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Focus

Appellate Law

Uncovering Unpublished Opinions

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Lawyers practicing in federal court, particularly in the 9th Circuit, need to be aware of a recent change to the Federal Rules of Appellate Procedure. Starting Jan. 1, lawyers may cite all opinions issued by the federal circuit courts of appeal after 2006. Cases marked "not for publication" may be cited now in party briefs as persuasive authority in circuits that previously had threatened sanctions for such references. Following years of heated debate among the circuits, the controversial new rule will affect how many lawyers research and draft federal-court briefs.

In reviewing lower-court decisions, appellate courts perform two primary functions: error correction and law clarification/creation. But because appeals may be taken as a matter of right, not every case requires a new statement on the law. Most decisions are drafted for the more-limited purpose of explaining the outcome to the parties. However, when a case requires the creation of new law, the decision also must clarify the law for future litigants. Writing opinions for this audience can be time-consuming; decisions often comprise 20 pages of carefully crafted language.

In the 1960s, federal courts faced an increasing caseload. As a timesaving measure, the Judicial Conference recommended that the circuit courts publish only cases with precedential value. Decisions involving routine cases and error correction would be entered, but only those with precedential value would be certified for publication. Because error-correcting decisions would be limited to the parties involved and could not be relied on by future litigants, judicial resources could be conserved to focus on published decisions.

Each appellate court developed its own local rule regarding the extent to which unpublished opinions could be relied on by parties in their briefs. Before the current rule change, nine of 13 circuits allowed litigants to cite unpublished opinions in their briefs as persuasive authority. The District of Columbia Circuit permitted parties to reference unpublished opinions as binding authority, while the 3rd and 5th Circuits allowed such citations of unpublished cases issued after 1996 and 2002, respectively, as permissive authority. In general, the 1st, 4th, 6th, 8th, 10th and 11th Circuits allowed citation to unpublished opinions as permissive authority only where no published opinion had resolved the relevant issue.

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In contrast, the 2nd, 7th, 9th and Federal Circuits maintained local rules prohibiting the citation of unpublished opinions to the court except in limited circumstances. Unpublished opinions could be referenced only for their factual relevance, such as to show double jeopardy, notice or entitlement to attorney fees, not for persuasive effect. Violation of the local rule could result in sanctions. *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001).

The inconsistency across the circuits prompted the Advisory Committee on Appellate Rules to consider a uniform rule. Rule 32.1 of the Federal Rules of Appellate Practice, first formally proposed in 2003, then adopted by the Judicial Conference, Congress and the Supreme Court, now allows practitioners to refer to unpublished opinions in briefs. Under the new rule, judges will have discretion to determine what weight, if any, to give these unpublished citations.

Proponents of the change support Rule 32.1 for several reasons. First, common-law systems are premised on the notion that judicial decisions serve as precedent for future opinions. Attorneys should be able to use a court's reasoning to persuade another court, particularly where the reasoning is pronounced on the appellate level. As noted by U.S. Chief Justice John Roberts Jr., a former Advisory Committee member, "[a] lawyer ought to be able to tell a court what it has done." Despite this, 80 percent of federal appellate decisions are unpublished, amounting to tens of thousands of noncitable decisions under the old rules.

Second, the variation in citation rules across circuits creates a hardship for attorneys who practice in more than one circuit. Creating a uniform citation rule is a step toward eliminating myriad local rules. The inconsistent citations rules across circuits also lead to the perplexing result that an unpublished Federal Circuit opinion, for example, may not be cited in the Federal Circuit, but it can be relied on as persuasive authority in the 3rd Circuit.

Third, noncitation rules may undermine judicial accountability because they enable judges to make a decision in one case but not be bound by it in future litigation. However, although judges should be able to change course in future decisions, they arguably should not be able to forbid parties from mentioning past holdings.

Fourth, noncitation rules that prohibit any reference to unpublished decision are difficult to justify, given that attorneys may cite any other resource, such as law review

articles, treatises, Shakespearian sonnets and advertising jingles.

Finally, and most compellingly, Rule 32.1 does not dictate how judges must treat unpublished opinions. The rule imposes no duty on judges to follow or even consider unpublished decisions cited by parties. The rule does not mandate that judges must consider these opinions if cited in briefs. It merely prohibits circuits from proscribing the citation of unpublished decisions altogether. The rule allows circuits to require in their local rules that parties indicate when they are citing an unpublished opinion, so that the judge can be sure to treat the opinion differently.

Nevertheless, many believe the rule change is a step in the wrong direction. According to 9th Circuit Judge Alex Kozinski, "[w]hen the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it, anyway."

Not surprisingly, the rule change has generated more comment to the Advisory Committee on Appellate Rules recently than any other issue has. The committee received 500 public comments — many from 9th Circuit judges and most in opposition to the change.

Opponents of Rule 32.1 rely primarily on the original rationale for unpublished opinions. Knowing that unpublished opinions may not be referenced beyond the initial judgment, judges can explain their reasoning briefly to the parties without discussing every fact. By saving time on unpublished opinions, judges may focus their attention on carefully considering and crafting lengthy precedential decisions.

Additionally, the change could advantage large law firms and government attorneys and disadvantage parties with fewer resources. Rule 32.1 likely requires attorneys to research more case law, straining smaller firms and potentially driving up client bills. Attorneys without access to expensive research databases could be hard-pressed to find unpublished opinions. However, this latter argument carries little weight, given the passage of the E-Government Act of 2002, which requires federal courts to publish all opinions on their Web sites.

Uniformity, although easing the burden on national practitioners, could be inconsistent with local differences among circuits. Judges from the 2nd and 9th Circuits in particular contend that the new rule is not suitable for circuits with voluminous case loads, because a high percentage of cases require only summary dispositions. They assert that judicial economy would be served best through summary orders that provide a minimal explanation intended only for the current litigants.

Consequently, opponents argue that the current system, in which parties are given a brief overview of the court's reasoning, will be supplanted by one with one-line judgments offering a holding but nothing else. Such a shift will occur because judges no longer can shield their decisions through nonpublication. But in such a system, neither the parties involved nor the district courts will have any basis for understanding the holding or why the lower-court decision was affirmed or reversed.

This scenario has not been borne out in practice. The circuits that allow citation to unpublished decisions contend that their lenient rules have not resulted in a landslide of one-line judgments.

Despite weighty opposition to Rule 32.1, it went into effect Jan. 1. As to whether judges in the 2nd, 7th, 9th and Federal Circuits will rely on unpublished opinions, only time will tell. Litigators practicing in those circuits should be cautious as they begin to cite unpublished opinions. They likely will be best served by approaching the issue mindful of the varying circuits' histories and philosophies on unpublished opinions.

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