule 32.1, which would allow parties to cite memorandum dispositions.

A national rule is unnecessary. While the Committee Note asserts that "conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit," I am not aware of any such "hardship." I have litigated in several appellate forums, and always make it a point to research and comply with local rules. (I am writing in my personal capacity only). Diverging rules are a reality in federal appellate practice: Some circuits require special sections in briefs, some have special requirements for the submission of electronic copies of briefs, and some even require special certifications in addition to the two required by the Federal Rules. Of these diverging rules, rules about the citation of memorandum dispositions are among the easiest to research: Each memorandum disposition contains a clear statement (often reprinted by LEXIS or WESTLAW in capitals at the top of the screen) warning all who read them that they cannot be cited. I am not aware of any case where a practitioner violated a citation rule because he confused different circuits' rules.

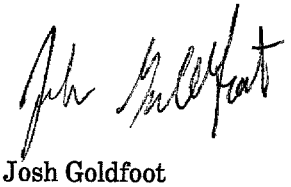
The Committee Note argues that "[t]here is no compelling reason to treat 'unpublished' opinions differently" than "the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles." That argument ignores an obvious distinction: When a litigant cites an advertising jingle, he is invoking the persuasive authority of a Madison Avenue hack. When a litigant cites a court's own memorandum disposition, he is invoking the persuasive authority of the court that will decide his case.

Even though it is not precedent, a citation to a court's own memorandum disposition is much more difficult for opposing counsel to ignore than a citation to a newspaper article, or even an opinion from another court. Unlike all other "persuasive" authorities, a court's own memorandum disposition carries the suggestion that the court must either "apply" the "rule" in the memorandum or risk the appearance of being arbitrary and inconsistent. That

suggestion is wrong, of course—the argument in *Hart v. Massanari* that unpublished memorandum dispositions violate neither the Constitution nor obedience to the doctrine of stare decisis remains unrebutted—but unless counsel feels supremely confident that the court will ignore a memorandum disposition cited by opposing counsel, he will feel compelled to respond. The result is that parties will debate the applicability of memorandum dispositions, using up scarce space in their briefs. This is exactly what circuit courts seek to avoid by restricting citation to memorandum dispositions.

Thus, a circuit court could easily conclude that allowing citation to memorandum dispositions will undercut their administrative value. Each circuit should have the freedom to decide this question for itself, taking into account its own unique circumstances. There is no reason to supplant individual circuits' judgment on this question with a single rule.

From,



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