The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders, 62 Wash. & Lee L. Rev. 1491 (Fall, 2005)

Before FRAP 32.1 was adopted, there was opportunity for public comment, followed by studies conducted by the Appellate Rules Advisory Committee of the United States Judicial Conference. Professor Stephen R. Barnett, of Washington and Lee University, conducted his own study, interviewing federal defenders in circuits which already permitted citation of unpublished opinions. Below are some of his findings, taken from the 42 page article:

Effect of Citability Rule in those Circuits

No real complaints, not discussed at circuit conferences. Some problem in 11th circuit which had delayed in putting its unpublished opinions online. One defender voiced some concern about having to argue over the weight of unpublished opinions in a particular case.

Frequency of Citation

Unpublished opinions were cited in all circuits; frequency of such citation varied. No defender suggested there was too much citation of unpublished opinions in his/her circuit.

Research Burden

Virtually all defenders stated that they regularly research unpublished opinions. Numerous defenders emphasized the role of computers and that unpublished cases "just pop up on Westlaw." Any additional research burden was minimal or insignificant.

Impact on Opinion Quality

Difficult for defenders to say whether citability forces judges to spend more time on their opinions; split in assessment of quality of unpublished decisions in the circuits.

One-line Dispositions

No evidence that one-line dispositions had increased following institution of citability rule.

Precedential v. Persuasive

No experience of having litigants argue that unpublished opinion should be treated as precedent, instead of as merely persuasive, *ie.*, no, attempts to blur the line.

Delay, Other Adverse Effects

No defender mentioned delay, slower dispositions, as a consequence of citatiblity.

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENTS TO RULE 809.23(3)

PETITION OF JUDICIAL COUNCIL REQUESTING THAT THE SUPREME COURT CONSIDER WHETHER OR NOT TO ORDER AN AMENDMENT TO RULE 809.23(3)

The Judicial Council respectfully petitions this Court to consider whether or not an order should be entered, pursuant to WIS. STAT. § 751.12, adopting the following amendment to WIS. STAT. RULE 809.23(3).

SECTION 809.23(3) of the statutes is amended to read:

> 809.23(3) CITATION OF ~~U~~UNPUBLISHED OPINIONS ~~NOT CITED~~. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of ~~res judicata~~ claim preclusion, ~~collateral estoppel~~ issue preclusion, or law of the case. An unpublished opinion issued on or after [insert effective date] may also be cited for its persuasive value, provided that the party citing the opinion files a copy of the opinion with the court and serves a copy of the opinion upon all opposing parties together with the brief or other paper in which the opinion is cited. Because an unpublished opinion is not precedent, an unpublished opinion cited by a party is not binding on any court of this state, and the court need not distinguish or otherwise discuss an unpublished opinion cited by any party in its ultimate decision. For purposes of this section, "unpublished opinion" does not include summary dispositions.

RESPECTFULLY SUBMITTED

JUDICIAL COUNCIL

_____ _____

by: James C. Alexander
State Bar #1013971
110 East Main Street, Suite 606
Madison, WI 53703-3328

Date

le After Publication and Comments No ade to the text of the proposed amendment ttee Note.

a)(7)(C). If the principal brief of a party s, or if the reply brief of a party exceeds 15)(7)(C) provides that the party or the party's ertify that the brief complies with the type- on of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has o refer to Form 6 (which has been added to f Forms) and to provide that a party or uses Form 6 has complied with Rule ourt may provide to the contrary, in its local se.

ests not only the information mandated by , but also information that will assist courts typeface requirements of Rule 32(a)(5) and requirements of Rule 32(a)(6). Parties and ot required to use Form 6, but they are o so.

c)(2)(A). Under Rule 32(c)(2)(A), a cover is a petition for panel rehearing, petition for aring en banc, answer to a petition for panel nse to a petition for hearing or rehearing en her paper. Rule 32(d) makes it clear that no ire that a cover be used on any of these r, nothing prohibits a court from providing in that if a cover on one of these papers is ed, it must be a particular color. Several opted such local rules. *See, e.g.*, Fed. Cir. R. ; yellow covers on petitions for hearing or anc and brown covers on responses to such Cir. R. 40(a) (requiring yellow covers on el rehearing and brown covers on answers to 7th Cir. R. 28 (requiring blue covers on earing filed by appellants or answers to such equiring red covers on petitions for rehearing es or answers to such petitions); 9th Cir. R. blue covers on petitions for panel rehearing nts and red covers on answers to such peti- ring red covers on petitions for panel rehear- pellees and blue covers on answers to such Cir. R. 35–6 (requiring white covers on aring or rehearing en banc).

ting local rules create a hardship for counsel more than one circuit. For that reason, Rule been amended to provide that if a party a cover on a paper that is not required to have must be white. The amendment is intended to al rulemaking on the subject of cover colors omote uniformity in federal appellate practice.

de After Publication and Comments No nade to the text of the proposed amendment ittee Note.

(d) and (e). Former subdivision (d) has been subdivision (e), and a new subdivision (d) has he new subdivision (d) requires that every other paper filed with the court be signed by unrepresented party who files it, much as . 11(a) imposes a signature requirement on district court. Only the original copy of every signed. An appendix filed with the court does igned at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

2005 Amendments

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 32.1. Citing Judicial Dispositions

(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.

(Added Apr. 12, 2006, eff. Dec. 1, 2006.)

ADVISORY COMMITTEE NOTES

2006 Adoption

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

ubdivision (a). Every court of appeals has allow l opinions to be cited in some circumstances, port a contention of issue preclusion or claim But the circuits have differed dramatically to the restrictions that they have placed on the published opinions for their persuasive value. have freely permitted such citation, othe raged it but permitted it in limited circumstan others have forbidden it altogether.

le 32.1(a) is intended to replace these inconsiste with one uniform rule. Under Rule 32.1(a), a may not prohibit a party from citing an unp of a federal court for its persuasive value or reason. In addition, under Rule 32.1(a), a co place any restriction on the citation of such example, a court may not instruct parties on of unpublished opinions is discouraged, no forbid parties to cite unpublished opinions ished opinion addresses the same issue.

le 32.1(a) applies only to unpublished opinions after January 1, 2007. The citation of unpublis issued before January 1, 2007, will contin rned by the local rules of the circuits.

ubdivision (b). Under Rule 32.1(b), a party opinion of a federal court must provide a cop on to the court of appeals and to the othe that opinion is available in a publicly access c database — such as a commercial database o a legal research service or a database mainta rt. A party who is required under Rule 32.1(b) copy of an opinion must file and serve the copy f or other paper in which the opinion is cit 1(b) applies to all unpublished opinions, reg en they were issued.

Rule 33. Appeal Conferences

The court may direct the attorneys—a appropriate, the parties—to participate in on conferences to address any matter that m disposing of the proceedings, including simpl ues and discussing settlement. A judge erson designated by the court may preside conference, which may be conducted in per telephone. Before a settlement conference, eys must consult with their clients and much authority as feasible to settle the c court may, as a result of the conference, order controlling the course of the proce implementing any settlement agreement.

As amended Apr. 29, 1994, eff. Dec. 1, 1994; A eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

The uniform rule for review or enforcement administrative agencies, boards, commissions or the general note following Rule 15) authorizes a conference in agency review proceedings. The erations which make a prehearing conference such proceedings may be present in certain cas