Hyperlinks in Judicial Opinions

David Nuffer to: CAPS 05/08/2010 09:00 AM
Cc: Edward C Prado, Chambers of Judge Thomas I. Vanaskie, Beth Deere, Paige Gossett, Nancy S Nowak

An April 30 2010 memorandum from Director Duff asked for comments on the Judicial Conference policy on (a) preservation of internet pages cited in judicial opinions and orders and (b) hyperlinks to commercial research services.

We are in favor of the wise **policy** that judges **preserve a snapshot of any Internet page** s they cite in judicial opinions or orders. This policy mitigates the uncertainty of preservation of internet data at persistent URLs, and respects the need for judicial orders or opinions to remain in context regardless of transience of internet data. While we believe such preservation is not necessary with respect to many web sites, it is not easy for users to tell the difference, so preservation is likely the best, most cautious policy to maintain the integrity of opinions and orders. Link degradation is a problem outside the judiciary and has attracted national attention.

We are opposed, however, to the **policy regarding use of research hyperlinks** . We are opposed to it because of its *interpretation* and because of its *substance*.

Interpretation: The policy has been interpreted by most judges as *prohibiting* hyperlinks to research services, and many judges interpret it as prohibiting *all hyperlinks*. Also, at least two courts have implemented the DenyLinks option in CM/ECF 4.0 which effectively bars filing of any document with a hyperlink, even internal links such as e-enabled tables of contents, tables of authorities, and cross references, as well as the document-to-document hyperlinks (which are possible *by design* in CM/ECF starting with version 3.1), allowing a document of record to refer to another document of record. These links reduce record size by eliminating the need to re-file extensive exhibits each time they are pertinent. The result of misinterpretation of the research hyperlink policy has been to substantially impair the added value of electronic documents.

The Social Security Administration worked with magistrate judges on the Magistrate Judges Advisory Group as SSA sought court input on their implementation of an electronic record and especially with regard to SSA records on appeal in the district court. Since SSA records are now maintained in an electronic format, and the courts use electronic filing, SSA thought it made sense to file the record on appeal electronically. After discussion with several magistrate judges and others, SSA agreed to make several "court-friendly" changes in their e-record on appeal, to enable compliance with local court filing practices and give the courts the benefit of an electronic record on appeal, complete with hyperlinks, indexes and text-based PDF documents to facilitate searching and copy-paste operations. The effect of the "anti-hyperlinks" perception caused by the Conference policy has significantly impacted SSA as their carefully prepared e-records cannot be filed in courts that have denied filing to documents with links.

Substance: We are opposed to the substance of this policy. There are several reasons we feel the policy is unwise:

- We should be enabling, not disabling, features of our electronically filed documents. Research hyperlinks make electronic documents more useful. They maximize the benefit of an electronic document, making possible one-click access to research sources. This is a tremendous advantage over paper documents.
- If judges do not use research hyperlinks, we have no way to lead and encourage attorneys to use them. It is very hard to tell attorneys to make our work easier by using research links in their memos if we do not reciprocate to make their work easier by using links in our documents. We need to show them how, and why.
- No one is required to use the research links. They are a convenience. The standard citation to a paper source is still available. The reader can still go to a book.
- An embedded hyperlink does not restrict a reader to any research service. A reader is still

free to find the document on any research service. True, one service is link-enabled, but, just as in paper, a Westlaw or Lexis cite gives enough information to find the resource on other research services.

- There are two alternative research link creation programs and judges and lawyers are free to auto-populate a document with links using either West links or Lexis links or to create manual links to public free databases. There is no exclusive endorsement.
- In paper orders and opinions, the courts regularly use Westlaw or Lexis cites for unpublished opinions without fear of an implied endorsement.
- The courts use West product citations for books -- Fed. Supp., Fed. Rptr., F.R.D. -- without fear of endorsement or need for a disclaimer.
- The court has endorsed a PDF standard without much negative impact. While PDF is technically an open standard, there is still considerable benefit to Adobe from the courts' selection of PDF format.
- For years, WordPerfect was the only format in which the court could accept draft orders or jury instructions. *Many courts still require submission of draft jury instructions and orders in that format.* The courts have in effect required attorneys to have a copy of WordPerfect. No fear of endorsement was expressed and no disclaimer was mandated.
- We sense the policy is in some measure motivated by a fear of the unfamiliar and new. A policy resting, even in part, on that basis is unfortunate.

Thank you for the opportunity to comment on these policies. We would be glad to answer any questions.

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