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 Comments:

I am a former clerk for now-retired Sixth Circuit Judge Bailey Brown, and I now litigate in Knoxville, Tennessee. My practice has included trial and appellate work. I write to support proposed Appellate Rule 32.1 regarding citations to unpublished opinions.

The Byzantine rules (or, more accurately, non-rules, as they shift in the wind) for such citations across the circuits are an unnecessary complication in an already complex environment. This complication rears its head in a particularly unfortunate way: I have seen judges at all levels, federal and state, upbraid counsel for citing unpublished opinions. In my view, there should be no penalty for finding persuasive authority and applying it to your case. That's simply good advocacy. The proposed rule should serve to diminish the likelihood of such penalties.

If circuits want to treat unpublished opinions differently, that's fine; they're equally free to disregard other circuits' opinions, as well as treatises, law review articles, and even logic if they so choose. But no one should have to hesitate to cite and apply a useful case simply because it didn't get designated for publication, for whatever reason.

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