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Miscellaneous: Yes.
Comments:

TOPIC: allowing attorneys to cite to unpublished
9th Cir. opinions:

I oppose the idea of allowing citations to unpublished opinions. It is important to recognize that unpublished opinions are not designed to serve as precedent and thus are not written with the analytical thoroughness or clarity that we typically find in published opinions. Thus, if the Circuit were to allow citation to unpublished opinions, this would openly invite lawyers to submit legal arguments that are based on Circuit-made decisions and analysis that are more superficial and cursory than traditionally seen in published opinions. This would invariably result in a degradation of the intellectual standards of federal practice in this Circuit.

It is no solution to suggest that the quality of unpublished opinions should be improved to match that of published opinions, so that the qualitative disparity referenced above can be resolved and thereby permit citation to unpublished opinions. To suggest this would overlook the administrative and management needs of the Ninth Circuit. In view of the huge volume of appeals, particularly criminal appeals, that is processed each year by the Circuit, as well as the repetitive nature of many legal issues raised on appeal, it is important for the Circuit to allocate its time and energy selectively. In so doing, the Circuit gives priority to a relatively small number of appeals which raise the types of issues that are worthy of contributing to the precedent-setting function of appellate litigation. It is through the process of prioritizing that the Circuit is able to dedicate the time and energy of law clerks and judges to those specific cases that ultimately become our published opinions. The rest of the docket needs to be handled more expeditiously, and it is no secret that less time and energy is devoted to those matters.

Ultimately, they become the body of unpublished opinions that understandably have less analytical depth than their published counterparts.

If the Circuit were to require a qualitative equivalence between published and unpublished opinions, then the management / administrative system of allocating priorities would break down. If more time and energy are going to be spent on preparing unpublished opinions in order to increase their quality, then less time and energy will inevitably be spent on the published opinions, and so we end up with an eventual reduction in the quality of published opinions. This would be a terrible compromise, as it would signal a serious dilution in the intellectual value of appellate decision-making in this Circuit.

Greg Nicolaysen
(Los Angeles)

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