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01/18/2004 06:16 PM

03-AP-127

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ALLOWING CITATION OF MEMDISPOS IS BOTH UNFAIR TO POOR LITIGANTS AND LACKS RESPECT FOR THE LAW IN RELATION TO POOR LITIGANTS.
Legal decisions, unlike articles, treatises, and Shakespearian sonnets—which are cited for their persuasive value—are based on legal logic and later cited in subsequent cases because they reflect the law, not merely influence on the law. However, if citation to unpublished opinions—cases deriving from legal decisions with precedential value --should be allowed, clearly, the financially resourceful litigant or high powered firm would have the added muscle to create immeasurable burden for opposing litigants. What lies below, is a fervid belief that the American legal system fails to follow it's own convictions of fairness when it really matters to poor and minority litigants.

This is so because citation to unpublished opinions would in effect expand legal research, which would simultaneously, require additional lawyers, clerks, and computers. Moreover, allowing one practitioner, with knowledge or access to glean information of an unpublished opinion and use it only when favorable to their position would ultimately erode our underlying system of fairness and equal access. Accordingly, the expansion promotes unfair bargaining power for those who can use money to buy time so as to manipulate the fabric of the law itself. In essence, allowing the rule change would be more harmful to the economically poor and minority litigants but beneficial to those practitioners with potent resources to advance their self-interested principles, purpose, and prudence.

EXPERT RESEARCHING: ADVANCEMENT IN TECHNOLOGY WIDENS THE ALREADY EXISTING DISPARITY BETWEEN RESOURCEFUL AND IMPOVERISHED LITIGANTS.

Arguably, the advent of commercial websites such as LEXIS and Westlaw and the advancement in technological capacity of free Internet websites would make unpublished opinion readily available to everyone, even to the poor destitute litigant. But based on my experience, LEXIS and Westlaw in and of themselves illuminate another degree of unfairness in the legal system. Indeed, adding unpublished decisions to the mix means additional research will zealously be carried out. Correspondingly, those who could afford the extra cost of researching supplementary or unpublished materials are likely to have an unjust advantage over less resourceful litigants. What I have found in my law practice is that the commercial websites are limited in their use due to the exorbitant cost of only a few minutes where as the free services require more than one researcher to unearth a case that fits the facts and issue of the underlying case. This is so for two reasons: First, finding a document that is relevant depends largely on having more than one researcher with an amalgam of knowledge and understanding of the subject to conduct the search. To be sure, shepardizing and analyzing published and unpublished opinions, demands a great deal of time from staff attorneys and law clerks to conduct expert on point research. However, the public interest firms, unlike their corporate counterpart, who by and large represent indigent minority litigants, are largely understaffed and without the financial resources to support such extensive and exacting investigation. For many such firms, time and energy is expended on: imposed deadline for filing response papers; properly responding to a discovery request; nurturing effective communication, honesty, integrity and understanding of the legal issue to clients, and; more importantly, working at effectively managing the burgeoning litigation caseload that encompasses just about everything. In this regard, the issue of fairness as it relates to unpublished opinions needs to be correctly identified with a view toward preventing inequity to the poor.

Second, the practitioner who is expecting costly websites, such as LEXIS and Westlaw, to be accurate and thorough as possibly will discover that too often these systems don't necessarily identify all the opinions that have a negative effect on the validity or persuasiveness of the cited opinions, much less an unpublished one. Retrieving then separating relevant legal documents from irrelevant ones is often complex and exhaustive and thus error prone. The problem with this Internet searching is that the system relies exclusively on the machine to recognize words supplied by the researcher. But words and ideas don't automatically correspond. For example, a court discussing a twenty five year old male could include words such as young man, brother, victim, plaintiff, student etc. Also, there could be cases relevant to the same issue but make reference to other people that doesn't fit the "25 year old male" description. Indeed, accuracy in published

opinions must often be approved in some cases by checking a citation in both commercial databases where negative or positive analyses are often missed because citation is checked in only one system. One can only imagine the kind of chaos that a free Internet service—lacking the financial resources of commercial giants like LEXIS and Westlaw -- would create. For the former, research would basically spiral into a prayer and a hope that the decision is still potentially good law.

Finally, the fact that 95% of all cases never make it to court doesn't seem to present a problem for the proponents of unlimited publication rule. The exponential growth of federal caseload and the resulting backlog would have a damaging effect on courts if unpublished opinions were given the same treatment as published ones.

Prisoners for example have no right to counsel on habeas and at the same time, no access to research remedies to wrongs. As such, they will be put at particular disadvantaged vis-à-vis prison officials who have the power of the state or federal justice department who have access to all manner of legal research tool. This disadvantage illustrates the damaging ways in which the powers of the state can make effective use of the law to suppress obvious wrongs and allow officials to exercise dominion and control over the prison population. In effect, unleashing unpublished opinions would promote a sharp a double edge sword use of the law: legal subjugation of the prisoner's right to be heard and looks the other way when they are victims.

Unleashing unpublished opinions would also add to the caseload and overwhelm those few practitioners who offer representation to prisoners. Under the new rule, indigents who rely upon public interest firms and their advocates for timely legal advice will begin to wonder why due process means in due time. In essence, the fundamental fairness of having one's case be heard would apply to only 1% of litigants if public advocates were made to scrutinize publish and unpublished cases before offering sound advice.

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