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Comments:

I am writing regarding proposed new rule of appellate procedure 32.1. I consider the issues raised by the proposal to be complex, and I am not in a position to strongly urge an outcome one way or the other. On the one hand, I agree with those who think there are situations where it would be troubling not to allow a litigant to cite an "unpublished" decision. But on the other, I would like to offer a comment from the standpoint of my own experience in the courts of appeals; I spent a summer working for Judge Kozinski and a year after law school working for Judge Posner. I think it is true that if unpublished opinions become available for citation, some of the opinions that now would be labeled "unpublished" will no longer be written at all, or will become abbreviated. This would be a significant cost of the rule, as it would decrease the parties' understanding of the decision and the possibilities for further appellate review.

To be clear, I do not think rule 32.1 would change Judge Posner's behavior in the slightest, since he doesn't write unpublished opinions anyway. And it might not have an effect in the chambers of Judge Kozinski, either, as he and his clerks are among the hardest working members of the entire appellate system. But in some other chambers I observed, particularly in the Ninth Circuit, I believe this tendency toward abbreviation might well become noticeable. There is a strong sense in many chambers that there isn't enough time to do a perfectly thorough job on every opinion in every case. The option not to publish is invoked as a direct attempt to relieve that pressure. Without that option, I would expect the pressure to be relieved in the other ways I have described: by simply saying less about many cases.

I hope the committee will reflect on this danger before making its decision.

Very truly
yours,

Ward Farnsworth

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