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Comments:

I am a former law clerk for jurists on both the Second Circuit Court of Appeals and the United States Supreme Court, a professor of constitutional law, and a proponent of proposed Federal Rule of Appellate Procedure 32.1. My comments are brief and consistent with many of the arguments that have been offered for such a Rule over the past decade.

When I clerked on the Second Circuit, the governing assumption was that a case would be decided by published opinion if it resolved an open issue of law, applied settled law to new facts in a manner that would be useful to future litigants, or involved a dispute that was already the subject of significant public interest or importance. All other cases would be decided by unpublished summary orders. In our chambers and those of a great majority of judges on the court, summary orders were short and terse (often less than a page) explanations of the reasons for the Court's decision, replete with predictable citations to the relevant circuit or Supreme Court precedent.

I think the Second Circuit practice had it about right. Almost all cases fall into one of those two categories: worthy of a full precedential opinion (albeit often a short opinion or one that focuses on a single novel issue) or easily resolvable in a short, terse summary order with little original legal analysis. Opponents of the proposed rule want to reserve for appellate courts a third, intermediate option: a full and reasoned but unprecedented appellate opinion. In my clerkships, in my practice, and at my current academic job, I have participated in or observed perhaps one thousand appeals. I have yet to see more than a handful of cases in which I believe this third option might benefit the court.

If the rule has

the effect (as some have predicted)of forcing judges to choose between short, terse non-precedential opinions and longer carefully reasoned precedential opinions, I think it's effect on judicial practice will be salutary, both in eliminating unnecessarily long opinions in cases that raise no signficiant new issue and in pushing judges to take a bit more care in lower profile cases or cases raising minor new issues. When those effects are combined with our general preference for transparency in all things governmental, I think the case for the new rule is amply made.

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