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## Green Light to Cite Unpublished Opinions

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Defying a barrage of opposition from hundreds of federal judges and lawyers, a U.S. Judicial Conference advisory committee last week endorsed a proposed rule that would make it easier for litigants to cite so-called unpublished opinions in federal court.

The proposal still has formidable obstacles ahead of it before it becomes binding — including approval by the full Judicial Conference and the Supreme Court — but the April 14 action represented a significant milestone in the ongoing debate over unpublished opinions, which dispose of more than 80 percent of the cases before federal appeals courts.

"This is a good first step toward improving the openness and transparency of our court system," says Richard Frankel of Trial Lawyers for Public Justice.

The Advisory Committee on Appellate Rules voted 7-2 in favor of the rule, which states that "no prohibition or restriction may be imposed" on the citation of unpublished opinions. Federal circuit courts of appeal would still be allowed to specify how much weight they will give to unpublished opinions. But rules in four circuits that prohibit virtually all citation of unpublished opinions — the 2nd, 7th, 9th, and Federal Circuits — would be swept away by the new rule.

The chief judge of the U.S. Court of Appeals for the 2nd Circuit, John Walker Jr., testifying against the rule, told the committee that it would prompt a "sea change" in the way judges do their work.

Sanford Svetcov, a lawyer with Milberg Weiss Bershad Hynes & Lerach in San Francisco, voted in dissent, describing unpublished opinions as "junk law." Also dissenting was U.S. District Judge T.S. Ellis III of the Eastern District of Virginia. The committee action mirrors a preliminary vote it took last year on the same issue before wording of the proposal was disseminated for public comment.

Judges and lawyers in the 9th Circuit and elsewhere had bombarded the committee with more than 500 letters describing the often cursory rulings as an essential time-saving device for overburdened judges. Opening these routine dispositions to citation would force judges to spend more of their limited time on them, critics said.

Lawyers also voiced concern that the new rule would quadruple the number of cases they would have to review and thereby increase costs for litigants. Nine of the 13 federal circuits currently allow some form of citation of unpublished opinions, so named because they do not appear in the printed volumes of circuit opinions.

Supporters of the rule said unpublished opinions, no matter how hurried, represent the judgments of courts and should be citable. Since most unpublished opinions are already available online, supporters also say, added research costs are negligible.

"A lawyer ought to be able to tell a court what it has done," said John Roberts Jr., a member of the advisory committee and a judge on the D.C. Circuit.

Judge Carl Stewart of the 5th Circuit, another member of the committee, also said it was unfair to lawyers who are

zealously representing their clients for courts to say, "You can't tell me I took a contrary position" in an unpublished opinion.

Also voting in favor of the proposed rule was Solicitor General Theodore Olson, who was represented on the committee by Douglas Letter, appellate litigation counsel in the Justice Department's Civil Division.

The committee turned back a proposal by member Mark Levy of the D.C. office of Kilpatrick Stockton that would have made the new rule prospective, so that only those unpublished opinions issued after the rule took effect would be citable. The D.C. Circuit adopted such a rule when it allowed citation in 2001.

Levy said that would give judges "a chance to adjust their opinion-writing practices." But Stewart said, "I like the purity of the rule," and Levy's amendment was withdrawn — though the committee suggested that making the change prospective would be acceptable if that was the only way it could be approved.

Next stop for the proposal is the standing rules committee of the Judicial Conference, followed by the full Judicial Conference and then the Supreme Court. If it is approved by all those entities and if Congress does not intervene to veto it, it would take effect — a difficult process that would take one to two years.

"There will be resistance at every level," says University of California, Berkeley Boalt Hall School of Law emeritus professor Stephen Barnett, a leading proponent of the rule. "But the committee's extensive consideration and very solid vote should carry the measure to the Supreme Court."

The vote came after a full day of testimony before the committee, much of it critical of the proposed rule. The 8th Circuit's Judge Myron Bright told the panel that opening unpublished opinions up to broad citation would "add so much law that it will really mean, from a research standpoint, 'the cup runneth over.' "

Judge Diane Wood of the 7th Circuit said the practice of issuing unpublished opinions was the result of a "devil's deal" made 30 years ago as a way of reducing judges' workload. But she told the committee that the new rule is aimed at a nonexistent problem. "Every last word coming out of the courts is available," she said. "We're not talking about a 'secret law' problem." In her circuit, lawyers who think an unpublished opinion would have value in their case can petition the court to change its designation, and such requests are routinely granted.

Two judges from the Federal Circuit testified against the rule. Chief Judge H. Robert Mayer said unpublished opinions are "not prepared with less care" than published ones, but rather are "not written with the extra care and concern for language" that characterize published opinions.

His colleague William Bryson said that he, for one, would write routine opinions differently if he knew they could be cited, and that would result in less time for more-significant cases. "We're pretty hard-pressed. It's going to come out of somebody's hide," noted Bryson.

Judge Walker of the 2nd Circuit said a likely result of the new rule would be that overburdened judges will dispose of routine cases with one-line judgments "out of sheer necessity." Unpublished opinions at least give the parties to the case some sense of the court's reasoning, so a rule that would lead to one-line rulings instead "actually leads to less transparency."

No 9th Circuit judges testified at the hearing, though several wrote the committee in opposition to the rule. Only one of the 9th Circuit's 38 active and senior judges, A. Wallace Tashima, wrote in favor of the rule. Judge Alex Kozinski, the circuit's leading opponent of the rule, declined comment after the vote. In his letter to the committee, Kozinski said the proposed rule would increase the workload for judges and lawyers and would impose "colossal burdens on weak and poor litigants."