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Cover Page Footnote

I would like to thank Jonathan Zalewski and the entire University of Dayton Law Review staff for their top-notch efforts toward publishing my Article. Lastly, I would like to thank my wife, Amy, for her enduring support and willingness to move across the country for me.

DOES FEDERAL RULE OF CIVIL PROCEDURE 62.1 ENTICE DISTRICT COURTS TO RENDER UNCONSTITUTIONAL ADVISORY OPINIONS?

Jesse D.H. Snyder[*]

I. INTRODUCTION

Small imperfections often hide in the murk, evasive even in critical review. But once they emerge from the shadows, it is hard to look away. Federal Rule of Civil Procedure 62.1 seems innocuous on its face. Rule 62.1 is a means to achieve an "indicative ruling" from a district court after final judgment so that an appellate court could later remand to the district court to address the issue in the first instance.[1] Rule 62.1 makes clear that the district court does not have jurisdiction to address the issue to which the indicative ruling applies, and the district court has discretion on remand to address its indicative ruling, to decline further consideration of the indicative ruling, or to make a contrary ruling.[2] While streamlining litigation and avoiding the redundancy of up-and-down appeals are well-intended concerns, the result of Rule 62.1 is a decision with no legal impact on the parties. That is tantamount to an advisory opinion by a federal court, a practice the Supreme Court "abjured [since] the beginning of our history."[3]

This Article argues that Rule 62.1 is a procedural vehicle that generates unconstitutional advisory opinions. Rule 62.1 entices district

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[1] *See* FED. R. CIV. P. 62.1.

[2] *See id.*

[3] United States v. Sharpe, 470 U.S. 675, 726 (1985) (Stevens, J., dissenting) (citation omitted).

courts—after the court is divested of jurisdiction—to render an indicative ruling without any force of law or binding effect on the parties. The byproduct of Rule 62.1 is an optional decision at the district court's discretion that imposes no legal obligations on anyone. An indicative ruling is a hint that a district court might, upon remand, address a certain argument in a certain way. There are no guarantees, and worse, such decisions could influence the disposition of appellate opinions. When confronted with a motion for indicative ruling during the pendency of an appeal from a district court's final judgment, parties adverse to such relief should challenge the constitutionality of Rule 62.1 in their responses in opposition. Challengers should articulate why the movant's request places the district court in peril of rendering an impermissible advisory opinion, and they should request that the district court strike Rule 62.1 as unconstitutional.

II. THE NEFARIOUS ADVISORY OPINION

An advisory opinion is one in which a court decides "questions that cannot affect the rights of litigants in the case before [the court]."[4] The aversion to advisory opinions among the federal judiciary is moored in constitutional interpretation and past practice.[5] Although both can be thought of as separate bases to advocate against advisory opinions, the commitment to staunch resistance of advisory opinions is best understood as one in which history and constitutional fidelity intertwine.

As early as 1792, in *Hayburn's Case*, the Supreme Court observed that federal courts should decline to address cases not properly before them:

> [W]e have had some doubts to the propriety of giving an opinion in a case which was not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly . . . .[6]

Following that decision, the Supreme Court made clear, after a series of letters between the Court and the executive branch of government, its practice of not rendering advisory opinions.[7] The correspondence began on

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[4] North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted).

[5] *See, e.g.*, Muskrat v. United States, 219 U.S. 346, 351–53 (1911) (citations omitted); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing *Muskrat* as connecting the concepts of an advisory opinion with Article III, Section 2); *Rice*, 404 U.S. at 246 (observing that *Muskrat* interpreted *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as holding that federal courts have "no power to issue advisory opinions").

[6] 2 U.S. (2 Dall.) 409, 410 n.2 (1792).

[7] *See Sharpe*, 470 U.S. at 726 (Stevens, J., dissenting).

July 18, 1793, when Secretary of State Thomas Jefferson, on behalf of President George Washington, wrote the following letter to Chief Justice John Jay and the Associate Justices:

> GENTLEMEN:
>
> The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances *which do not give a cognisance of them to the tribunals of the country*. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their *advice on these questions*? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,
>
> Your most obedient and humble servant,
> THOS. JEFFERSON.[8]

The letter included an attachment with 29 questions.[9] Two days later, Chief Justice Jay and the Associate Justices wrote the following to President Washington:

> SIR:

[8] 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–87 (Henry P. Johnston ed., 1891).

[9] *See* 33 THE WRITINGS OF GEORGE WASHINGTON 15–19 (John C. Fitzpatrick ed., George Washington Bicentennial Commission ed. 1940).

> We have taken into consideration the letter written to us, by your direction, on the 18th inst., by the Secretary of State. The question, "whether the public may, with propriety, be availed of the advice of the judges on the questions alluded to," appears to us to be of much difficulty as well as importance. As it affects the judicial department, we feel a reluctance to decide it without the advice and participation of our absent brethren.
>
> The occasion which induced our being convened is doubtless urgent; of the degree of that urgency we cannot judge, and consequently cannot propose that the answer to this question be postponed until the sitting of the Supreme Court. We are not only disposed, but desirous, to promote the welfare of our country in every way that may consist with our official duties. We are pleased, sir, with every opportunity of manifesting our respect for you, and are solicitous to do whatever may be in our power to render your administration as easy and agreeable to yourself as it is to our country. If circumstances should forbid further delay, we will immediately resume the consideration of the question, and decide it.
>
> We have the honour to be, with perfect respect, your most obedient and most humble servants.[10]

President Washington responded by relenting on the previous requests, while expressing hope that Chief Justice Jay and the Associate Justices may reconsider their stance in the future:

> Gentlemen: The circumstances which had induced me to ask your counsel on certain legal questions interesting to the public, exist now as they did then; but I by no means press a decision whereon you wish the advice and participation of your absent brethren. Whenever, therefore, their presence shall enable you to give it with more satisfaction to yourselves, I shall accept it with pleasure. With sentiments of high respect, I am, &c.[11]

Chief Justice Jay and the Associate Justices offered a final reply, reiterating cordiality, yet remaining steadfast on their position of declining to address the executive branch's requests:

> SIR:

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[10] 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 8, at 487–88.
[11] 33 WRITINGS OF GEORGE WASHINGTON, *supra* note 9, at 28 (footnotes omitted).

> We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.
>
> We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.
>
> We have the honour to be, with perfect respect, sir, your most obedient and most humble servants.[12]

Following *Hayburn's Case* and the 1793 letter correspondence, the modern conception of an advisory opinion did not take shape until the 1900s.[13] Although not directly referencing advisory opinions, in 1821, Chief Justice John Marshall, in *Cohens v. Virginia*, connected the case-or-controversy requirement of Article III, Section 2 with the exercise of restraint in hearing certain cases not properly before the Court:

> The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article.[14]

It was not until 1911, in *Muskrat v. United States*, that the Supreme Court returned to *Hayburn's Case*, holding that the prohibition of advisory opinions has its constitutional foothold in the case-or-controversy

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[12] 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, *supra* note 8, at 488–89 (alteration in original).

[13] *See* Muskrat v. United States, 219 U.S. 346, 351–53 (1911) (citations omitted).

[14] 19 U.S. (6 Wheat.) 264, 405 (1821) (citation omitted).

requirement of Article III, Section 2.[15] After *Muskrat*, jurisprudence in this area began to gain momentum. By 1974, Justice Potter Stewart observed that federal courts are "impotent 'to decide questions that cannot affect the rights of litigants in the case before them.'"[16] One year later, the Supreme Court made clear that federal courts are incompetent to review hypothetical cases: "Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'"[17]

In *Rhodes v. Stewart*, a per curiam opinion issued in 1988, the Court explained that a federal judgment is a means to an end that cannot be conferred as a matter of right without a case or controversy: "The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion -- is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff."[18] Ten years later, in *Steel Co. v. Citizens for a Better Environment*, Justice Antonin Scalia explained that when a court issues an advisory opinion, "hypothetical jurisdiction" attaches to what becomes a "hypothetical judgment," something the Supreme Court has long refused to countenance.[19]

III. THE INSIDIOUS FEDERAL RULE OF CIVIL PROCEDURE 62.1

Effective December 1, 2009, Rule 62.1 allows parties to file a motion with the district court for an indicative ruling otherwise barred by a pending appeal.[20] The rule's title makes this point clear: "Indicative Ruling on a

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[15] 219 U.S. at 351–53; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing *Muskrat* as connecting the concepts of an advisory opinion with Article III, Section 2); North Carolina v. Rice, 404 U.S. 244, 246 (1971) (observing that *Muskrat* interpreted *Hayburn's Case* as holding that federal courts have "no power to issue advisory opinions").

[16] Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 127 (1974) (Stewart, J., dissenting) (citations omitted).

[17] Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (citations omitted).

[18] 488 U.S. 1, 4 (1988) (citation omitted).

[19] 523 U.S. at 101 (citation omitted).

[20] Rule 62.1 is provided in its entirety below:

> Rule 62.1. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal
> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
> (1) defer considering the motion;
> (2) deny the motion; or
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.
> (b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
> (c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

FED. R. CIV. P. 62.1.

Motion for Relief That is Barred by a Pending Appeal."[21] Upon receiving a motion for relief in an instance in which the district court "lacks authority to grant," the district court may either defer considering the motion, deny the motion, or "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."[22] If the district court grants the motion or annotates that the motion raises a substantial issue, under Federal Rule of Appellate Procedure 12.1, the movant must notify the appellate court now retaining jurisdiction over the case.[23] Despite the issuance of an indicative ruling, remand on the issue remains at the discretion of the appellate court.[24] The appellate procedural rules are silent on the course to take if a district court denies a motion for indicative ruling.[25] Thus far, only the Sixth Circuit has addressed whether the denial of a motion for indicative ruling is reviewable on appeal, answering in the affirmative.[26] In *Dice Corp. v. Bold Technologies*, the entirety of the Sixth Circuit's analysis rested on the notion that the panel was "unaware of any case which so holds" that appellate courts cannot review denials of motions for indicative ruling.[27] No published or otherwise publically available opinion has addressed whether an indicative ruling is an advisory opinion.

Rule 62.1 was codified for innocent reasons to promote judicial efficiency. According to the Eleventh Circuit, the rule formalized a practice that most courts were already doing.[28] For example, "[a] party proffering newly discovered evidence may obtain an indicative ruling from a district court concerning relief from judgment pending appeal."[29] Motions for indicative ruling also arise when superseding case law develops after the district court's final judgment.[30] Despite a recognized informal practice, motions for indicative ruling seldom appear on courts' dockets.[31] Perhaps that is why Rule 62.1 has evaded scrutiny as an unoffending procedural vehicle that affords the movant one last opportunity to be heard.

For whatever good intentions motivated the codification of Rule 62.1,

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[21] *Id.*; Munoz v. United States, 451 F. App'x 818, 819 n.1 (11th Cir. 2011).

[22] FED. R. CIV. P. 62.1(a).

[23] *Id.* 62.1(b); FED. R. APP. P. 12.1(a).

[24] FED. R. CIV. P. 62.1 advisory committee's note to 2009 amendment; FED. R. APP. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

[25] *See* FED. R. CIV. P. 62.1(c); FED. R. APP. P. 12.1(a).

[26] Dice Corp. v. Bold Techs., 556 F. App'x 378, 382–84 (6th Cir. 2014).

[27] *Id.* at 382–83.

[28] Munoz v. United States, 451 F. App'x 818, 819 n.1 (11th Cir. 2011) ("Rule 62.1 was adopted in 2009 . . . to codify the practice that most courts had been following.").

[29] Franken v. Mukamal, 449 F. App'x 776, 779 n.2 (11th Cir. 2011).

[30] *See* Lee v. Mike's Novelties, Inc., 608 F. App'x 946, 947 (Fed. Cir. 2015).

[31] An all-federal-courts search on December 2, 2016, in LexisNexis for the term "Fed. R. Civ. P. 62.1" yielded under 400 results. The Supreme Court has yet to cite Rule 62.1.

constitutional concerns scuttle its application. Indeed, a motion for indicative ruling is the quintessence of a request for an advisory opinion. The motion requests relief that the district court—divested of jurisdiction—cannot grant. And Rule 62.1 and the accompanying Appellate Rule 12.1 make clear that should such a ruling come to fruition, that ruling does not bind the parties or compel action by either the trial or appellate court.[32] The grant or denial of a motion for indicative ruling is simply an issue that a tribune could address, but need not address, even if the parties affirmatively press the issue before either the appellate or trial court.[33] Taken to its logical conclusion, the district court relies on hypothetical jurisdiction to make a ruling that cannot impact the parties, cannot obligate the appellate court to remand on the issue, and cannot restrict the district court to its own indication even if the appellate court remands on that issue. Just like the letter correspondence from 1793, thoughtful judicial insight cannot be confused with resolving actual cases or controversies. Although insight is always appreciated by the requestor, such insight offends the Constitution unless it has the legal force to resolve a cognizable dispute in law or equity. An indicative ruling does no more than present an opportunity for a district court to offer a suggestion that no one needs to follow. The upshot is a procedural rule that answers "questions that cannot affect the rights of litigants in the case before [the court]."[34]

An indicative ruling cannot be excused away as a vehicle for administrative convenience to promote an eventual judicial outcome. An indicative ruling is different from many of the preliminary devices that courts use en route to a final order or judgment.[35] District courts often adopt provisional claim constructions during the progression of a patent case and then eventually arrive at a final claim construction order.[36] There, the district court retains jurisdiction over the case when rendering the provisional claim construction. Provisional claim constructions provide a notice function to the parties and afford an opportunity for additional evidence and argument before the district court executes its obligation of resolving claim construction disputes through a final order.[37] In addition, that district courts provide preliminary jury instructions to the parties for approval, objection, and modification does not salvage the wreckage created by an indicative ruling.

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[32] *See* FED. R. CIV. P. 62.1(c); FED. R. APP. P. 12.1(a).

[33] FED. R. CIV. P. 62.1(c) ("The district court may decide the motion if the court of appeals remands for that purpose."); FED. R. APP. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

[34] North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted).

[35] *See, e.g.*, FED. R. CIV. P. 65(a)–(b).

[36] *See, e.g.*, The Honorable K. Nicole Mitchell, *Docket Control Order*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=14 (last visited Dec. 1, 2016) (follow "Docket Control Order" hyperlink under "Patent Documents").

[37] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 390 (1996) (holding that claim construction is a question of law decided by judges and not juries).

Similar to provisional claim constructions, the district court retains jurisdiction and is working toward a final outcome when preparing instructions for the jury. An indicative ruling comes too late, and the ruling has no binding effect on anyone.

When consequences are nil, advocates should be suspect. And when suspicions arise, it is incumbent on advocates to protect their clients' interests by taking action. Confronted with the prospect of a motion for indicative ruling, advocates should present a facial challenge to the constitutionality of Rule 62.1 on grounds that the movant entices an impermissible advisory opinion. Advocates need only serve up the argument for disposition: Rule 62.1 is not subtle about what the movant is asking for or what the result would be. As Justice Scalia once observed, when a glaringly unlawful issue stares you down, surprise is the commonplace response:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[38]

Rather than being fooled into tacit acquiescence, let your response brief guard your flock.

IV. CONCLUSION

At passing glance, Rule 62.1 sails by without a trace of transgression. When the veil is lifted from a procedural rule infrequent in practice, its effects are striking and readily apparent. Rule 62.1 is unabashed: the rule allows a district court to provide an indication of how it would rule on an issue, and Appellate Rule 12.1 ropes courts of appeal into the fray by sanctioning remand on the basis of such an indication. The district court does not have jurisdiction over a ruling on the issue, and it is dubious whether an appellate court has jurisdiction to review these rulings either. Although the impact of Rule 62.1 is probably minor, the same could have been said for the letter correspondence in 1793. But as the Supreme Court has reiterated in consistent fashion, the Constitution is never minor. The constitutional prohibition of federal advisory opinions is the bulwark that maintains separation of powers and assures that advocacy and judicial decision-making is at its acme when the results count. Advocates encumbered with responding to motions for indicative ruling should be prepared to challenge the mettle of

[38] Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Rule 62.1 by advancing arguments targeting the rule's constitutional infirmity. Lenient attitudes toward Rule 62.1 operate on a slippery slope to unconstitutional perdition. Rule 62.1 comes as a wolf and should be challenged in kind.