

Citing Unpublished Decisions in Federal Court: A New Beginning

By Thomas L. Hudson

After three years of spirited debate, vigorous opposition from the Ninth Circuit Court of Appeals, two votes by the U.S. Judicial Conference Advisory Committee on Appellate Rules, and a study by the Federal Judicial Center, the rule permitting citation of unpublished decisions in the federal appellate courts—Federal Rule of Appellate Procedure (FRAP) 32.1—is likely to become effective December 1, 2006.¹ The text of FRAP 32.1 provides:

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
- (ii) issued on or after January 1, 2007.

(b) **Copies Required.** If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

FRAP 32.1 is expected to bring uniformity and better decision making to the federal courts. Furthermore, although practitioners and judges in the circuits that previously prohibited citing unpublished decisions will have some adjusting to do, the changes FRAP 32.1 brings were in many ways inevitable.

The Development of Unpublished Opinions and Restrictions on Citing Them

The restrictions on unpublished opinions now coming to an end originally grew out of concerns about the ballooning growth of the federal reporters due to publishing *all* opinions—a tradition started by John B. West.² Looking for ways to manage the volume of paper, in 1965, the U.S. Judicial Conference recommended that federal appellate courts publish only opinions “which were of general precedential value.”³ In 1972, the Judicial Conference then recommended that each circuit prohibit the publication of opinions unless ordered by a majority of the panel rendering the decision, and take steps to discourage citation of the “unpublished” opinions. By 1974, each circuit had developed its own rules to implement these directives.⁴

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—Judge Richard Arnold

The Citation of Unpublished Decisions

Although these changes slowed the ballooning growth of the federal reporters, critics began questioning the wisdom of restricting the citation of unpublished decisions, particularly when, over time, such decisions became electronically available to courts and litigants. In 1999, Eighth Circuit Judge Richard Arnold argued that “judges must respect what they have done in the past, whether or not it is printed in a book.”⁵ The following year, *Anastoff v. United States*, an Eighth Circuit decision authored by Judge Arnold, held that a court could not, consistent with Article III’s definition of “judicial power,” deem an opinion nonprecedential.⁶ Although later vacated as moot, *Anastoff* effectively launched a “nationwide reexamination of non-precedent practice.”⁷

In the wake of this debate—and well before anyone proposed FRAP 32.1—the First and D.C. Circuits relaxed their restrictions on citing unpublished decisions, leaving just four circuits (the Second, Seventh, Ninth, and Federal Circuits) that prohibited the citation of unpublished decisions other than for *res judicata* and similar limited purposes.⁸ In accordance with this trend, FRAP 32.1 was proposed in 2003 as a means of bringing uniform treatment to unpublished decisions in the federal courts.⁹ But it would take three years of vigorous debate for the rule to wind its way through the rule-making process, even though it initially looked like smooth sailing.

FRAP 32.1’s Controversy

In 2004, the U.S. Judicial Conference Advisory Committee on Appellate Rules considered FRAP 32.1. Then–Third Circuit Judge Samuel Alito Jr. chaired the Committee, and then–D.C. Circuit Judge John Roberts Jr. was a member. The committee,

including Judges Alito and Roberts, voted 7 to 1 in favor of FRAP 32.1.

After this initial approval of FRAP 32.1, however, more than 500 comments poured in from federal judges and lawyers expressing concerns about the proposed rule.¹⁰ Ninth Circuit Judge Alex Kozinski emphasized that law clerks and staff attorneys generally drafted unpublished opinions, and that “[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.”¹¹

To shed more light on the issue, the Federal Judicial Center, the research and education agency of the federal judicial system, was then charged with conducting empirical research on the potential impact of implementing FRAP 32.1.¹² The research showed that judges in circuits that already permitted the citation of unpublished decisions generally agreed that changing the federal rule would have “no impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them.”¹³ Two circuits—the First Circuit and the D.C. Circuit—had recently changed their citation rules to allow citation of all decisions, and judges from these circuits did not experience the problems critics predicted would result from the change.¹⁴ A majority of lawyers surveyed also “said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule.”¹⁵

In light of this analysis (and after approval by several more committees), the U.S. Supreme Court—which by now included former Advisory Committee members Roberts and Alito—approved FRAP 32.1 on April 12, 2006.¹⁶ Although the original proposal would have permitted the citation of past unpublished decisions, the rule as adopted applies only to decisions issued on or after January 1, 2007, presumably to allow courts to refine their “sausage making” in light of the change. The new rule also does not restrict a circuit’s ability to give unpublished opinions different precedential weight (for example, by treating unpublished decisions as persuasive only). The rule thus accommodates the existing differences among circuits, such as the First Circuit (which permits the citation of unpublished decisions, but only for their persuasive value) and the Third Circuit (which places no limitations on citing unpublished decisions).

FRAP 32.1: Looking Forward

Given the flexibility permitted by FRAP 32.1, practitioners and judges in the nine circuits that already permit citation of unpublished decisions for persuasive or precedential value will likely notice little impact from the new rule. But practitioners and judges in the Second, Seventh, Ninth, and Federal Circuits will need to make some adjustments. Practitioners will most likely continue to emphasize published decisions but will have the freedom (and perhaps responsibility) to cite unpublished decisions when helpful (or relevant) to an argument. Although many practitioners already research unpublished decisions to at least get a sense for if or how the circuit has treated an issue, FRAP 32.1’s adoption may mean that such analysis should be done in every case. Fortunately, lawyers already accustomed to citing unpublished decisions generally report that the benefits outweigh the burdens.¹⁷

For judges in these four circuits, it will mean that their unpublished decisions are no longer off limits. If the rule works as planned, this will not only make for more consistent decision making, but will enable judges “to engage in a dialogue with each other across cases and across panels,” before issuing a “published” opinion on a legal issue.¹⁸ But if the critics’ predictions hold true, judges may write shorter unpublished decisions with little or no analysis.

No doubt, many will be watching to see what happens in the federal courts, and the issue has already created some ripples in the states. Seven states recently relaxed their citation rules, while several others—including Arizona and Hawaii—have begun to consider changes, with Hawaii expressly deciding to await the outcome of FRAP 32.1’s fate before making any change.¹⁹ Presumably, if FRAP 32.1 improves decision making among the federal courts, or at least creates no long-term mischief, we will see more states follow the federal lead. ♦

Endnotes

1. The Supreme Court approved FRAP 32.1 on April 12, 2006; the rule will automatically go into effect on December 1, 2006, unless Congress countermands it before then, which is unlikely.
2. In 1882, John B. West formed the West Publishing Company “to collect, arrange in an orderly manner and put into convenient and inexpensive form in the shortest possible time, the material which every judge and lawyer must use.” *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 406 (1889).
3. Administrative Office of the U.S. Courts, Judicial Conference Reports 1962–64, at 11 (1964), quoted in Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).
4. See Suzanne O. Snowden, “That’s My Holding and I’m Not Sticking to It!” *Court Rules That Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, 79 WASH. U. L.Q. 1253, 1263–64 (2001) (discussing this history).
5. Administrative Office of the U.S. Courts, *supra* note 3.
6. *Anastoff v. United States*, 223 F.3d 898 (8th Cir.), vacated as moot en banc, 235 F.3d 1054 (8th Cir. 2000).
7. See Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 758–59 (2003). Other articles framing the issues raised by *Anastoff* and the nonpublication and no-citation rules include Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?* 3 J. APP. PRAC. & PROCESS 175 (2001); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001); Daniel H. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 344 (2001); R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold’s Use of History in Anastoff v. United States*, 3 J. APP. PRAC. & PROCESS 353 (2001); J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastoff*, 3 J. APP. PRAC. & PROCESS 425 (2001); see also <http://www.nonpublication.com> (collecting materials).
8. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battle Field Report and Analysis*, 5 J. APP. PRAC. & PROCESS 474 (2004) (summarizing changes in rules for citations made by the federal circuits and states); see also Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Rules Governing Publication and Citation: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) (summarizing the circuits’ and states’ current rules); see also Federal Judicial Center, *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 1* (April 14, 2005).
9. See <http://www.uscourts.gov/ttb/May04ttb/hearing>.
10. See Statement of Stephen R. Barnett, *Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the*

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