Appellate Law

Unpublished Opinions

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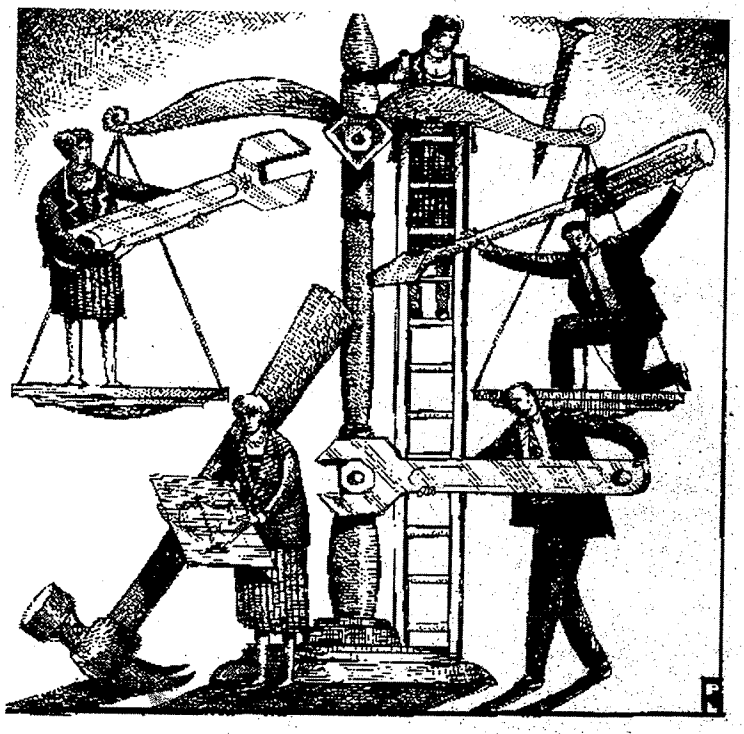

The verboten is about to be no more. After years of extensive debate, reams of commentary and vigorous opposition from several circuit judges and many attorneys, the Committee on Rules of Practice and Procedure and the U.S. Supreme Court have answered "yes" to the question of whether unpublished federal opinions are citable. Rule 32.1 of the Federal Rules of Appellate Procedure, effective Dec. 1, lifts restrictions on citing unpublished federal opinions or other dispositions that are filed after Jan. 1, 2007.

Rule 32 states that no court "may prohibit or restrict the citation of federal opinions, orders, judgments, or other written dispositions" issued on or after Jan. 1, 2007. This holds true regardless of whether they have been designated as "'unpublished,' 'not for publication,' 'nonprecedential,' 'not precedent,' or the like." Rule 32.1(a). Parties who cite an unpublished disposition must provide the court with a copy unless one is available on a publicly accessible electronic database.

The committee note states that Rule 32.1 is "extremely limited." It clarifies that Rule 32.1 neither requires an appellate court to file an unpublished opinion nor forbids it from doing so. It also states Rule 32.1 does not establish the factors or procedure appellate courts use to determine whether they should designate an opinion unpublished. The note also provides that the new rule is not meant to govern the weight a court should give an unpublished opinion.

Moreover, as the note states, Rule 32.1 "addresses only the *citation* of federal judicial dispositions that have been *designated* as 'unpublished' or "nonprecedential' — whether or not those dispositions have been published in some way or are precedential in some sense" (original emphasis). In other words, for purposes of the rule, all that matters is that the court has designated the opinion "unpublished" or "nonprecedential." That the opinion may have been "published" somewhere — that is, in a newspaper, electronic database or unofficial reporter or that some courts may give it precedential (or other) effect is irrelevant to its citability.

In promulgating the rule, the committee recognized that, although every federal circuit has permitted the citation of unpublished opinions for some purpose, such as to support an issue- or claim-preclusion argument, the courts "have differed dramatically" over their persuasive value. Indeed, "[s]ome circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether."

The 9th U.S. Circuit Court of Appeals, for example, has said that its unpublished dispositions are not binding precedent and therefore not citable, except for res judicata, collateral estoppel, or law of the case, purposes, or for factual purposes such as showing double jeopardy, sanctionable conduct, notice, attorney fees entitlement, or the existence of a related case. See 9th Circuit Rule 36-3b(i)–(ii). A few years ago, the 9th Circuit broadened the citability of unpublished dispositions, permitting parties to cite them in a petition for rehearing or rehearing en banc to show the existence of an intracircuit conflict. 9th Circuit Rule 36-3b(iii).

On the other hand, the 3rd Circuit has permitted the citation of unpublished opinions for any reason, cautioning merely that "the members of this court regard them for what they are worth — the opinion of three members of the court in a particular case." *In re Grand Jury Investigation*, 445 F.3d 266 (3rd Cir. 2006).

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Rule 32.1 does not alter these conflicting rules for unpublished dispositions filed before Jan. 1, 2007. However, it does resolve the conflict for future matters, by intending "to replace these inconsistent standards with one uniform rule." In that vein, the note specifies that no court may prohibit citation to an unpublished opinion for its persuasive value "or for any other reason." It also states that a court may not restrict or discourage citation to such opinions in any circumstance, including where a published opinion addresses the same issues as an unpublished one.

Although Rule 32.1 is contained in the Federal Rules of Appellate Procedure, its scope is not limited to the federal circuit courts of appeals. Because those courts are charged with establishing the citation rules for the courts within each circuit and the rules forbid appellate courts from prohibiting the citation

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of unpublished opinions, district courts are also bound by Rule 32.1's nonprohibition. Compare, 9th Circuit Rule 36-3(b) ("Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit.").

So what does Rule 32.1 mean for practitioners? Maybe very little, but maybe a lot.

Up to now, the federal appellate courts have tended to include far more detail and analysis in published opinions. That is not surprising, because published opinions typically are filed in cases that establish a new rule, that apply a settled rule to a new set of facts, that disagree with the holdings in other circuits, that urge Supreme Court review or that involve issues of interest to the public or the legal profession. In such cases, it's necessary to have a thorough understanding of the facts, the procedural background, the standard of review and the relevant legal principles so the reader can appreciate the significance of the opinion and understand why the court chose to publish.

On the other hand, unpublished dispositions, at least in the 9th Circuit, have tended to be far skimpier, even in cases where the record and the briefing are voluminous. Such dispositions rarely contain a factual and procedural statement, almost never set forth the governing legal principles and often resolve the appeal in only a few pages, often with a citation to one or two cases (if that). Even though such dispositions will now be citable, the 9th Circuit is unlikely to change its practice and make such dispositions more exhaustive — or even understandable to all but the parties and lawyers involved, if for no other reason than the court lacks the time and resources to devote to writing more comprehensive dispositions.

Moreover, the 9th Circuit weighs a number of factors to determine whether an opinion should be published, including whether it establishes, clarifies or changes a rule of law; calls attention to an overlooked rule; criticizes a rule; involves a unique issue or one of substantial importance; disposes of a case in which the district court opinion was published; follows on the heels of a reversal by the Supreme Court; or is based on a dissenting or concurring judge's request for publication. 9th Circuit Rule 36-2.

Rule 32.1 does not affect these factors or the procedures used to determine publication. For these reasons, we predict that, on the judicial side, Rule 32.1 will have little, if any, effect on the court.

Whether the rule will have a substantial effect on practitioners is an open question. If the rule does not effectuate a substantial change in the way the courts write unpublished dispositions — that is, if the bulk of unpublished dispositions remain short, to the point and largely bereft of detailed factual or legal analysis — there may be precious little for practitioners to cite. At a minimum, however, a conscientious practitioner may want to devote at least part of his or her research time — and with today's many computerized legal research programs, that is probably not an overly cumbersome task — to examine unpublished dispositions to see what nuggets they contain.

One unknown is whether the rule will raise the standard-of-care bar a little higher — that is, to require practitioners to survey both published and unpublished authority on the points of law involved in their case. And whether or not the rule raises that bar, whatever time a practitioner takes to examine unpublished dispositions undoubtedly will raise the cost of legal services, because that additional time (and the additional time necessary to deal with such dispositions in an efficient manner in court submissions, which are page- or word-limited) could be significant.

Both the standard of care and cost concerns were aired fully during the debates over Rule 32.1. Presumably, the rule's proponents, the Rules Committee and the Supreme Court believed the benefits of lifting the citability ban outweighed these concerns.

What effect will Rule 32.1 have in the California state courts? By its terms, the rule lifts the citability ban on federal dispositions only. The rule does not (and could not) change the citability rules in states like California, which prohibit the citation of unpublished California Court of Appeal opinions except where relevant to res judicata, collateral estoppel or law of the case. Only time and experience with Rule 32.1 will tell whether such state citability rules warrant the same kind of re-examination that their federal counterpart has been given.

One thing is certain, however: As of Jan. 1, federal practitioners should be vigilant and make sure an unpublished decision isn't lurking in the weeds to snakebite their case.

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