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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed FRAP 32.1

03-AP-094

To the Committee on Rules of Practice and Procedure:
I am writing in opposition to Proposed FRAP 32.1 as a former Ninth Circuit judge of 17 years and as a litigator with over 30 years in private practice. I am currently an active member of the Appellate Group at Akin, Gump. Strauss, Hauer and Feld.

I oppose Proposed FRAP 32.1 because I believe its asserted benefits are far too tenuous to justify the cost -- especially the human cost -- of the burdens it would inflict on an already overburdened federal judiciary. My experience as a Ninth Circuit judge taught me that it would be fanciful to expect Congress to provide the resources needed to cope with the added burdens imposed by Proposed FRAP 32.1. I am genuinely concerned. I know only too well what a struggle it is for the Ninth Circuit judges to keep up with their ever-expanding caseload. I despair of any proposal that can only make matters worse.

Rather than burden your Committee members with my own version of the various arguments against Proposed FRAP 32.1, I would refer them to a thoughtful article by one of my (and Justice Blackman's) former law clerks. See "The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful," by Edward Lazarus. (See attached pdf file.) I am both constrained and pleased to say that Mr. Lazarus is also practicing as a member of the Appellate Group of Akin Gump.

I would like to make one additional point. I question whether the case made in support of Proposed FRAP 32.1 is strong enough to justify a uniform national rule binding on all the circuits. As matters stand today, the circuits differ widely in how they deal with unpublished dispositions. Why not leave it that way? Each circuit is different, not only in terms of size and complexity, but in terms of practice and tradition. I fail to see the harm in leaving them free to go their own way in adopting rules governing the citation of unpublished dispositions.

Very truly yours,
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http://writ.findlaw.com/lazarus/20031127.html

The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions

Why It Will Be Harmful

By EDWARD LAZARUS
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Thursday, Nov. 27, 2003

The federal judicial system is in need of significant reform.

We need a lot more federal judge to handle the explosion of litigation that clogs the courts and delays adjudication, often for years, even in relatively simple matters.

We need to pay federal judges a lot more, perhaps double what they earn now. Otherwise, this incredibly important job will continue to be less attractive than it might be to leading private practitioners, who routinely earn ten times what judges now make.

Unfortunately, these salutary reforms remain a pipe dream. And rather than working toward these important goals, the Administrative Office of the U.S. Courts has proposed a fundamental change in the Federal Rules of Appellate Procedure that I believe, if enacted, will actually be harmful: It will make the current nightmare of federal litigation not better, but worse.

On the surface, the rule change seems innocuous enough. It would permit lawyers to cite as precedent even those opinions that courts specifically designate as "unpublished" or "non-precedential." (Under current practice, several federal courts of appeals strictly forbid the citation of such opinions.)

What could be wrong with allowing litigants to cite as precedent all properly decided judicial opinions? One might ask. A lot, as I will argue. In the end, I believe the consequence of allowing citation to unpublished judicial opinions will be pernicious.

The Case In Favor of Allowing Citation to Unpublished Judicial Opinions

Advocates of the rules change -- such as my fellow Findlaw columnist Michael Dorf, who recent wrote a column on the topic -- advance a variety of very reasonable arguments.

They rightly point out that prohibiting the citation of unpublished opinions renders the vast majority of all judicial decisions - indeed, roughly 80% -- off limits to future litigants. There is something intrinsically troubling about nullifying the precedential value of so many properly adjudicated cases and, thus, in essence, creating a giant reservoir of "second-class" decisions.

Advocates of the rule change also properly note that the use of past cases as controlling precedent for similar subsequent cases has a long tradition in American law, and is importantly grounded in the principle of fairness. A strong adherence to precedent insures that courts decide similar cases in similar ways.

Indeed, in a perfect world, judges would produce carefully crafted and well-reasoned opinions in every case -- and all of them would have equal precedential value just as the rule change would mandate.

The Case Against Allowing Citation to Unpublished Judicial Opinions

The world of appellate judging, however, is far from perfect -- and that's where the case against allowing citation to unpublished opinions begins.

Given the avalanche of federal litigation, appellate judges are constantly engaged in triage. They must separating the relatively routine cases, to which they will devote relatively little attention, from the more difficult and complex cases that require a substantial investment of judicial resources.

The U.S. Court of Appeals for the Ninth Circuit, for example, has a formal process for "weighting" cases. Under this process, the Court Clerk assigns each case a numerical degree of difficulty ranging from 1 to 10. Judges can then look to the weighting as a rough benchmark of the degree of difficulty the case is likely to present.

And even in Circuits that lack a formal system like the Ninth Circuit's, appellate judges, by necessity, will reserve their time and energy for those relatively few cases that will make new law, or are of unusual significance. And it only makes sense for them to do so -- just as it makes sense for a surgeon to give the person with cardiac arrest more time and care than the person with a hangnail.

Thus, the current rule, whereby courts do not allow citation of unpublished decisions, simply reflects the underlying truth that all cases do not receive the same level of judicial scrutiny. That reality is unlikely to change unless one of the problems I isolated above -- the understaffing of the federal courts -- changes first, and dramatically.

And that means the issue of citations to unpublished opinions must be seen in a new light: Should judges' best work be published, or should all of their work be published? That question seems a lot more difficult than the question than the question rule change proponents tend to pose: Should all of judges' work be published, or only part of it?

How Appellate Judges Typically See Their Role In "Easy" and "Hard" Cases

Interestingly, the way the judges approach routine, "easy" cases is different not only in degree, but also in kind, from the way they approach groundbreaking "hard" case. Not only do they spend more time on the hard cases, but their analysis in those cases is much more searching, as well.

In "easy," routine cases, appellate judges tend to see their role as merely checking for mistakes. They look to see that the lower court applied the right legal standards, and that no obvious injustice occurred.

And the opinions that judges produce in these cases reflect this approach. Generally speaking, they provide only a minimal elaboration of the law. That is because they are

designed for the narrow purpose of providing the parties to the case - and only these parties - the court's basic reasons for its ruling.

As a practical matter, moreover, appellate judges almost universally delegate the writing of these routine opinions to their law clerks, and spend little time overseeing the final product. Importantly, they can do this precisely because such opinions can (at least under current rules) be designated for non-publication, thereby negating their precedential value for future litigation involving outside parties.

Handling the routine cases in this way lets judges invest themselves deeply in the more important "hard" cases, the ones with potentially lasting impact on the development of federal law. These cases, in turn, result in published (and therefore citable) opinions - and judges often spend hundreds of hours writing their own drafts in these case, or commenting on the drafts of colleagues, in order to hone and improve these binding statements of law.

A rule change vesting every decision with precedential effect will destroy this sensible allocation of judicial resources. If judges cannot control whether unpublished opinions will govern future cases, inevitably they will spend much more time overseeing every word that comes out of their chambers.

As things stand now, an incomplete statement of the law or a misleading stray phrase in an unpublished opinion has no lasting effect. But if the rule change goes through, these same half-truths or mistakes will become important fodder for clever lawyers in future cases.

One Bad Consequence of the Rule Change: Less Give-and-Take and Less Oversight

Given that federal judges are already severely overtaxed, the proposed rule change will almost certainly have one of several baleful consequences. Or it may have all of these consequences at once -- for different judges may respond in different ways.

It may be that, in order to improve their now citable unpublished opinions, some judges will take some of the time they currently devote to the more significant cases, and transfer that time to the less significant ones.

But this would be very unfortunate. One of the best aspects of how the federal appellate courts work is the extended give-and-take among the judges as they prepare their opinions in the big cases. Anything that detracts from that interchange would undermine the kind of collegial brainstorming and reflection that is the hallmark of good judging.

The workings of the U.S. Supreme Court prove the point. At the high court, every decision does have precedential value. Indeed, each decision commands the allegiance of every court in the country.

Yet, by and large, the Court's written opinions are not subject to the intensive internal vetting that takes place inside most courts of appeals. Because every case is so important, and because the press of business is so great, the first draft of many Supreme Court opinions becomes the final draft after only the most cursory internal review. And the quality too often reflects this lack of care and attention.

In this respect, it would be regrettable if the courts of appeal mirrored the Supreme Court. But the proposed rule change threatens to have just that effect.

A Second Bad Consequence of the Rule Change: No Opinions at All in Easier Cases

Alternatively (or additionally), the proposed rule might prompt the following response: those judges who are unwilling to re-order their priorities may well stop writing opinions in the less significant cases at all. There is, after all, no requirement that judges actually give the reasons for their rulings.

Instead, they could simply issue opinions giving a bottom line result: "affirmed" or "reversed" with little if any explanation. (Some trial court judges already do this). Or they could "rule from the bench" -- with their logic reflected only in an oral argument transcript (as trial court judges also sometimes do.)

This, too, would be unfortunate. As things stand, even unpublished decisions give the parties a basic idea of why they won or lost. And this giving of reasons - even if not citable in future cases - is important to preserving the reputation of the courts for handing down non-arbitrary decisions.

A rule change that provides a powerful incentive not to accompany decisions with reasons risks undermining public confidence in the integrity of our courts -- and increasing litigant resentment. After all, part of the way our society convinces litigants to abide by even those decisions that do not favor them, is to give the reasons for those decisions, and show that they are the result not of individual caprice, but of legal interpretation.

It is worth noting, moreover, that the proposed rule change, though very high-minded, will also be inequitable in its results. Unpublished opinions are generally available on free websites, so technically, all will have access to them. But in practice, well-heeled litigants - those with the time, resources, and training to fully exploit the newly created mass of citable law - will enjoy an unfair advantage over less fortunate litigants. Remember, the addition of unpublished opinions to appellate databases will likely quintuple the number of opinions for future years.

Finally, to the extent that the new rule promises additional delays in adjudication, that burden too will fall on poor litigants - those who can least afford to wait as the wheels of justice grind on.

In short, the road to hell is paved with good intentions - and this proposed change in the federal appellate rules is a smooth stretch of macadam headed the wrong way.

Edward Lazarus writes about, practices, and teaches law in Los Angeles. A former federal prosecutor, he is the author of two books - most recently, Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court.