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03-AP-211

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Comments:

RE: proposed revision to FRAP 32.1: I'm a Savannah, Georgia attorney who's practiced over 20 years, 8 in private practice and 12 as a law clerk and staff attorney in the federal court system. I'm presently a district court career clerk and was a U.S. Fifth Circuit staff attorney.

I'm in favor of the rule, and, relatedly, welcome West Publishing Co's publication of unpublished circuit court opinions in its new "Fed Appx" softbound volumes and on Westlaw. The new rule will help further expose unpublished opinions. I want them exposed because "sunshine is the best disinfectant" and that alone will pressure judges/law clerks to do a better job of crafting them.

A lot of unpublished opinions are at best a pretense of "doing justice." They lay out the facts, repeat boilerplate law, then, without any real analysis, simply conclude: "We find no abuse of discretion and affirm" (or some variation of that), without bothering to state why. In other words, they are empty shell opinions, no better than the much overused one-word affirmances (the dreaded "fortune cookie" approach).

"Equal justice for all" means that every opinion should be treated with the same conscientious thoroughness as the opinion writer would want were his/her case up on appeal. Unpublished opinions have been referenced as "undisciplined" by one circuit judge who (back in the 1980s, when I proposed greater exposure of them) opposed bringing them out of the shadows, and anyone who reads a fair sample of them can see why.

But there should not be an "econo-class" opinion tier. If a judge is going to write an opinion explaining why someone

wins or loses, then he must reach every non-frivolous argument and diligently explain the basis for his reasoning -- an indispensable prerequisite for open government and equal justice. Glossing over results with "blah-blah-blah" verbiage ("because this is gonna be unpublished, so no one will really read this") should never be tolerated. Calling unpublished opinions "sausage" (Judge Kozinski's 1/16/04 letter to Hon. S.A. Alito, Jr. at 2) insults the system itself (again, everyone should feel that their appeal will be given equal treatment).

And judges who say they're overworked and can't devote the same quality to each opinion should articulate that to Congress in calling for more resources, most notably law clerks/staff attorneys, to get the job done and done right. If one is going to write an opinion (and thus purport to explain how one is applying the law to the facts), one should do so diligently, conscientiously and thoroughly, not waltz around with boilerplate then conclude with a flip-of-the-hand disposition.

This does not mean that unpublished opinions must be as finely polished writing-wise as published opinions (yes, that does take a lot of time), for it is substance, not form, that matters to those who win and lose their appeals.

Much of Judge Kozinki's concern -- that lawyers and lower courts will waste time fussing over unpublished opinions as de facto binding precedent -- is unfounded. Judges and jurors routinely constrain themselves to accept evidence "for a limited purpose," yet, according to Judge Kozinski, judges cannot do the same for unpublished opinions cited to them. "Oh ye of such little faith..."

Finally, citation to unpublished opinions should not present an "extra burden" to litigants (to research "an extra layer of cases" for contrary results) if appellate judges do their job and ensure that unpublished opinions do not conflict with published opinions and thus contain "nothing new" precedent-wise (in which case, what's my incentive to cite to them?). Quality-assurance, not banishment, is the solution here.

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