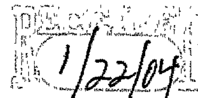
03-AP-164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Comments:

I write to express my strong opposition to proposed FRAP 32.1. Although I have been practicing law for only five years, I have spent that time in intense litigation environments (two years clerking for federal judges, two years with a corporate law firm, and my current position as a federal prosecutor) that I feel have given me some relevant perspective on the value of maintaining the clear distinction between the precedential value of published and unpublished opinions.

My
appellate clerkship experiences led me to appreciate the significance of publishing an opinion -- it is about far more than deciding the case at hand and affects many more people than just the specific litigants at issue. That is a very obvious statement, but it is one that many lawyers do not appreciate. I was very surprised upon becoming a practicing attorney to see the high rate of citation to unpublished opinions in lawyers' briefs and lower court opinions. This practice was and is rampant in civil litigation, to the point that many lawyers hardly make any distinction at all between published and unpublished opinions when citing to "precedent." I have seen much the same amongst criminal defense lawyers, who often cite to unpublished opinions from every circuit in the land if they can find a shred of support for their positions without any regard whatsoever for circuit rules on citing such decisions (I have found prosecutors to be much less likely to follow this unfortunate practice, in large part because our work product is vetted by supervisors and colleagues to a much greater extent than the typical defense attorney).

One might say, as the
committee apparently does, that since everyone's doing it, why not make it official? My response is that encouraging lawyers to cite to opinions that were not written as, nor intended to be, precedent is a dangerous

precedent itself. It allows less scrupulous and less careful attorneys to cite to a multiplicity of decisions as support for dubious positions without having to wrestle with what actually counts -- the published opinions issued by a three-judge panel that are intended to define the law. Indeed, I have seen on many occasions, particularly in the area of criminal law, counsel citing to unpublished opinions that appear to contradict or at least be in tension with published decisions of the same circuit. Of course, in reality the apparent tension or contradiction is almost always a function of the particular facts of the case, making the unpublished decision fact-bound and of little precedential value -- which is almost certainly why the decision was not published in the first place. But that doesn't stop lawyers from exploiting seeming inconsistencies in the law by waving around unpublished opinions as precedent on an equal footing with the published decisions of the circuit. And, unfortunately, sometimes the district judge has difficulty seeing the unpublished decision for what it is because such decisions, understandably, are often quite cursory in their analysis.

The imprimatur that FRAP 32.1 gives the practice of citing unpublished decisions will inevitably destroy any residual distinction that remains. The way out of the problem is not to encourage people to do more of it, but to take the tougher position and tell people to stop. If the real goal of proposed FRAP 32.1 is to encourage more publication of opinions, this is certainly not the right way to go about it in my opinion. Instead, proposed FRAP 32.1 will further undermine the already eroding distinction between precedent and one-off decisions and lead to ever more confusion for lower courts in applying the law. This is not a practice to be encouraged.

Thank you for your consideration of these views (which are solely mine and do not necessarily reflect the views of my Office).

Bill Burck

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