EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

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ELECTRONIC CASE FILING

Rules Recommended for Approval and Transmission

The Advisory Committees on Appellate, Bankruptcy, and Civil Rules submitted proposed uniform amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5 with a recommendation that they be approved and transmitted to the Judicial Conference. (Federal Rule of Criminal Procedure 49(d) incorporates by reference the filing procedures in Civil Rule 5.) The proposed amendments authorize a court to require electronic case filing by local rule. The amendments were published for public comment for a three-month period beginning November 10, 2004, and expiring on February 15, 2005. Public hearings were scheduled to coincide with hearings earlier scheduled for other proposed rules amendments, and a separate hearing was set for the amendment to the Appellate Rules, which had no other proposed amendments. Only one person asked to testify. Several written comments were received on the proposals.

In August 2004, the Committee on Court Administration and Case Management (CACM) requested that the federal rules of practice be amended on an expedited basis to authorize federal courts to adopt local rules that require parties to file papers electronically. The existing rules authorize a court to adopt local rules that "permit" a party to file papers by electronic means. Although many courts have adopted local rules that require electronic filing, some courts have been reluctant to do so without a more explicit grant of authority.

CACM urged the Committee to recommend these rules amendments to promote broader use of the Case Management/Electronic Case Files system now being deployed in the courts nationwide. CACM concluded that mandatory electronic case filing would achieve significant cost savings for the federal courts.

Several major bar organizations, including the American Bar Association, expressed concern during the public comment period that mandatory electronic case filing would pose hardships for litigants who do not have access to a personal computer and suggested that the national rules require that any local rule include appropriate exceptions. Such a provision was not included in the version published for public comment because a study of existing local court rules requiring parties to file papers electronically confirmed that each set of rules already excepted pro se litigants and others for good cause. Nonetheless, in light of the public comment and concerns, the advisory committees revised the proposed amendments to authorize a court to require electronic case filing by local rule only if reasonable exceptions are allowed. The Appellate Rules Committee added a provision in its proposed Committee Note to recognize that a local rule may direct a party to also file a hard copy of a paper that must be filed by electronic means. This provision responds to distinctive features of appellate practice and is not included in the other proposed rules.

The Committee concurred with the advisory committees' recommendations.

Recommendation: That the Judicial Conference approve proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed new Rule 32.1 concerning the citation of unpublished opinions, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposal was originally published for comment in August 2003. Fifteen witnesses testified on the proposed new rule at a public hearing in Washington, D.C. More than 500 comments were submitted, a majority from lawyers and judges in the Ninth Circuit. The great majority of these comments were opposed to the proposed rule. But the proposed new rule was supported by major national bar organizations, including the American Bar Association and the American College of Trial Lawyers, by bar organizations in New York and Michigan, by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice, and by the Department of Justice.

In June 2004, the advisory committee recommended that the Committee approve new Rule 32.1 and transmit it to the Judicial Conference. In an effort to reach a greater consensus among the courts and in deference to the judges in the four circuits that opposed the proposed rule, the Committee decided to defer approving the proposed new rule and suggested that an empirical study be undertaken to assess its potential impact on the courts' workload. The advisory committee asked the Federal Judicial Center to conduct the study. It also asked Administrative Office staff to conduct a comparative statistical study of the median case disposition time and the number of summary dispositions in the nine circuits that permit citation of unpublished opinions.

The Federal Judicial Center study, *Citations to Unpublished Opinions in the Federal Courts of Appeals,* [hereinafter *FJC Report*] consisted of three components:

(1) a survey of all 257 circuit judges (active and senior); (2) a survey of attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. The Administrative Office's study examined the median case disposition time for the two years preceding and (where possible) the two years following the years in which the nine circuits liberalized or abolished their no-citation rule. Both studies failed to support the main arguments against proposed Rule 32.1 that a permissive citation policy will result in more summary opinions and impose additional work on judges and lawyers, and in some respects the studies directly contradicted those arguments and predictions. The advisory committee (7-2) and the Committee (unanimously) voted to approve the proposed new rule.

Explanation of the New Rule

Citation of unpublished opinions by attorneys in their briefs is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions. In fact, about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit.

Proposed new Rule 32.1 is very limited. The Committee and the advisory committee expressly take no position on whether unpublished opinions should have any precedential value, leaving that issue exclusively for the circuits to decide. For this reason, a proposal that would have permitted, but disfavored, citation of unpublished opinions was not adopted. Such a rule might be interpreted as taking a formal position on the precedential value of such opinions, compromising the proposed rule's substantive neutrality. Also, such a restriction appears

unnecessary; parties would not cite to an unpublished opinion deemed non-precedential by the circuit where a published, precedential opinion is on point.

Proposed new Rule 32.1 permits the citation in briefs of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The present practices governing citation of unpublished opinions vary among the circuits, with some permitting citation, others disfavoring citation but permitting it in certain circumstances, and others prohibiting citation. Nine circuits now permit citation of unpublished opinions, at least when, in the judgment of counsel, there is no precedential opinion on point.

Background of Courts' Practices Involving Citation of Unpublished Opinions

In the early 1970's, before the era of widespread computerized legal research, the Judicial Conference encouraged courts to develop plans to limit the number of opinions submitted for publication to cope with the exponentially expanding volume of litigation. Many of the court plans contained provisions governing citation of unpublished opinions. These plans were quite different from each other. Some plans prohibited the citation of unpublished opinions as a means to prevent large institutional litigators — who might have their own collections of unpublished opinions — from gaining an unfair advantage.

The Judicial Conference raised concerns about the lack of uniformity in the court plans and noted with approval the then-Committee on Court Administration's report "that further experimentation may well lead to the amendment of the diverse circuit plans and that *eventually a somewhat more or less common plan might evolve*" (JCUS-MAR 74, p. 13; emphasis added). The Committee on Court Administration recognized that some courts had adopted a policy prohibiting citation to unpublished opinions, and it suggested that courts may eventually adopt a uniform policy permitting citation of unpublished opinions.

The issue lay dormant in the Judicial Conference until the 1990's. The *Long Range Plan for the Federal Courts* (hereafter "Long Range Plan") recommended that a *"uniform set of procedures and mechanisms* for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation" be developed. Long Range Plan, Implementation Strategy 37d (Dec. 1995) (emphasis added). The Long Range Plan's recommendation was itself based on an earlier proposal in the *Report of the Federal Courts Study Committee*, which had recommended the creation of an ad hoc committee to review the policy on unpublished opinions. The Study Committee expressed concern with practices barring citation of unpublished opinions. It recognized that the "policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity" and that technological advances in publishing opinions supported a change in that policy (*Report of the Federal Courts Study Committee*, April 1990, p. 130).

Department of Justice and Other Requests to Amend the Rules

In 2001, the Department of Justice requested the advisory committee to amend the rules to establish uniform procedures permitting citation of unpublished opinions. The Department cited examples of unpublished cases involving recurring issues decided differently by different courts of appeals (and sometimes by the same court of appeals) without knowledge of the previous dispositions. For the same and other reasons, many bar associations, attorneys, and members of the public, and numerous law review and bar journal articles had been urging a review of the disparate citation practices.[1]

[1] A thorough discussion of the subject can be found in *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers in the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). The American College of Trial Lawyers recommended that "the rules governing access to and use of 'unpublished' opinions in the circuit courts should be uniform. The existing circuit-by-circuit patchwork is confusing, perilous, and getting worse."

As concerns with disparate citation policies mounted, the underpinning of the original rationale for no-citation rules was quickly eroding. Institutional litigators, who at one time might have enjoyed an unfair advantage because of their ability to collect unpublished opinions, no longer were alone in their access to unpublished opinions. With the advent of computer assisted legal research, the reference to "unpublished" opinions has become a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites in compliance with the E-Government Act of 2002 and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries. As a result, the concern about unfair, uneven access to unpublished opinions, which was the principal reason for the promulgation of restrictive citation policies, no longer is cogent.

Mindful of the Judicial Conference's Long Range Plan, responding to the Department of Justice's and many others' requests, and considering the altered status of the availability of "unpublished" opinions caused by technological change, the advisory committee proceeded with the rulemaking process. After reviewing the citation practices of the courts of appeals and the substantial literature on the issue, and in keeping with the clear trend in the circuits toward more liberal citation rules, the advisory committee proposed the new rule preventing courts from barring citation of unpublished opinions.

Justification for the New Rule

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. Moreover, in an adversary system,

the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither proposed Rule 32.1 nor the Committee Note takes any position — they cannot be justified as a matter of policy.

The advisory committee found the evidence overwhelming that unpublished opinions can be a valuable source of "insight" and "information." The opinions may be helpful in addressing recurring issues, which involve similar fact patterns. They can be particularly helpful to district judges who must exercise discretion in applying relatively settled law to an infinite variety of facts while at the same time striving for uniformity, *e.g.*, dispositions involving sentencing guideline decisions.

On the other hand, no-citation rules forbid attorneys from bringing to the court's attention information in unpublished opinions that might help their client's cause. No-citation rules prohibit attorneys from explaining how substantive legal rules have actually been applied by the court and in what actual — not hypothetical — circumstances the issue at hand has been coming before the court. No-citation rules are especially troublesome when an unpublished opinion has been erroneously characterized as routine, even though some courts mitigate this problem by adopting procedures allowing a court to reconsider publishing a particular opinion. Lawyers, district court judges, and appellate judges regularly read unpublished opinions despite local prohibitions against citing them, providing further evidence of their value.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage. As this justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, however, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g., Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). An exhaustive study conducted by the Federal Judicial Center at the request of the advisory committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See FJC Report* at 15, 45 (2005). Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. Many unpublished opinions include lengthy discussions of legal issues and may include a dissenting opinion. The Supreme Court has granted review of unpublished decisions. *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of

Second Circuit); and *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004) (reversing unpublished decision of Sixth Circuit). The FJC findings were consistent with the advisory committee's conclusions, showing that a large minority of surveyed judges (55) found citations to unpublished opinions to be "occasionally," "often," or "very often" helpful. Only a small minority (14) agreed with the contention that unpublished opinions are "never" helpful. *FJC Report* at 10-11.

When attorneys can and do read unpublished opinions — and when judges can be and are influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about the unpublished opinions that both are reading.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions because they know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished opinions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. To the contrary, a study of the federal appellate courts conducted by the Administrative Office at the request of the advisory committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005).

The Federal Judicial Center, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See FJC Report* at 12-13, 42-43. In addition, when the Federal Judicial Center asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. *Id.* at 10, 38. The responses from the judges in the four restrictive circuits were more mixed. In the Seventh Circuit, a majority of judges (8 of 13) predicted that the time devoted to unpublished opinions would either stay the same or decrease. The Second Circuit was divided almost in thirds: seven judges predicted no impact or decrease, six judges predicted a "very small," "small," or "moderate" increase, and six

judges predicted a "great" or "very great" increase. Half the judges in the Federal Circuit (7 of 14) predicted that the time devoted to unpublished opinions would not increase, four other judges predicted only a "moderate" increase, and only three judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, whose judges have expressed so much opposition to the new rule, 17 of 43 judges predicted no impact or a decrease — a few more (20) predicted a "great" or "very great" increase. *Id.* at 36.

It is true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished opinions causes the harms predicted by defenders of no-citation rules. No such evidence exists. The advisory committee found telling the lack of evidence that any court that had abolished or liberalized its no-citation rules had experienced any of these adverse consequences. Significantly, the Committee received no comment that the citation policy has had bad consequences from any judge from a circuit that permitted citation of unpublished opinions.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand; because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about judicial workloads. Over the past few years, numerous federal and state courts have abolished or

liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that proposed Rule 32.1 would not have an "appreciable impact" on their workloads. *FJC Report* at 17, 49. Moreover, the attorneys who expressed positive views about proposed Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See id.* at 17-19, 50.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, and law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which requires that all opinions, including unpublished opinions, be made widely available at little or no cost.

Conclusions

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable in today's changed circumstances. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, proposed Rule 32.1 abolishes those rules and requires courts to permit unpublished opinions to be cited.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve proposed new Appellate Rule 32.1 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

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