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**Proposed rule would allow citation of unpublished opinions**

By Jason Hoppin

A federal rules advisory committee has approved a proposal to allow the citation of unpublished decisions in all federal appellate courts.

Although the precise wording is yet to be worked out, the measure would allow the citation of unpublished opinions solely for persuasive value. The rule still has at least two years to go before it is written into the Federal Rules of Appellate Procedure.

Meeting in San Francisco, the 10-member Advisory Committee on Appellate Rules passed the measure with just one dissenting vote - Milberg Weiss Bershad Hynes & Lerach partner Sanford Svetcov.

Even if it is ultimately enacted, the rule is still a long way off. It must be subjected to a public comment period and ultimately approved by the U.S. Judicial Council and the U.S. Supreme Court.

Federal appellate courts are divided on how to treat unpublished opinions. Many allow lawyers to cite them in briefs, even if they don't have precedential value.

However, the proposed rule contravenes the rule in the Ninth Circuit U.S. Court of Appeals, one of several to bar their citation.

The move was praised by critics of unpublished opinions.

"This presumably puts some pressure on ... circuits to allow citation," said Stephen Barnett, a professor at Boalt Hall School of Law.

Barnett said the proposed rule was first floated by former Solicitor General Seth Waxman as a way to synthesize the rules among circuits.

"That's the main purpose of this proposal - to gain uniformity," Barnett said.

However, the current Solicitor General, Theodore Olson, abstained from Monday's 7-1 vote.

His representative, Deputy Associate Attorney General Douglas Letter, told the committee Olson had concerns about the rule, which were apparently highlighted during a phone call from Ninth Circuit Judge Alex Kozinski.

"Olson's representative said Olson had heard from Judge Kozinski and now had some concerns," Barnett said.

Kozinski declined to comment extensively on Monday's vote. "We have a rule, and it's a good rule," Kozinski said.

He also declined to say whether he contacted members of the advisory committee.

"What communications I have with other people is not a matter for public discussion," he said.

Svetcov said he opposed the rule for two reasons: Judges, he said, often sign on to unpublished opinions for the result, not necessarily the reasoning. Thus, lawyers end up citing opinions that have flawed reasoning.

The second reason has to do with the first - if judges worry about the reasonings in unpublished

opinions, they may pay more attention to them at the expense of published law.

And although Svetcov said some circuits may need more law, that is not the case in the Ninth, which is the largest appellate court in the country.

"We've got thousands of cases," Svetcov said.

Michael Schmier, a longtime opponent of unpublished opinions, said he was pleased with Monday's vote.

"I think that they're making progress in changing policy," Schmier said. "The decision's been made to go in the direction I've been saying they should go for years."

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