The Value of Unpublished Opinions

By Moe Keshavarzi

For some time now, judges and lawyers have debated the pros and cons of permitting lawyers to cite to unpublished opinions. The debate has heated up in the last several years after the Supreme Court, in 2006, over the objection of several hundred judges and lawyers, adopted a new Rule 32.1 of the Federal Rules of Appellate Procedure requiring that federal courts allow citation of unpublished cases issued on or after Jan. 1, 2007. Unlike federal law, California law still forbids lawyers from citing to unpublished opinions. (California Rule of Court 8.1115.) This article gathers and summarizes several key arguments advanced by supporters of Rule 32.1 in favor of permitting lawyers to cite to unpublished opinions.

One of the most often cited arguments in favor of permitting lawyers to cite to unpublished opinions is that an opinion, published or not, is an official act of the court and in our common law system, every decision and official act of a court makes law. See, e.g., Danny P. Boggs and Brian P. Brooks, "*Response: Unpublished Opinions & the Nature of Precedent*," 4 Green Bag 17 (2000). Prohibiting citations to unpublished opinions is inconsistent with this basic principle of common law because it prevents litigants from citing to a court its own official acts. As Chief Justice John G. Roberts Jr. has noted, "[a] lawyer ought to be able to tell a court what it has done."

The no-citation rule also deprives litigants and the courts of the benefits of unpublished opinions. Supporters of Rule 32.1 have argued that "unpublished opinions are a valuable source of 'insight and information.'" Patrick J. Schiltz, "*The Citation of Unpublished Opinions in the Federal Court of Appeals*," 74 Fordham L. Rev. 23, 43-44 (2005). Written comments submitted in support of Rule 32.1 point out that not only do lawyers and judges read unpublished opinion, they cite them. For example, research has revealed hundreds of opinions in which judges cited to unpublished opinions. See, e.g., *Harris v. United Federation of Teachers*, No. 02-Civ. 3257, 2002 WL 1880391 (S.D.N.Y. 2002). The reasoning for this was best explained by Judge Kenneth F. Ripple, 7th U.S. Circuit Court of Appeals, who in a letter dated Feb. 12, 2004 to the Chair of the Advisory Committee on Appellate Rules (then) Judge Samuel A. Alito Jr., wrote "Judges rely on this material [unpublished decisions] for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions.... We have all encountered the situation in which there is no precedent in our circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order.... I certainly do not understand why counsel, obligated to present the best possible case for his client, should be denied the right to comment on legal material in the public domain."

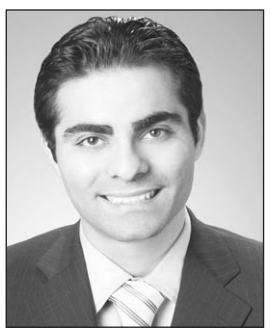
Many commentators have also expressed concern that no-citation rules can erode the public's confidence in the courts and the decision-making process. To a non-lawyer (and even some lawyers) a rule prohibiting the citation of certain opinions is inconsistent with two basis tenets of our judicial system: accountability and transparency. See, Schiltz, "*The Citation of Unpublished Opinions in the Federal Court of Appeals*," 74 Fordham L. Rev. at 49 (2005). In a letter dated Feb. 13, 2004 to Peter G. McCabe, the Secretary of the Commission on Rules of Practice and Procedure, Judge Frank H. Easterbrook, 7th U.S. Circuit Court of Appeals, explained it this way: "It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to 'revised and extended remarks' inserted into the Congressional Record to op-ed pieces in local newspapers; why should the 'unpublished' judicial orders be the only matter off limits to citation and argument? It implies that judges have something to hide."

There are compelling reasons for permitting lawyers to cite to these unpublished opinions at least for their persuasive value.

Not only are there valid reasons to permit litigants to cite to unpublished decisions, the reasons proffered in support of the no-citation rule are based largely on speculative fears and lack any evidentiary support. Opponents of the rule permitting lawyers to cite to unpublished opinions often argue that unpublished opinions are necessary because they take much less time than published opinions. These opponents contend that if judges know that their opinions will be cited for precedential or persuasive authority, they will either be forced to spend much more time drafting these opinions or they will issue short opinions without much analysis or reasoning. Research shows, however, that this fear of the no-citation camp is exaggerated. Prior to its approval of Rule 32.1, the Advisory Committee on Appellate Rules asked the Administrative Office of the U.S. Courts to analyze the impact on the judiciary of a pro-citation rule. For its report, among other things, the Administrative Office surveyed judges in circuits that had changed their rules to allow lawyers to cite to unpublished opinions and asked them about the impact the new rules had on their workload. The Administrative Office's report concluded that there was "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time...[or] the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 2, 2005).

Opponents of the rule permitting citation of unpublished opinions also argue that such a rule would increase the cost of legal representation by increasing the number of cases that lawyers will have to review and analyze when representing a client. Research shows that this fear is also unfounded. The Administrative Office's report also surveyed attorneys who responded that the adoption of a rule permitting citation to unpublished opinions would not significantly increase their research workload.

Lawyers researching California law often come across a case that is directly on point factually but unpublished. There are compelling reasons for permitting lawyers to cite to these unpublished opinions at least for their persuasive value. There is no valid reason why litigants should not be able to let a trial judge or appellate justice know how their colleagues decided a case involving similar facts even if that opinion is unpublished.



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