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Comments:

03-AP-207

Re: proposed Federal Rule of Appellate Procedure  
32.1.

While I am sure I could say little or nothing that has not already been said on this topic, I wanted to offer my thoughts as a commercial/complex litigator on why the proposal to allow citation to unpublished decisions is a bad idea.

The first and most obvious is the nightmare headache that users of computerized databases would face telling "never published" decisions from the actually prohibited "Ordered unpublished" decisions. Thousands and thousands of cases would have to be reflagged on databases such as Westlaw and Lexis, and practitioners would, in the meantime, have to look at every single unpublished decision to ensure that it was never published rather than ordered unpublished.

That looking is yet another reason: it already takes days and days to research a brief if one is going to do a thorough job, and while my clients can no doubt afford to pay me to spend x-hundred hours researching a brief, I fear that this would be a heavyburden on litigants who are not national corporations and multi-million dollar trusts.

My final thought is that courts THEMSELVES already have enough in the way of cases flying at them with every motion. There is no subject I can think of where the published decisions do not give a full and fair opportunity to brief an issue. Sure, occassionally you run into one of those unpublished opinions that is DEAD on point... but usually you could arrive at the same conclusion by the application of principles pronounced in a published decision. How many more cases does a judge need to review to make a decision?

What is being proposed is essentially taking the works of Augustine, of Meister Eckhart, of Julian of Norwich, of Anselm of Canterbury, Peter Abelard, Bonaventure, and Irenaeus and giving them the same weight as the rest of the Bible.

Is there a good, solid, principled reason not to? No.

Will it cause a never ending stream of practical and logistical nightmares?

Quite possibly. I believe almost certainly.

Sincerely,

Michael  
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