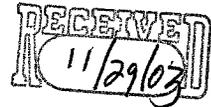


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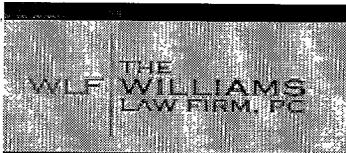
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Appellate: Yes
Comments:

You can see my full comments on the issue of the amendment of FRAP 32.1 at <http://www.mayitpleasethecourt.net/journal.asp?blogid=147>. Suffice it to say here that I am opposed to allowing the citation of unpublished opinions.

P.S. Why do you assume that everyone has a middle initial?

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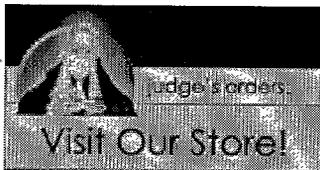
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By Justice William W. Bedsworth

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Welcome to the "May it Please the Court" weblog of the WLF | The Williams Law Firm, PC website.

Quote of the Day

You can't have everything. Where would you put it?

- Steven Wright

Perish the Thought - Citing Unpublished Opinions

In California, we're used to it. You can't cite an unpublished opinion to either a state or federal court. So is the law in 38 other states. But if you're in Delaware, you may cite such an opinion, as you can in 9 other states.

Why is this a big deal? Right now, the federal courts are considering changing their rules to allow lawyers to cite unpublished opinions. It's a scary prospect. The body of unpublished opinions is large, almost incomprehensible when compared to published opinions. In 1999, the Ninth Circuit issued 700 published opinions, and 3800 unpublished opinions. That's just one year, and only one of 12 circuits. You do the math, I can't.

The distinction is important. Published opinions go through as many as 80 drafts and can take weeks or months of preparation time, but unpublished opinions are drafted in as little as a day, and summarily sent to the parties with little revision. So, we have this whole body of unpublished opinions that do not rise to the same quality level as published opinions.

We can all rely on published opinions as precedential law. Unpublished opinions obviously do not have the same value. Unpublished opinions are simply the appellate court's responses to the individual parties in cases where the judges do not feel that the opinion qualifies to be published as a clarification or change in the law, and it allows the courts to decide many more cases than they would be able to do otherwise.

There are those who are in favor of allowing citation to unpublished opinions. To quote one jurist, "Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions – that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the judges."

But, that is not the case. According to the same jurist, "We ... [are] baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it."

Obviously, that doesn't happen.

All of these unpublished opinions are available for research on Lexis and Westlaw, but are not citable to the Courts because of their obvious deficiencies compared to published opinions. Often, if I find a particularly persuasive unpublished opinion, I don't cite it, I just use the applicable arguments.

I think this method is much more in line with the rules of the court, and still allows me to have the best of both worlds. I have been on the receiving end of unpublished opinions before, and I know that my clients preferred at least getting that much compared to a simple rebuff entitled "Affirmed" or "Denied," which is the likely result if this rule goes through.

There's two positions in opposition to this idea. First, leave the existing rules intact. Otherwise, if the courts are going to legislate a national rule, prohibit citation to unpublished opinions.

28 29 30 31

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If you'd like to be heard on these points, and want your voice to make a difference, Ninth Circuit Court of Appeals Judge Alex Kozinski is interested in this issue and you can get more information if you contact him. You can email him at: kozinski@usc.edu.

Speak out or you'll have no one to blame but yourself. [Rock the Vote!](#)

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