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Circuit's New Citation Rule: Few Takers
In 2002, D.C. Lawyers Made Little Use of Unpublished Cases
By Jonathan Groner

Controversy over the citation of unpublished appellate decisions has swirled for years. Some attorneys and judges say courts should allow all their rulings to be cited as precedent, while others say that relying on unpublished cases will foment chaos.

One year ago, the U.S. Court of Appeals for the D.C. Circuit became a key laboratory for an experiment with unpublished cases, permitting lawyers to cite them in their briefs in the same way that they cite published opinions. The step came even as a panel of the Judicial Conference of the United States began work on a proposal to allow such citations in federal appeals courts nationwide, with final approval possible in late 2005.

After a year of experience, the D.C. Circuit has not noticed any problems with lawyers' use of unpublished or, as they are often called, nonprecedential rulings. In fact, the court has hardly noticed any change at all.

Interviews with lawyers and judges and a review of the circuit's decisions show that the rule has been used only rarely since it went into effect on Jan. 1, 2002.

"We try to avoid [unpublished cases] because they just don't have the same oomph as published opinions," says R. Craig Lawrence, appellate counsel at the Civil Division of the U.S. Attorney's Office in Washington, D.C. "I especially don't like to use them naked, without any published circuit authority to back them up."

Lawrence says he might choose to remind the court of an earlier unpublished decision if its facts were very similar to those in the case before the court.

Other litigators have even less use for unpublished rulings.

"It's made no difference whatsoever," says Richard Bress, a partner at the D.C. office of Latham & Watkins and former law clerk on the D.C. Circuit and on the Supreme Court for Justice Antonin Scalia. "It's not even like a tree falling in the forest. It didn't even have that much force."

Bress acknowledges that he did cite unpublished opinions a few times in 2002, but only for subsidiary points, such as "showing how the court has described a certain doctrine in the past." This limited use of nonprecedential opinions was permissible even before the rules change.

Bress says he does not recall reading a brief from any other lawyer that cited an unpublished opinion as a full precedent and says he never did so himself. His reasoning: "I just think they'll never get the same kind of respect [as published opinions]."

There are indications that Bress is right.

When the court changed the rule in late 2001, it issued what it called "an important caveat" to brief-writers. The court noted that its decision to issue an unpublished ruling in a particular case still means that it sees no precedential value in that opinion. Accordingly, the court said, "there is no need for counsel to base their arguments on unpublished dispositions."

But it is too early to say for certain that the expanded citation of unpublished rulings won't have greater impact over time.

Circuits around the country hand down unpublished decisions in varying percentages. The D.C. Circuit issues relatively few unpublished rulings while the 9th Circuit, for example, produces thousands of such cases each year.

Another factor is that the change in the D.C. Circuit's rule, which was adopted after a period of

public comment in the fall of 2001, permits free citation only of those unpublished opinions issued by the court after Jan. 1, 2002.

"There may be a transition problem involved," says D.C. Circuit Judge A. Raymond Randolph. "The important thing for us [when the rule was adopted] was making it prospective only."

It's possible that as a larger body of citable unpublished rulings builds up, more of them will start to appear in briefs and decisions.

Nonetheless, Randolph says he doesn't know of any decision in his court last year that cited an unpublished opinion.

And Latham & Watkins' Bress says the best, perhaps the only, reason to cite a nonprecedential opinion is when "you can't find anything published."

While the D.C. Circuit is one of three federal circuits to allow citation of unpublished cases as full precedents [the 4th and 6th Circuits are the others], it may not be the perfect template for how an expanded rule might ultimately play out. Its caseload is lighter than most other circuits, and it also tends to make relatively little use of unpublished cases.

Data from the Administrative Office of the U.S. Courts show that the D.C. Circuit issued unpublished opinions in 64.2 percent of its 589 rulings in 2001. That put the circuit near the bottom, percentage-wise.

Meanwhile, the 4th Circuit issued unpublished opinions in 91.5 percent of its cases, the highest percentage of any circuit. The 9th Circuit, which has the largest caseload of the federal circuit courts, issued unpublished rulings in 81.9 percent of its 4,994 cases.

Alex Kozinski, a judge on the sprawling 9th Circuit, says that in a circuit as large as his, citing unpublished opinions will result in mischief. Kozinski is one of many judges who say these briefer, less fully reasoned decisions were never meant to serve as legal precedents.

"In a circuit with as many as 45 judges, including senior judges, and hundreds of cases per judge per year, to try to keep track of all those opinions is just nuts," says Kozinski. "I'm not at all confident that as time accumulates [under the new D.C. Circuit rule] and they have more experience, they will continue to hold a favorable view even in that court."

The 5th, 8th, 10th, and 11th circuits permit citation of unpublished opinions but only as "persuasive" authority, not as precedents of the court. The 1st, 2nd, 7th, 9th, and Federal circuits do not permit such citations at all. The 3rd Circuit allows citation, but does not specify the precise use.

In a 2001 letter to members of a Judicial Conference committee, then-Solicitor General Seth Waxman wrote that he was "aware of nothing in the experience" of the six courts that permitted some form of citation "to indicate that the practice has been detrimental to the efficiency of litigants or judges."

A possible change along the lines proposed by Waxman in that letter is now percolating through the judicial bureaucracy.

An advisory committee of the Judicial Conference, the governing body of the federal judiciary, has proposed a new rule that would permit citation of unpublished opinions nationwide. If approved, that amendment would supersede all circuit rules.

This change, says Judicial Conference spokesman David Sellers, requires final approval of the advisory panel and of the conference's rules committee, as well as endorsement by the Supreme Court and Congress. The earliest it could take effect would be December 2005.

Meanwhile, one of the most common criticisms of the use of unpublished cases has fallen by the wayside. Many judges have raised concerns that unequal justice might result if large companies and other frequent litigants stay on top of unpublished decisions that individuals or small businesses don't have the time or the resources to track.

But now, pretty much everything is available electronically. There is even a book, West's Federal Appendix, that publishes "unpublished" opinions from around the country.

Lawyers here, although they have seen little or no change in circuit briefs and rulings, continue to support the 2002 rules change.

"In a number of areas, like the federal sentencing guidelines, there are a ton of unpublished opinions," says Andrew McBride, a former clerk on the D.C. Circuit and on the Supreme Court for Justice Sandra Day O'Connor, now a partner at Wiley, Rein & Fielding. "Permitting them to be cited would help avoid conflicts within the D.C. Circuit. That's a positive trend and a good thing."

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