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### **Courts Move Forward on Citation Change**

## **Advisory panel of Judicial Conference approves proposal that would allow lawyers to cite unpublished opinions.**

By Tony Mauro

The federal judiciary has taken the next key step toward the enactment of a rule that would allow lawyers to cite unpublished opinions in all appeals courts.

But a U.S. Judicial Conference advisory committee has sidestepped, for now, the thornier question of what precedential value can be placed by advocates on such opinions.

The issue has divided federal appellate courts, which continue to churn out unpublished opinions as a time-saving measure, often in routine cases and sometimes in cursory fashion. About 80 percent of all appellate court opinions are categorized as unpublished -- a misnomer, since legal databases publish most of them online. Under the E-Government Act of 2002, in two years all court opinions -- including unpublished ones -- will have to be posted on the courts' own Web sites. The circuits have different rules on the extent to which unpublished opinions may be cited.

The Advisory Committee on Appellate Rules last November initially approved the concept of allowing citations. On May 15, the panel signed off on specific wording that will be submitted for public comment for the next six months. After that, it will go back to the advisory committee, then to a standing committee of the Judicial Conference. Finally, if the full Judicial Conference and the Supreme Court approve the rule, it will go to Congress and take effect unless Congress acts to change or reject it. The process could take two years or more.

"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upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent' or the like," the proposed rule states. Another section of the rule requires parties to include copies of unpublished opinions they are citing, unless the opinions are available on a "publicly accessible electronic database."

In commentary accompanying the proposed rule, the advisory committee states, "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to a court's attention virtually every written or spoken word in existence except those contained in the court's own unpublished opinions."

The committee's vote was 7-1 in favor of the proposed rule, with the dissenting vote cast by Sanford Svetcov, a partner at Milberg Weiss Bershad Hynes & Lerach in San Francisco. "I think we don't need more junk law in opinions than we already have," says Svetcov. His vote also reflected the views of Alex Kozinski, a judge on the U.S. Court of Appeals for the 9th Circuit who opposes expanded use of unpublished opinions.

In testimony before a House Judiciary Committee hearing last year, Kozinski described unpublished opinions as "simply a letter to the parties telling them who won and who lost, and why." Issuing such opinions instead of full-blown rulings requiring many drafts, Kozinski said, "frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law."

Requiring all dispositions to be published opinions, he said, would result in "chaos in the law."

Kozinski also communicated his concerns about changing the rules on unpublished opinions to Solicitor General Theodore Olson last year. Olson, a member of the advisory committee, abstained on the issue, even though his predecessor, Seth Waxman, first proposed the rule change.

Waxman's proposal, and the increasing electronic availability of unpublished opinions, helped

start debate over the issue several years ago. But it was an opinion in 2000 by 8th Circuit appeals Judge Richard Arnold, *Anastasoff v. United States*, that pushed the debate toward the pending rule change. Acting in a routine tax case, Arnold said it was unconstitutional for courts to bar lawyers from citing unpublished opinions. The case was later rendered moot, but Arnold's views transformed the discussion.

In an interview, Arnold said the advisory committee's vote was "a step in the right direction," and also an easy step to take because of "the First Amendment implications and open government implications."

Arnold, who assumed senior status in 2001, also said the new rule would lead almost inevitably to giving unpublished opinions substantial weight as precedents. "It would be hard for a court to say, 'You can remind us what we did before, but we don't care. We're going to ignore it.' "

Asked if he was affirming the fears of opponents such as Kozinski that the rule change would create a slippery slope toward the widespread use of unpublished opinions, Arnold said, "Yes, and I hope the slope is very steep and very slippery." He added, "I don't know what judges are afraid of."

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