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IN PRACTICE

APPELLATE PRACTICE

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Are Federal Appellate Practitioners Free At Last?

Proposed rule change lifts ban on citation of unpublished decisions that is still in effect in certain federal appeals courts

During the past few months, a major salvo was fired in a long-simmering struggle for free expression. The battleground is the federal appellate court system and the administrative committees to which the system is attached.

Two of the major combatants are judges of the Third U.S. Circuit Court of Appeals, and weapons in the battle include Shakespearean sonnets.

Chances are, you missed it.

To be among the small group of lawyers who might not have missed this fusillade, you would have to be a practitioner who reads, or at least scans, the weekly advance sheet of *West's Supreme Court Reporter*. If you did happen to peruse the Nov. 1, 2003, issue, you still would have missed it if you skipped over the hundreds of pages of "stuff" at the beginning of that issue (as I usually do), heading straight to the actual Supreme Court opinions (or at least the headnotes).

You know what sort of stuff we're talking about: things like West's judicial highlights, parallel citation tables, key number translation tables, and other less than breathtaking material beyond the interest of the typical lawyer who seeks only to stay on top of our highest court's decisions.

Among the "stuff" in the Nov. 1, 2003, issue was an unusually large collection of proposed rule changes for the various federal courts. This hefty package included, among other things, proposed changes in the bankruptcy rules and even the admiralty rules.

Within this package of proposed rule changes was a group of changes for the Federal Rules of Appellate Procedure. But even within that group, the revolutionary battle cry for freedom of expression was buried among a group of rule changes that included mind-numbing topics such as replacing the reference to "President's Day" to "Washington's Birthday," rewriting the rules regarding cross-appeals, and still more efforts to plug loopholes exploited by practitioners seeking to squeeze more words or pages into a brief, and the like.

But if you had slogged through all of this (and stayed awake in the process), you would have learned about proposed new Rule 32.1 of the Federal Rules of Appellate Procedure, of which part(a) would read as follows:

> **Citation Permitted**. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments or other written dispositions.

In other words, as a practical matter, lawyers practicing in the federal appeals courts could not be prohibited from citing to an appellate court the prior decisions of that court which are not formally published in the *Federal Reporter* (Third Series).

Imagine! For the longest time, those of us who practice in certain federal appeals courts (but not all of them) have been prohibited from citing nonprecedential decisions of the same court, even where the nonprecedential decision was more relevant than any other authority available.

Because most of my appellate practice involves patent cases, I have had to live with Federal Circuit Rule 47.6(b) since that court opened its doors 20 years ago. That rule flatly states that an opinion designated as nonprecedential "must not be employed or cited as precedent." Some other circuits are similarly strict, while others (such as the Fifth, Eighth, 10th and 11th Circuits)

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have allowed the citation of nonprecedential opinions if counsel believe them to be "persuasive." This is a rather easy hurdle to clear, since if the decisions were not believed to be persuasive, why cite them?

Those of us who have labored under no-citation rules had a brief flicker of hope for liberation a few years ago when, in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), the Eighth Circuit declared unconstitutional that portion of Eighth Circuit Rule 28A(i) (which actually allowed citation of unpublished opinions if "persuasive") that declared that unpublished decisions "are not precedent."

But that flicker of hope was quickly snuffed out when, after the government abandoned its position in the underlying suit, the case became moot and the decision was vacated.

While the victory for free expression in *Anastasoff* had disappeared, the original opinion had not, and the issue did not slip away quietly. In *Hart v. Massarini*, 266 F.3d 1155 (9th Cir. 2001), an attorney had filed a brief that cited an unpublished decision, and the Ninth Circuit had issued an order to show cause why he should not be disciplined. After spending 20 pages explaining why the now-vacated *Anastasoff* decision had been wrong, the circuit exercised its discretion not to sanction the attorney.

The following year, in *Symbol Technology, Inc. v. Lemelson Med. Educ. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002), a few courageous souls tried to convince the federal circuit to adopt the reasoning from the original *Anastasoff* decision. But the circuit instead signed on to *Hart*, and its no-citation rule lives on — at least for now.

The bombshell about which I have been hinting was prefaced in the Nov. 1, 2003, advance sheet by a memorandum from Judge Samuel Alito Jr. of the Third Circuit, Chair of the Advisory Committee on Appellate Rules. The memorandum was addressed to Judge Anthony Scirica — also of the Third Circuit — who happens to be Chair of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

In his discussion on proposed new Rule 32.1, Alito begins by stating that the proposal is being made for two reasons, one of which is that the local rules of the circuits differ dramatically in their practices. He asserts that this creates a particular "hardship" for practitioners who practice in more than one circuit.

In my view, that's pretty weak. Lawyers who practice in the federal courts around the country know full well that all of the federal district and appellate courts have all sorts of unique and sometimes quirky practices, which we fail to follow at our peril. There has to be a more significant reason for this rule change — and, of course, there is.

As the second reason given in Alito's memorandum, he states that restrictions on the citation of unpublished or nonprecedential decisions are "wrong as a policy matter." Anticipating that some will disagree with him, including some judges who are "passionate" in defending no-citation rules, Alito goes on to acknowledge that this is a "controversial matter" and indicates that the committee "defends its position at length" in the "Committee Note." He predicts that the committee "will undoubtedly receive a substantial number of comments on the proposed new rule."

It is not until the "Committee Note" that we hear the cry for free expression. But it is well worth the wait. After paying lip service to the hardship imposed on lawyers who practice in more than one circuit, Alito's committee gets to the heart of the matter:

> It is difficult to justify prohibiting or restricting the citation of 'unpublished' opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.
>
> There is no compelling reason to treat 'unpublished' opinions differently. It is difficult to justify a system under which the 'unpublished' opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the 'unpublished' opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. … And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions. [Emphasis in original.]

Citing the availability of unpublished decisions on Web sites and elsewhere, the committee asserts that barring citation of unpublished decisions is "no longer necessary to level the playing field." The committee also argues that rules restricting citation may spawn "satellite litigation" over the propriety of citations, which serve only to "further … burden the already overburdened courts of appeals." (Might this be a dig at the Ninth Circuit having spent 20 pages excoriating — and then exonerating — the errant practitioner in *Hart*?)

It is hard to argue with the committee's assertion that "Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public." Presumably, the committee is suggesting that while unpublished appellate decisions normally are not quite as elegant as Shakespearean sonnets, they just might be more on point.

In apparent anticipation of the opposition he knows will be coming, and perhaps to make it clear that he personally supports the "Committee Note,"

Alito (in his memorandum to Scirica) hammers home the limited scope of proposed Rule 32.1 and avoids taking any position on the constitutionality of no citation rules (in comments which are echoed early in the Committee Note):

> I want to stress here — as I have stressed in prior communications to the Standing Committee — that proposed Rule 32.1 is extremely limited. It takes no position on whether designating opinions as 'unpublished' or 'non-precedential' is constitutional. It does not require any court to issue an 'unpublished' or 'non-precedential' opinion, nor does it 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 'non-precedential.' Most importantly, it says nothing whatsoever about the effect that a court must give to one of its own 'unpublished' or 'non-precedential' opinions or to the 'unpublished' or 'non-precedential' opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as 'unpublished' or 'non-precedential.' [Emphasis in original.]

What will come of proposed Rule 32.1 is anyone's guess. A public hearing on all currently proposed appellate rules is scheduled for Jan. 26, 2004, in Washington, and written comments will be accepted until Feb. 16, 2004. After the public comment period, the Advisory Committee on Appellate Rules will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure.

Thereafter, if it gets that far, both the Supreme Court and Congress will have opportunities to derail the proposed rule if they are so inclined.

But it does seem clear that opponents of no-citation rules have found an eloquent and influential ally in Alito. If his committee's view prevails, we may all be able to cite any and all cases in our appeal briefs.

Oh — and one more thing: however the debate turns out, if you haven't done so already, you might want to ask your law librarian to pick up a volume of Shakespearean sonnets. ■