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Raising the Bar: "Citing Unpublished Opinions"

By Paul Mark Sandler | *The Daily Record*

For the past several months, litigants in federal appellate cases have been free to cite unpublished federal opinions issued on or after January 1, 2007. This follows the U.S. Supreme Court's approval of Rule 32.1 of the Federal Rules of Appellate Procedure, which provides that a "court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent, or the like."

For some, the rule change represents a victory for the principle that "secret law is an abomination," as Professor Kenneth Davis famously pronounced nearly four decades ago. See Davis, Administrative Law Treatise 137 (1970).

In the seminal case of Anastasoff v. U.S., 223 F.3d 898 (8th Cir. 2000), Judge Richard Arnold lent further support to this cause when he held that the portion of the Eighth Circuit Local Rule "that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"

Another supporter of the change, the Supreme Court's Chief Justice John Roberts Jr., has remarked, "A lawyer ought to be able to tell a court what it has done." Other proponents of the rule change have argued that prohibiting citation of unpublished opinions serves to bury opinions that courts find embarrassing.

Despite these strong sentiments in favor of the change, the new rule has not been without opposition. During a comment period for a similar rule proposed in 2004, more than 35 judges from the 9th U.S. Circuit Court of Appeals wrote to the Federal Advisory Committee on Appellate Rules objecting to the proposal, and hundreds of public and private lawyers from the circuit also filed letters of opposition.

One opponent of the rule, Judge Alex Kozinski of the Ninth Circuit, expressed concern that allowing citation of unpublished opinions would lead to a result never intended by the judges who authored them. During debate, Judge Kozinski remarked, "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."

Perhaps in response to this opposition, in September 2005, the Supreme Court amended the original version of the proposed rule — which would have allowed citation of all unpublished opinions, regardless of the date of issuance — in favor of a rule that applies only prospectively to those unpublished opinions issued after January 1, 2007.

The new rule will bring a measure of uniformity to the federal courts of appeals. Although federal circuit courts will still be able to give varying precedential weight to unpublished opinions, they can no longer prohibit lawyers from citing them. Thus, Rule 32.1 will effectively overturn local appellate rules in the Second, Seventh, Ninth, and Federal Circuits, where the citation of unpublished opinions is currently banned outright.

The new rule also represents a change in the current practice in the 4th U.S. Circuit Court of

Appeals (which includes Maryland). In the Fourth Circuit, citation of unpublished decisions was strongly discouraged. See Local Rule 36(c).

No effect on state court practice

Counsel should be careful to remember that Rule 32.1 is a federal appellate rule that will not substantively affect the current practice followed in Maryland state courts.

With limited exceptions, unpublished decisions of the Maryland Court of Appeals and the Maryland Court of Special Appeals cannot be cited as binding authority. Under Maryland Rule 1-104 "[a]n unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority."

Unpublished opinions may be cited in the Court of Special Appeals and the Court of Appeals for "any purpose other than as precedent within the rule of stare decisis or as persuasive authority." In any other Maryland courts, unpublished opinions may be cited only: (1) when relevant under the doctrines of law of the case, res judicata, or collateral estoppel, (2) in a criminal action involving the same defendant, and (3) in a disciplinary action involving the same respondent. (See Md. Rule 1-104(b).)

Practice notes

The federal rule change should not alter the course of legal argument in the majority of federal appeals, but occasionally the new flexibility may aid attorneys in framing specific points.

Just as attorneys have always been free to cite the arguments of philosophers, social scientists or literary figures in their briefs, now litigants can cite unpublished opinions in federal appellate briefs. What a court will do with these citations is entirely in its hands. Attorneys citing unpublished opinions should be mindful of Judge Kozinski's point of view and not rely on them heavily.

If you elect to cite an unpublished opinion under the new rule, make sure it meets the jurisdictional and timing requirement of Appellate Rule 32.1: the opinion must be a federal one issued after January 1, 2007. Also, when submitting briefs and memoranda to a judge, be sure to note parenthetically that an opinion is unpublished, and always attach a full copy of any unpublished decision cited in your legal argument.

back >>

About Raising the Bar

From 2003 through June 2007, Paul Mark Sandler wrote "Raising the Bar," a regular column on trial advocacy that appeared in The Daily Record and other Dolan Media newspapers around the country.