The Fight to Cite

The 9th Circuit Is a Vocal and Formidable Opponent of the Move To Let Lawyers Cite Unpublished Opinions

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SAN FRANCISCO - Lawyers may cite sonnets by Shakespeare or scenes from Spielberg for their persuasive value, but they can't cite unpublished decisions by the very appellate courts they wish to persuade.

The 9th U.S. Circuit Court of Appeals has refused to budge on its rule against citation of unpublished opinions, although it did conduct an experiment recently allowing lawyers to point out any conflicts between the holdings in published and unpublished opinions. The test looked at 152 requests for publication in 2003 and did not find a single conflict between reported and unreported cases, according to the court.

Despite the 9th Circuit's intransigence on the topic of citation, other circuits are reconsidering.

The "citadel of no-citation rule is falling," or so argues Stephen Barnett, a law professor at the UC Berkeley's Boalt Hall.

But citation rules won't change if Judge Alex Kozinski of the 9th Circuit has anything to say about it.

And he has plenty to say.

He wrote a 22-page opposition letter to a federal rules committee pondering whether to allow unpublished memorandum decisions to be cited.

"Because unpublished dispositions tend to be thin on the facts, and written in loose, sloppy language - and because there's about a zillion of them out there - they will create a veritable amusement park for lawyers fond of playing games," wrote Kozinski, one of the most vocal judicial opponents of the proposed rule change.

Nine of the 13 federal circuits allow citation of unpublished opinions, according to Barnett. And although a majority of state courts still prohibit such citation, including California, "the margin is slim and dwindling," he said.

One of the last ramparts to be breached is likely to be the 9th Circuit, where just 800 of its 5,000 decisions per year - 16 percent - are published opinions announcing new law. The 9th Circuit adheres to a strict rule forbidding lawyers from citing any of its unpublished dispositions.

Currently, a federal rules committee on appellate procedure is considering adopting a national standard on the issue. That would require a change in Rule 32.1 of the Federal Rules of Appellate Procedure. The committee has asked the legal community to comment on whether it should create such a standard. The proposed change would allow citation of unpublished federal decisions for their "persuasive value" but not the additional step of declaring all decisions binding precedent.

The committee has been inundated well before its Feb. 16 deadline for comments with opposition statements almost exclusively from judges and lawyers in the 9th Circuit, according to Patrick Schiltz, the committee's recording secretary and a law professor at St. Thomas School of Law in Minneapolis.

"We have received 120 comments ... an extraordinarily high number to get so early," he said recently.

"We usually get a couple of dozen letters on rule changes," he said. "A substantial majority come from the 9th circuit and the ones that aren't, they seem to have some connection to the 9th Circuit" such as former law clerks working in other places.

The U.S. solicitor general's office originally proposed the rule change several years ago as a means of creating uniformity for Justice Department appellate lawyers across the country.

As a sign of just how much influence Kozinski swings, his call to Solicitor General Theodore B. Olson is credited with prompting Olson's representative to abstain from voting for the change during a 2002 advisory committee hearing in San Francisco, even though it was the department's own proposal.

Kozinski was frank in describing what many appellate lawyers have always understood: "Unpublished dispositions - unlike opinions - are often drafted entirely by law clerks and staff attorneys."

He said in his letter, "a good 40 percent of our unpublished dispositions - some 1,520 - were issued as part of our screening program in 1999."

That number grew steadily to nearly 2,000 by 2003. The screening program allows staff lawyers to draft dispositions, then present them to a panel of three judges in camera. The reviews take as little as five minutes each. During any of the two- or three-day monthly sessions, the panel will issue 100 to 150 rulings, according to Kozinski.

That leaves no time for judges to fine tune the language of the disposition.

"When 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," he wrote.

However, Barnett suggested that there are "compelling considerations of judicial integrity, constitutional rights and public policy that make it wrong as a policy matter to prohibit citation of judicial opinions."

Emeryville lawyer Ken Schmier, an ardent supporter of allowing citation said, "The practice [of banning citation] is odious. This [no-citation] rule runs into constitutional objections like a bumper car going in the wrong direction."

He has pressed the issue unsuccessfully in state court. His challenge to Rules 976-979 of the California Rules of Court was turned down in a decision by the 1st District Court of Appeal. To add insult to injury, it was issued as an unpublished decision, not citable as precedent. *Schmier v. Supreme Court,* A101206.

Schmier said the "most obvious objection is the clear violation of free speech. How can you allow a rule where a criminal defendant cannot tell a judge that another judge has already ruled on this subject."

He said if most circuits have demonstrated they can do without a no-citation rule, then Kozinski's rationale, of necessity, should be questioned.

Barnett pointed out that as of December 2002 the 1st Circuit in Boston dropped its objection to citation of unpublished opinions in "related cases."

Other circuits permitting some form of citation are the 3rd Circuit in Philadelphia, the 4th Circuit in Richmond, Va., the 5th Circuit in New Orleans, the 6th Circuit in Cincinnati, the 8th Circuit in St. Louis, the 11th Circuit in Atlanta and the D.C. Circuit.

Barnett said the holdouts "legitimately fear they will reduce the quality of their output.

"Still, court decisions ought to be citable as precedent. Kozinski is all wrong saying it is the reasoning and language of the opinion that is important. We all learn in law school that what judges say is dicta, what they decide is important."

Lisa Perrochet, an appellate practitioner for 17 years with Horvitz & Levy in Los Angeles, opposes the proposed rule change.

"There are two functions of an opinion: to resolve a dispute and provide guidance for the future," she said. "All opinions need to do the first, but in this day and age, with the volume of litigation, it can't be expected that all opinions will be crafted with the clarity needed to provide guidance to litigants. That's the problem."

She said the language in unpublished opinions always can be lifted and used in briefs for their persuasive value - lawyers just can't say it was originally written by another judge.
Kozinski and a host of opponents to the rule change warn that judges will resort to simply issuing judgments of "affirmed" or "reversed" to avoid giving future litigants the written ammunition to misconstrue the intent of the appeals court.

He said it will increase the expense of litigation by forcing both sides to search through thousands more cases to make sure they have covered all potential opposition. That additional research will fall harder on litigants with the least financial resources.

John Rabiej, chief of staff for the Rules Committee at the Administrative Office of the U.S. Courts in Washington, D.C., said he could not predict how the Appellate Rules Committee will vote in April when it meets. But he did say that even if most comments are negative, that does not necessarily mean the idea will be voted down.

"Normally, we receive adverse comments. Those who favor a particular rule don't usually submit comments," he said.

If the committee votes in favor of the changes, the proposal would be referred to the Committee on Rules of Practice and Procedure to make sure it doesn't conflict with other procedures. That committee is scheduled to meet June 17 and 18, Rabiej said. If that body agrees on the rule change, it would go to the Judicial Conference of the United States, presided over by Chief Justice William Rehnquist.

The conference has 27 members, including chief judges and one district judge from each circuit. It meets in September. The rule would then have to be approved by the U.S. Supreme Court, which would have until May 2005 to act. Finally, it would go to Congress.

If the proposal survives all those hurdles, it would take effect in December 2005, Rabiej said.