

THE SECOND CIRCUIT REVIEW -- 1983-1984 TERM: PART I: FOREWORD: SUMMARY ORDERS IN THE SECOND CIRCUIT UNDER RULE 0.23.

George C. Pratt *

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* Judge, United States Court of Appeals for the Second Circuit. I wish to acknowledge the efforts and talents of my former law clerk, Michael Hepworth, whose devoted labors made this Foreword possible.

Reading this issue of the Brooklyn Law Review is one way to learn how the Second Circuit applied, interpreted and even "made" law in the year ending June 30, 1984; another way would be to read all 490 opinions the court published during that time. Even the second approach, however, would not reach more than 58 percent of the cases disposed of by the circuit after arguments or submissions on the merits. This is because 697 cases were decided during that year by summary orders which, in accordance with Second Circuit Rule 0.23, are not published and "shall not be cited or otherwise used in unrelated cases before this or any other court." n1

Rule 0.23 and the circuit's use of summary orders have been matters of some controversy for several years. In June, 1985, in response to criticisms and proposals from the bar, the circuit voted on the question of changing Rule 0.23 to allow citation and publication of summary orders. The vote was to keep the rule as it was. The purpose of this Foreword is to discuss the Second Circuit's use of summary orders and the controversy leading up to the vote to retain Rule 0.23. What is written here is not in any sense either a report or an apology by the circuit as a whole. It is, rather, one judge's view on how the Second Circuit uses summary orders under Rule 0.23, why the Rule has become so controversial, the proposals for change that were presented to the circuit, and the arguments that have been made for and against those proposals.

There is more than just historical interest in all this. The bar's immediate goal of changing Rule 0.23 has not been accomplished, but its criticisms and proposals over the last four years have arguably had a significant effect on the frequency with which summary orders are used. The criticisms already made are likely to have a continuing effect, and future suggestions and proposals can significantly influence the circuit's actual practice under the Rule. Rule 0.23 is rather open-ended and flexible, and the circuit's decision was not a vote against all changes in the way the circuit uses the summary orders authorized by the Rule. It may be that a number of the bar's criticisms of the use of summary orders can be met by changing the circuit's practice, without having to change Rule 0.23 itself.

I. SUMMARY ORDERS IN THE SECOND CIRCUIT

A. How the Second Circuit's Rule Compares with those in Other Circuits

Second Circuit Rule 0.23 is captioned "Dispositions in Open Court or by Summary Order," and states:

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may believe a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court. n2

This Rule was adopted on October 31, 1973, in response to at least a decade of suggestions that the federal courts limit the number and length of published opinions. In 1964 the Judicial Conference of the United States adopted a resolution asking judges of the district courts and courts of appeals to "authorize the publication of only those opinions which are of general precedential value," n3 and in 1973 the Conference asked the circuits to develop plans for limiting the publication of opinions. n4 All the circuits have since adopted plans allowing for unpublished opinions. Some of the circuits have embodied their complete plans for publication of opinions in circuit rules, as the Second Circuit has done in Rule 0.23; other circuits have publication plans in addition to circuit rules.

Whether they have rules or plans or both, however, the circuits vary on a number of points. For example, circuits vary in regard to allowing a majority of a panel to determine whether an opinion will be published, as opposed to requiring that a panel be unanimous in deciding not to publish an opinion; in giving a single judge the right to publish a separate

opinion; in the degree of specificity of detail with which they indicate the standards panels are to use in deciding whether to publish an opinion; and in permitting or denying the right of parties in other cases, or of other courts or panels, to cite an unpublished opinion. n5

Under the Second Circuit's Rule 0.23, a summary order may include a "brief written statement" n6 explaining why the court has decided the case in a particular way; these statements may run from a sentence or paragraph in length to as many as seven or eight pages. The longer summary orders read much like the circuit's per curiam opinions or the shorter signed opinions, both of which are of course reported in the Federal Reporter Second Series.

Although Rule 0.23 states that summary orders are not reported, the Federal Reporter Second Series does report whether the case was affirmed, reversed, remanded or otherwise disposed of. These listings do not include the "brief written statement" which may accompany an order. The full order with its appended discussion is not secret or hidden; anyone who is interested can obtain a copy of any summary order from the clerk's office at the court of appeals. Because the orders are unpublished, however, they are largely unexamined except by the parties to the case. In all likelihood, this is one of the major reasons the bar in recent years has been advocating changes in Rule 0.23 that would authorize publication and allow citation of orders as precedents. It is easy for the bar to imagine that these unpublished orders contain statements or applications of law that would be just enough, if cited to a court, to tip a pending or future case one way rather than another -- or for the bar to imagine that an institutional litigant, such as the government, has an unfair advantage because it routinely collects summary orders and therefore knows about decision patterns that other litigants are unaware of.

Although the prohibition on citation is the most controversial aspect of Rule 0.23, seven of the thirteen circuits impose the same or similar limitations on citation. The First Circuit's plan for the publication of opinions, at (b)(6), states categorically that "[o]nly published opinions may be cited," n7 but the First Circuit's Rule 14 says that citation is prohibited only in "unrelated" cases. n8 The Eighth Circuit's Rule 8(i) and its plan prohibit citation "except when the cases are related by virtue of an identity between the parties or the causes of action." n9 The Second Circuit's Rule 0.23 uses similar language in its prohibition of citation of summary orders in "unrelated" cases.

It is arguable that the language about "related" or "unrelated" cases in the plans or rules of the First, Second and Eighth Circuits should be interpreted as allowing citation of summary orders only as support for claims of res judicata, collateral estoppel, or the law of the case. If this interpretation is correct, then the restrictions on citation in the First, Second, and Eighth Circuits] are exactly the same as those in the Seventh, Ninth, and District of Columbia Circuits.

In addition, although Rule 8(f) of the District of Columbia Circuit states that "[u]npublished orders, including explanatory memoranda of this Court, are not to be cited in briefs or memoranda of counsel as precedents," n10 the Rule does allow citation of unpublished orders and explanatory memoranda "for such purposes as application of the doctrine of res judicata, collateral estoppel and law of the case." n11

The Fifth Circuit's rule differs slightly from the approach taken by the seven circuits just mentioned, for the Fifth Circuit's Rule 47.5.3 states that citation of unpublished opinions is "normally" allowed only in support of claims of res judicata, collateral estoppel, or law of the case, or in situations where the case "involves related facts." n12 While the remaining five circuits place no absolute prohibition on citing unpublished opinions in an unrelated case, two of these five (the Fourth and Sixth Circuits) expressly disfavor the practice except when it is used to establish res judicata, collateral estoppel, or law of the case. Two of the circuits have no rule addressing the question, and only in the Tenth Circuit is there a rule specifically allowing unrestricted citation. When a circuit does allow citation of an unrelated case, the circuit rules usually require that a copy of the cited opinion be served on the other parties and filed with the court.

n13

A second controversial feature of the Second Circuit's Rule is the relative vagueness of the standard it sets for determining whether or not an opinion should be published. The Rule provides that an opinion should not be published if the panel unanimously decides that "no jurisprudential purpose would be served by a written opinion." n14 Nine of the other circuits have a rule or plan which provides more detail about the kinds of considerations that should go into a decision to publish. The Fifth Circuit's Rule 47.5.1, for example, states that:

The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published.

Therefore, an opinion will be published if it:

establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked; applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

explains, criticizes, or reviews the history of existing decisional or enacted law; creates or resolves a conflict of authority either within the circuit or between this circuit and another;

concerns or discusses a factual or legal issue of significant public interest; is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it; is accompanied by a concurring or dissenting opinion; reverses the decision below or affirms it upon different grounds. n15

B. How the Second Circuit Makes Use of Rule 0.23

Rule 0.23 authorizes both summary order decisions and oral decisions from the bench. Not too long ago, oral decisions were the court's overwhelming choice when there was no need for a published opinion. In 1975, for example, 70 percent of the dispositions under Rule 0.23 were oral decisions. Since then, however, there has been a dramatic decline in oral decisions almost every year, and in the 1984 statistical year only ten cases -- 1 percent of the Rule 0.23 decisions -- were oral dispositions. The decline in the use of oral decisions is intentional and for good reason. Using summary orders allows the judges to edit their remarks for clarity in a way that is not possible when delivering an unrehearsed oral decision; it avoids embarrassing the losing lawyer in the public courtroom setting; and it automatically provides a written record of the court's decision, without the need for counsel to request and pay for a transcription of the tape recording of the oral argument.

Although the decision to use an order under Rule 0.23 must, as mentioned above, be unanimous, there is seldom any real disagreement about the cases for which summary orders are appropriate. If only one judge thinks an opinion should be published, that judge will frequently be the one who undertakes to write the opinion, since he or she will be the one who feels most strongly that the court should spend the extra time it takes to prepare a published opinion.

Although summary orders are occasionally issued when the decision below is reversed or remanded, n16 they are most often used to affirm decisions. If the district court has written an opinion in a case and its reasoning is acceptable to the panel, the summary order's explanation of the circuit's decision will often be limited to the one line: "Affirmed substantially on the basis of the opinion below." A full development of the facts in the case is usually omitted, since the parties are the only ones who can be expected to read the order and they are assumed to be aware of the background facts and proceedings.

One-line decisions are not popular with either academic commentators or with litigants. One disappointed party recently devoted a large part of his petition for rehearing to complaining -- to no avail -- about the brevity of the summary order decision disposing of his case. A survey by Professors Reynolds and Richman published in 1981, n17 covering 12.6% of the unpublished decisions in the Second Circuit in 1979, found that 45.4% of the sample were shorter than 50 words, 20.4% were between 50 and 99 words in length, 23.4% were between 100 and 299 words, 7.8% were between 300 and 499 words, and 3.2% were 500 words or more in length. n18

Reynolds and Richman argue that 31.3% of the sample of unpublished Second Circuit opinions contained "no discernible justification" for the decision, if one rejects as unlightening such justifications as "appellant's contentions are frivolous and without merit" or "the conviction is supported by substantial evidence." n19

Whether a summary order goes into detail or not, however, "the judgment entered determines, either explicitly or implicitly, all issues raised in the appeal." n20 In *Furman v. United States* n21 the district court had denied a petition under 28 U.S.C. section 2255 because the petitioner's contentions had been raised and decided adversely to him on the direct appeal from his conviction. n22 The direct appeal had been decided by summary order, and Furman argued that because the affirmance was not by published opinion he was denied adequate appellate review. n23 The circuit rejected Furman's contentions, stressing that all summary orders are made "after due consideration," and pointed out that in Furman's case the order of affirmance was five pages long. n24

On occasion a decision to dispose of a case by unpublished opinion is later changed, and the substance of the summary order is then repeated in a published opinion. When this is done, the published opinion will note that the case was originally decided under Rule 0.23 and will usually give a very short explanation of why the substance of the order has been repeated. The decision to publish may be made in response to a request of one of the parties. n25 Publication may also come at the request of counsel who were not involved in the case at all, but who argue that they wish to quote from an order in connection with a petition for certiorari in a different case. n26 Finally, the panel originally adopting the summary order may on its own initiative decide that publication is appropriate, either because the panel finds in a later case that it wants to refer to its earlier order, n27 or because of second thoughts on the "importance of the case." n28 The circuit keeps no statistics on how often requests are made to publish a summary order, or on how often those requests are granted. A LEXIS search (starting with the search term "0.23") turned up a dozen cases since 1980 in which a published opinion noted that the case had first been decided by summary order; none of them came in the 1984 term. Although it might be expected that criminal and prisoner cases would make up the clear majority of Rule 0.23 dispositions, this turns out not to be true. In 1984, criminal and prisoner cases accounted for 34% of all the circuit's decisions, both published and unpublished, while accounting for 38% of all the Rule 0.23 decisions. Civil cases

accounted for 54% of all the decisions, and 47% of the Rule 0.23 decisions. Prisoner and criminal cases were more likely to be decided under Rule 0.23 than were civil cases; 51% of the civil cases were decided under Rule 0.23, as were 63% of the criminal cases and 72% of the prisoner cases. On the other hand, the chance that a contract case brought under diversity jurisdiction would be decided under Rule 0.23 was 66%, greater than either the chance that a criminal case would be decided under Rule 0.23, or the chance that a habeas corpus case would be so decided. n29

Pro se appeals fared about as one would expect. The court decided 160 pro se cases in 1984, and 93% of them were decided under Rule 0.23. Appeals pursuant to *Anders v. California* n30 fared worst of all; not surprisingly, 100% of these cases were decided under Rule 0.23. At the other end of the scale, only 25% of the securities cases, and 33% of the antitrust cases, were decided under Rule 0.23. n31

Normally, only the parties to the case, the court clerk, the judges on the panel, and the lower court or agency will receive a copy of the summary order. The circuit has a standard procedure for notifying all the circuit judges of the issues in cases for which published opinions will be written, but there is no procedure for alerting all the judges to the issues in cases handled by summary orders.

C. Trends in the Use of Rule 0.23: Why is the Use of Rule 0.23 Declining when the Caseload is Increasing?

One trend in the use of Rule 0.23 has already been mentioned: the practice of giving oral decisions from the bench has declined nearly every year, falling from 70 percent of the Rule 0.23 decisions in 1975 to only 1 percent in 1984. The reciprocal trend, of course, has been a steady increase in summary orders instead of oral decisions in those cases where Rule 0.23 was used.

In the midst of this trade off between summary orders and oral decisions, another trend emerged showing a change in the threshold determinations of whether to use Rule 0.23 in any form. As Table I below shows, the use of Rule 0.23 in any form generally increased in the eight-year period from 1974 to 1981, but since 1981 the trend has been in the opposite direction.

Table I

Statistical Year Ending June 30	Total Circuit Decisions	Percentage of Decisions Given		Percentage of Decisions in Published Decisions	Percentage Given Under Rule 0.23
1974	819	53	47		
1975	783	58	42		
1976	934	54	46		
1977	1023	46	54		
1978	921	43	57		
1979	977	37	63		
1980	1043	37	63		
1981	1151	34	66		
1982	1084	35	65		
1983	1186	36	64		
1984	1199	41	59		
1985 [1st 3/4]	853	46	54		

The high point in the use of all Rule 0.23 dispositions was 1981, and the high point in the use of summary orders alone under Rule 0.23 was 1982, as Table II illustrates:

Table II

Breakdown of Percentages in Table I

Statistical Year Ending June 30	Percentage of Decisions Given by		Percentage of Decisions Given		Percentage of Decisions, Given by Orally	Percentage of Decisions Given by Summary Order
	Signed	Opinion	Per Curiam	Given		
1975	statistics unavailable	70	statistics unavailable			
1976	45	9	26	20		
1977	39	7	34	20		
1978	38	5	29	28		

1979	30	7	21	41
1980	31	6	11	52
1981	30	3	7	59
1982	29	6	3	62
1983	31	4	2	61
1984	36	5	1	58
1985 [1st 3/4]	41	4	1	53

Why has the use of Rule 0.23 declined since 1981? Case load cannot be the decisive factor, since the number of case filings has actually increased, leaving less time than ever to write full-dress opinions. There are probably a good number of rather subtle factors responsible for the change, but it is at least arguable, and perhaps quite plausible, that the bar's statements of concern over Rule 0.23, and its suggestions for change, are among the more significant influences.

In 1981, Second Circuit Chief Judge Wilfred Feinberg met with the Committee on Criminal Law of the Association of the Bar of the City of New York to discuss Rule 0.23, and a year later the committee delivered a draft report on the rule to the chief judge. n32 The report expressed concern that summary dispositions were then running at nearly 65 percent of the cases decided by the court, as compared to what the report said had been roughly 25 percent in 1969. n33 The committee felt that there was an inherent danger in this practice, and urged that Rule 0.23 be changed. n34 The report was circulated to the circuit's internal committee on Rule 0.23 for consideration. Specific proposals for changing the rule were later referred for study to the circuit's advisory committee on rules and operating procedures, which is made up of both judges and lawyers. Memoranda from individual judges discussing the rule and criticisms of it had been circulated since at least 1982, and Chief Judge Feinberg discussed the issue in a speech entitled "The State of the Second Circuit" made to the Association of the Bar of the City of New York on February 24, 1983. n35 The New York Times n36 and the New York Law Journal n37 reported on the controversy over the rule and carried letters discussing it. n38 After considering the bar's critique and proposals for over a year, the circuit's committee on rules and operating procedures reported to the Second Circuit as a whole in early 1985. The question of changing the rule was discussed by the court's active judges at three separate meetings, and the views of the senior judges were solicited and considered. During the extended period when a possible revision of the rule was under consideration, there occurred, as indicated, a definite change in the statistical pattern of the rule's use. n39 Even though the circuit ultimately decided that no amendment to Rule 0.23 was needed, this change in the use of the rule strongly suggests that at least some of the judges found a degree of merit in the bar's case against the Rule. The nature and strength of that case is the subject of the rest of this Foreword.

II. THE CASE AGAINST RULE 0.23

A. The Complaints

The arguments against Rule 0.23 can be broken down into at least six different categories. Summarizing these complaints does not, of course, acknowledge either approval of or disagreement with them. First, it is alleged that Rule 0.20 deprives the bar of useful legal material because any summary order, no matter how routine, provides significant information about how particular legal principles are applied to particular situations. Every case is unique, and the more cases a lawyer -- or a lower court -- can study, the better he or she will understand the way the court of appeals interprets the law. Hence, every case decision should be made generally available and should be citable.

Second, it has been argued that the current system, in effect, gives institutional litigants such as the United States Attorney's offices an unfair advantage. Institutional litigants can routinely build up files of summary orders that provide their attorneys with a method of discovering patterns of court decisionmaking that is unavailable to others. The privilege of learning from summary orders should not be restricted to large institutions; therefore, summary orders should be reported as fully as any other court decision.

The third complaint hedges somewhat on the first. The first complaint maintains that there is a jurisprudential purpose in making every decision generally available; the third admits that there are some decisions whose general publication would serve no jurisprudential purpose, but insists that no panel can really tell at the time of decision which decisions those are. The course of the law frequently takes unexpected turns, and what looks like a trivial or run-of-the-mill case today could appear considerably more important tomorrow. In short, unintentional mistakes in applying the standard for Rule 0.23, though undesirable, are inevitable. The conclusion is that it is better to acknowledge human limitations in predicting what might in the future serve some jurisprudential purpose, and let all decisions compete equally as citable precedent.

A fourth complaint focuses on the danger of intentional or careless abuse in using Rule 0.23's power to "hide," or to make relatively inaccessible, a decision or the considerations which have gone into a decision. Certain cases are difficult

because there does not seem to be a ready way to achieve the "right" result, and in such situations, runs the argument, the abbreviated form and general inaccessibility of summary orders may tempt a panel to make a difficult decision easy by ignoring or gliding over genuine problems in the law. Summary orders might also be used to conceal divisions within the court or within a panel, or to avoid issues entirely. If all decisions were published and citable, however, these temptations for abuse would be largely removed, since there would be a much greater chance that any failure to fully address the issues of a case would reach the eyes of the legal community.

A fifth charge is that Rule 0.23 is incompatible with a common-law system built on binding precedent established by case law. A court that decides cases and then prohibits up to two-thirds of those decisions from being called to the attention of other courts and panels is not properly discharging its responsibilities in a common-law system.

Finally, the sixth allegation is that the "veil of secrecy" involved in using Rule 0.23 generates distrust for the whole system and deprives the court of desirable feedback on its work. Rule 0.23 summary orders, of course, are not absolutely secret, since each order is available to anyone who asks for it. But without publication and indexing no one can really be sure of what is going on across the board, and that in itself is enough to stimulate doubts or suspicions about the court's work. Moreover, public scrutiny and criticism of opinions are part of a dialog which helps inform or instruct the court's lawmaking, and Rule 0.23 impedes this process.

B. Two Proposed Remedies

While the case against Rule 0.23 stresses both the fact that summary orders are unpublished and the rule that they cannot be cited as precedent, it is the prohibition of citation that lies at the root of most of the problems the rule allegedly creates. Rule 0.23 does not actually prohibit reporting of summary orders, but only announces that they are not reported -- "officially" reported, that is. n40 The rule does not stop unofficial reporting, and any attempt to prohibit it would surely encounter first amendment problems. The issue of unofficial reporting does not arise, however, because the ban on citation removes almost any economic incentive to publish summary orders. Despite the complaint that the files of summary orders probably kept by the United States Attorney are a valuable litigation tool, few people or institutions are likely to pay for a service publishing summary orders that are not citable law. Remove the ban on citing those orders, on the other hand, and presumably market forces would encourage an appropriate supply of unofficial publication services and indices. It is unsurprising, therefore, that the bar's suggestions for changing Rule 0.23 have focused on the prohibition against citation. In a recent letter n41 addressed to the circuit, the Federal Courts Committee of the Association of the Bar of the City of New York suggested two alternative changes in Rule 0.23, both of which would permit summary orders to be cited. There was no consensus in the bar committee that one of the two proposals for change was preferable to the other, and the circuit considered both before voting to retain the current rule. The first proposal was simply to allow summary orders to be cited to a court, provided that a copy of the cited order is served on the other parties and filed with the court. n42 Because the bar committee anticipated objections to this proposal, it offered a second suggestion that summary orders be citable not as binding precedent, but only as nonbinding examples of what the court did when faced with similar issues. n43 It would be left to the litigants and judges in future cases to determine, if they chose to make the effort, whether the facts and circumstances of the case decided by summary order made that order applicable or persuasive in a new case. Parties and judges would be free to cite the orders and give them whatever weight they deemed was appropriate.

III. THE CASE FOR RETAINING RULE 0.23 AND FOR REJECTING THE BAR'S PROPOSALS

A. A Cure Worse than the Disease?

As suggested in its first paragraph, the primary purpose and principal advantage of Rule 0.23 is that its use saves a significant amount of time that circuit judges can use on more important cases. n44 If the bar's proposed changes in Rule 0.23 had been perceived as not requiring any adjustment in the way summary orders are written, then the circuit might well have gone along with one of the bar's suggestions for modifying the rule. There are forceful arguments, however, suggesting that if the proposed changes were adopted, the judges could not continue to write summary orders as they have been writing them without creating a host of new problems at the same time.

Take the first proposal, the suggestion that summary orders simply be made citable as precedent. Defenders of Rule 0.23 can argue that if this proposal were adopted, and summary orders continued to be written as they are now, there would be an unacceptable risk of panels creating precedents through use of simplified generalizations of black-letter law or other rough or imprecise language, which could come back to haunt the court at a later date as undesirable or misleading statements of the law of the circuit. Further, summary orders as they are now written contain too little factual background to make them clear enough to be useful as precedents. Without a full statement of facts, it is difficult to know just what an order means, and asking the parties citing the order or the court to whom the order is cited to delve

back into the record of the case is scarcely an efficient use of time. A third significant drawback similarly involves efficiency considerations. If, as many believe, summary orders add little or nothing to the development of the law, it would be inefficient to publish such orders. Such publication would double the number of decisions published each year and therefore double the number of cases to be researched by attorney's and courts. The added time cost for finding and reading summary orders in a given area of the law would probably exceed any benefits that might be gained.

Some of the problems mentioned above would no doubt be met by changing the way summary orders are written. However, the changes themselves would likely create new difficulties. One possible change, for example, would be for judges to write summary orders that are more carefully polished and that contain more detail about the factual background of a case; this, however, would require an immense and unacceptable time cost. One of the major purposes of using summary orders is to speed up the appellate process; taking more time to write them would largely defeat that purpose. The other likely change would be for the judges to write summary orders that are even briefer than they now are, perhaps saying only whether the decision below was affirmed or denied. But that would satisfy neither the parties nor the attorneys in individual cases, and it would also make summary orders nearly useless as precedents.

The case against the bar's alternative proposal -- that summary orders be treated as non binding but persuasive precedent -- reveals additional problems. This alternative answers the argument that orders might cause difficult problems by using unfortunately drafted statements of law, for in the rare instance in which this happens a district court or subsequent panel could treat the order as nonbinding and turn to other, binding precedent to make a decision. The alternative proposal also lessens the concern that summary orders would be too unclear to be useful precedent; if an order were unclear, then the court or subsequent panel could say so and turn to more persuasive authority.

The alternative proposal, however, might also lead to situations in which, although a summary order clearly states a legal principle, the district court or a subsequent panel simply chooses to disregard the order's statement. Critics of the proposed change in Rule 0.23 have argued that this would be embarrassing at the very least, and perhaps insulting to the panel that issued the original summary order. Whether this should be viewed as a significant concern is debatable. Currently, when a panel issues a summary order it announces, in effect, that nothing said in the order changes the existing law of the circuit and that there is no reason the bar or courts should look to the order for guidance as to the state of the law. It is not apparent why, if the bar's alternative proposal were adopted, a panel should be embarrassed if a subsequent panel or district court took the summary order at this announced value. By electing to use such an order, the panel would be stating that it does not regard the order as authority, so that it could hardly complain if later panels or other courts agreed. On the other hand, if the panel intended a particular holding to have the force of binding precedent, it could always act through a signed or per curiam opinion.

Quite aside from this concern about situations in which a panel's decision might be disregarded, a number of other serious doubts have been raised about the strength of the case against Rule 0.23. Many who are familiar with summary orders do not believe that every summary order adds important information about the scope of legal principles, or that mistakes in judging the jurisprudential importance of cases occur frequently, if at all. If there is a temptation to abuse the summary order device by sliding over troublesome issues, it has been suggested that pressure from colleagues will be sufficient to prevent judges from succumbing. To paraphrase one critic of the proposed changes, if circuit judges have occasionally sinned, they have it in their power to stop sinning without having to charge Rule 0.23.

With regard to the alleged advantage now held by institutional litigants who see large numbers of summary orders, the fact that the overwhelming number of summary orders deal only with routine, run-of-the-mill cases suggests that any advantage gained by collecting summary orders is minuscule. In addition, the reluctance of conscientious judges to send unpolished work out to the general public should not be underestimated. In his speech to the Association of the Bar of the City of New York on February 24, 1983, Chief Judge Feinberg remarked:

[W]hat Veblen called the instinct for workmanship runs powerfully in all of us. It is one thing to write and agree on an order that will satisfy the litigants -- particularly the one that loses -- that an appeal has been fully considered, that the issues have been addressed and understood and that the decision was fairly reached and is reasoned. It is quite another thing indeed to write an opinion that . . . may be read and cited by those who peruse the pages of Federal Reporter Second. n45

Finally, there is much to be said for the folk wisdom, "If it ain't broke, don't fix it." For many years the Second Circuit has been admired for the example it has set for the nation's circuits by its efficiency, prompt dispositions, and quality opinions on the difficult and complex issues its judges deal with on a daily basis. Both the bar and all members of the court and its staff take justifiable pride in this record and reputation, and it is at least arguable that Rule 0.23 has played no small part in making them possible.

B. Rule 0.23 Practice After the Circuit's Vote

All of the arguments outlined above were brought to the attention of the circuit judges in the spring of 1985 and were

thoroughly considered by them. The circuit's vote showed, of course, that the judges believed the balance tipped in favor of retaining Rule 0.23 in its present form, but the outcome did not indicate that the judges believed arguments for change to be entirely without merit. One might fairly conclude that many of the arguments for change impressed the judges, since the circuit did devote considerable time to evaluating the proposed changes and the court's use of summary order has, in fact, declined. n46 The changing practice in the use of summary orders also shows that the circuit responds to reasoned criticism and expressions of concern, and there is no basis for believing that the vote on Rule 0.23 marks an end to this.

The outside observer's likely conclusion would be - and my conclusion as an insider is -- that the real questions now, after the vote to retain the rule, are whether the circuit's decreasing use of Rule 0.23 will continue, what kind of pressure to bar can and will continue to exert on the use of the summary order process, and how or whether the style of writing summary orders might change. There has already been some discussion of at least three matters which might play a part in answering these questions. One is the suggestion that the court accommodate some of the bar's concerns by using more per curiam opinions. As Table II n47 shows, per curiam opinions now play a minor role in the court's business, and there seems to be no obvious pattern in the use of per curiam opinions over the years. The distance between a summary order and a per curiam opinion, in terms of the time required to write at the necessary qualitative level, is less than the gap between a summary order and a signed opinion. Perhaps there is room here for the circuit, and for individual panels, to experiment.

A second suggestion under discussion calls for the spelling out in greater detail of the criteria used in employing the rule. Most judges currently think of Rule 0.23's "jurisprudential purpose" standard n48 in much the same terms as, for instance, the longer Fifth Circuit rule quoted at the beginning of this Foreword. n49 However, publishing a longer and more detailed explanation of "jurisprudential purpose" as part of a circuit plan for implementing Rule 0.23, or as an amendment to the rule itself, might be worthwhile. The bar would better understand why certain cases either did or did not go by summary order, and some judges' conceptions of how "jurisprudential purpose" should be interpreted might also be affected.

Finally, it has also been proposed that the bar perform a continuing monitoring function. There are advantages to the circuit in getting feedback on its summary orders, and the bar itself might realize advantages in keeping closer track of the way the circuit uses summary orders. A committee of the bar might occasionally recommend which, if any, of the Second Circuit summary orders should be published as per curiam opinions. Circuit panels would also, I believe, be receptive to more requests from counsel asking that summary orders be published, especially if the requests explained in a thoughtful way why the circuit's order would be useful to other attorneys, parties, and courts. Fortunately, there is a great deal of flexibility built into Rule 0.23. What use the circuit makes of the rule in the future will in good measure depend, as it has depended in the last four years and before, on how the bar makes its concerns known and on how creative the bar and the court are in coming up with possibilities for change.

Table A
 PROVISIONS COVERING UNPUBLISHED OPINIONS
 in the Thirteen Federal Circuits

	First Circuit	Second Circuit	Third Circuit
1. What rule or plan covers unpublished opinions?	circuit rule 14; plan in appendix I.B. to rules	circuit rule 0.23 rules on operating procedures)	appendix 1 to rules (chapters V and VI on
2. Who makes the decision to publish an opinion?	majority vote of panel	unanimous panel required for nonpublication curiam or signed opinion should be published; unanimous panel required for a "judgment order," which is never published	majority of panel decides whether a per
3. Can a single judge publish a separate opinion?	No	No	No
4. How detailed are the criteria for deciding whether to publish an opinion or order?	detailed criteria not provided	detailed criteria not provided	detailed criteria not provided
5. Can an unpublished opinion be cited?	Rule 14: "never to be cited in unrelated cases." App. I.B (b) (6): "Only published opinions may be cited."	only in related cases	no rule addresses the question

Table A
 PROVISIONS COVERING UNPUBLISHED OPINIONS
 in the Thirteen Federal Circuits

	Fourth Circuit	Fifth Circuit
1. What rule or plan covers unpublished opinions?		circuit rule 18 circuit rule 47.5
2. Who makes the decision to of judges	author or majority required	unanimous panel

publish an opinion? opinion	joining the	for nonpublication
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3. Can a single judge publish a separate opinion? No No

4. How detailed are the criteria for deciding whether to publish an opinion or order? detailed criteria detailed criteria

5. Can an unpublished opinion be cited?	disfavored	yes, but it is "normally" "except for the purpose of establishing res judicata, estoppel, or the law of the case"; if an unpublished opinion is cited, copies must be served and filed	yes, although	only for purposes of res judicata, collateral estoppel, law of the case, or where facts are related; if cited, copies must be attached to brief
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Table A
PROVISIONS COVERING UNPUBLISHED OPINIONS
in the Thirteen Federal Circuits

	Sixth Circuit	Seventh Circuit	
1. What rule or plan covers unpublished opinions?		circuit rule 24	circuit rule 35
2. Who makes the decision to publish an opinion?	determines publication	majority of panel determines publication	majority of panel determines
3. Can a single judge publish a separate opinion?	No	Yes	
4. How detailed are the criteria for deciding whether to publish an opinion or order?		detailed criteria	detailed criteria
5. Can an unpublished opinion be cited?	disfavored	yes, but citation is of res judicata, collateral	only for purposes of res judicata, collateral estoppel, and law of the case
	"except for the purpose of establishing res judicata, estoppel, or the law of the case"; if an unpublished opinion is		

cited, a copy
must be served
and filed

Table A
PROVISIONS COVERING UNPUBLISHED OPINIONS
in the Thirteen Federal Circuits

	Eighth Circuit	Ninth Circuit	
1. What rule or plan covers unpublished opinions? to rules	8(i); plan in	appendix II	circuit rule circuit rule 21
2. Who makes the decision to publish an opinion?			court, panel, majority of panel
3. Can a single judge publish a separate opinion?		Yes	author of separate opinion can request publication
4. How detailed are the criteria for deciding whether to publish an opinion or order?		detailed criteria	detailed criteria
5. Can an unpublished opinion be cited?	"except relevant under when the cases are related by virtue of an identity between the parties or the causes of action"	the doctrine"	citation prohibited only "when

Table A
PROVISIONS COVERING UNPUBLISHED OPINIONS
in the Thirteen Federal Circuits

	Tenth Circuit	Eleventh Circuit	
1. What rule or plan covers unpublished opinions?			circuit rule 17 circuit rule 25
2. Who makes the decision to publish an opinion?			court or panel court
3. Can a single judge publish a separate opinion?	No	No	
4. How detailed are the criteria for deciding whether to publish an opinion or order?	moderately detailed criteria	moderately detailed criteria	moderately

5. Can an unpublished opinion be cited? yes, citation allowed; if an unpublished opinion is cited a copy must be served upon opposing counsel no rule addresses the question

Table A
 PROVISIONS COVERING UNPUBLISHED OPINIONS
 in the Thirteen Federal Circuits
 D.C. Circuit Federal Circuit

1. What rule or plan covers unpublished opinions? circuit rules 13 and 8(f) circuit rule 18

2. Who makes the decision to publish an opinion? the question no rule addresses the question no rule addresses the question

3. Can a single judge publish a separate opinion? the question Yes no rule addresses the question

4. How detailed are the criteria for deciding whether to publish an opinion or order? not detailed criteria not provided detailed criteria provided

5. Can an unpublished opinion be cited? permitted "for such purposes" as res judicata, collateral estoppel, and law of the case Rule 8(f): citation purposes of res judicata, collateral estoppel, and law of the case only for

Table B
 UNITED STATES COURT OF APPEALS
 SECOND CIRCUIT
 CASES DECIDED AFTER HEARING ON THE MERITS
 (28 classifications; some cases may be counted in more than one classification; figures in parentheses indicate percentages)
 July 1, 1983 to June 30, 1984

	Published Opinions	Unpublished Decisions (Local rule 0.23)		
A. Admiralty (tort)	4	(36)	7	(64)
B. Admiralty (other)	8	(53)	7	(47)
C. Anti-trust	8	(67)	4	(33)

D. Bankruptcy	12	(52)	11	(48)	
E. Constitutional		15	(65)	8	(35)
F. Contract (diversity)	11	(34)	21	(66)	
G. Contract (other)	19	(59)	13	(41)	
H. Criminal	129	(43)	171	(57)	
I. Discrimination	10	(71)	4	(29)	
J. ERISA	7	(54)	6	(46)	
K. Habeas Corpus	17	(37)	29	(63)	
L. Labor (NLRB)	19	(54)	16	(46)	
M. Labor (other)	13	(43)	17	(57)	
N. Other Administrative	36	(44)	45	(56)	
O. Other Civil	38	(63)	22	(37)	
P. Patent					
Q. Procedural	18	(51)	17	(49)	
R. Pro Se	11	(7)	149	(93)	
S. Section 1983 (Non-prisoner)	14	(47)	16	(53)	
T. Section 1983 (Prisoner)	5	(56)	4	(44)	
U. Securities	18	(75)	6	(25)	
V. Tax	24	(62)	15	(38)	
W. Tort (diversity)	6	(35)	11	(65)	
X. Tort (other)	8	(57)	6	(43)	
Y. Trademark/Copyright	16	(67)	8	(33)	
Z. Anders Brief	0		14	(100)	
Expedited Appeals	46	(65)	25	(35)	
Original Proceedings	2	(3)	61	(97)	

Table C
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
CASES DECIDED AFTER HEARING ON THE MERITS
July 1, 1983 to June 30, 1984

	Civil	Prisoner	Criminal	Original Administrative	Proceedings		
Published Opinion			316 (49%)	43 (28%)	94 (37%)	36 (49%)	1 (2%)
Unpublished Decision (Local Rule 0.23)		333 (51%)	110 (72%)	162 (63%)	38 (51%)	64 (98%)	

July 1, 1984 to March 31, 1985

	Civil	Prisoner	Criminal	Original Administrative	Proceedings		
Published Opinion			257 (54%)	30 (28%)	85 (39%)	24 (50%)	2 (5%)
Unpublished Decision (Local Rule 0.23)		222 (46%)	79 (72%)	132 (61%)	24 (50%)	42 (95%)	

FOOTNOTES:

n1 2D CIR. R. 0.23.

n2 Id.

n3 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1964 ANNUAL REPORT 11 (1965).

n4 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT 33 (1973).

n5 See Table A in the Appendix *infra*.

n6 2D CIR. R. 0.23.

n7 1ST CIR. PLAN FOR THE PUBLICATION OF OPINIONS, App. B, at (b)(6).

n8 1ST CIR. R. 14.

n9 See 8TH CIR. R. 8(i); 8TH CIR. PLAN FOR THE PUBLICATION OF OPINIONS, at (3).

n10 D.C. CIR. R. 8(f); see Table A in the Appendix *infra*.

n11 Id.

n12 5TH CIR. R. 47.5.3.

n13 See Table A in the Appendix *infra*.

n14 2D CIR. R. 0.23.

n15 5TH CIR. R. 47.5.1.

n16 See, e.g., *Shmulyarenko v. Schweiker*, 738 F.2d 418 (2d Cir. 1984) (decision listed as "without published opinion," disposition listed as "reversed and remanded"); *Patel v. I.N.S.*, 738 F.2d 418 (2d Cir. 1984) (decision listed as "without published opinion," disposition listed as "reversed; enforcement denied"); *United States v. Simmons*, 732 F.2d 142 (2d Cir. 1984) (decision listed as "without published opinion," disposition listed as "affirmed in part; reversed in part").

n17 Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

n18 Id. at 598 n.69 & 599 Table 8.

n19 Id. at 601 n.75 & 602 Table 10.

n20 *Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983).

n21 720 F.2d 263 (2d Cir. 1983).

n22 Id. at 264.

n23 Id.

n24 Id. at 266.

n25 See, e.g., *United States v. Perez*, 702 F.2d 33 (2d Cir.) (published at defendant-appellant's request), cert. denied, 462 U.S. 1108 (1983); *United States v. Vasquez*, 675 F.2d 16 (2d Cir. 1982) (published at government's request); *O'Hara v. Long Island R.R.*, 665 F.2d 8 (2d Cir. 1981) (published at appellee railroad's request).

n26 See *Ottaviani v. State Univ. of N.Y. at New Paltz*, 646 F.2d 21 (2d Cir. 1981), cert. denied, 456 U.S. 992 (1982).

n27 See *Blair v. Commissioner of Admin. Servs.*, 644 F.2d 69 (2d Cir. 1980).

n28 See *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 657 F.2d 3 (2d Cir. 1981) (court-ordered prejudgment attachment of Iranian assets vacated following Supreme Court's response to certified questions).

n29 See Tables B & C in the Appendix *infra*.

n30 386 U.S. 738 (1967). In an appeal under *Anders*, counsel for the appellant asks to be relieved of the obligation to represent his or her client on the appeal because there are no nonfrivolous issues for consideration.

n31 See Table B in the Appendix *infra*.

n32 Report of the Committee on Criminal Law Concerning Rule 0.23 of the Rules of the United States Court of Appeals for the Second Circuit (1983).

n33 *Id.* at 2-3.

n34 *Id.* at 6, 11, 12-15.

n35 W. Feinberg, Speech to the Association of the Bar of the City of New York, "State of the Second Circuit," (Feb. 24, 1983) (reprinted in 38 *Rec. A.B. City N.Y.* 363 (1983)) [hereinafter Feinberg Address with page citations to *Rec. A.B. City N.Y.*].

n36 See Chambers, U.S. Appeals Court Restricts Use of Opinions by Lawyers, *N.Y. Times*, Feb. 21, 1983, at B1, col. 1.

n37 See Kohn, Steps to Better Federal Courts, *N.Y.L.J.*, Feb. 25, 1983, at 1, col. 4.

n38 See Feinberg, U.S. Appeals Court: Separating the Significant from the Trivial, *N.Y. Times*, Feb. 28, 1983, at A14, col. 4 (Op-Ed); Piel, A Court Whose Fiery Decision is Precedent, *N.Y. Times*, Mar. 9, 1983, at A22, col. 5 (Op-Ed); Liotti, Caution Urged on Trimming Opinions, *N.Y.L.J.*, Apr. 11, 1983, at 2, col. 6 (Letter to the Editor).

n39 See Tables I and II at text accompanying note 33 *supra*.

n40 2D CIR. R. 0.23.

n41 Letter from Federal Courts Committee of the Association of the Bar of the City of New York to the Honorable Jon O. Newman, Second Circuit Judge (January 1985).

n42 *Id.* at 9-10.

n43 *Id.* at 7-9.

n44 See text accompanying note 2 *supra*.

n45 Feinberg Address, *supra* note 35, at 376.

n46 See Tables I and II at text accompanying note 32 *supra*.

n47 See Table II at text accompanying note 32 supra.

n48 2D CIR. R. 0.23.

n49 See text accompanying note 15 supra.

APPENDIX

Note: Statistical information in the tables and text of the Foreward comes from the office of Steven Flanders, the second circuit executive, and from the Administrative Office of the U.S. Courts in Washington, D.C. Information in the tables regarding rules of the various United States Courts of Appeals may be found in 28 U.S.A. RULES (1980 & Supp. 1985).