



United States Court of Appeals

For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

03-AP-396

February 11, 2004

Hon. Samuel A. Alito, Jr.
United States Court of Appeals
Room 357, 50 Walnut Street
Newark, NJ 07101

In re: Proposed Fed. R. App. P. 32.1

Dear Judge Alito:

We the undersigned, a majority of the judges of the U.S. Court of Appeals for the Seventh Circuit, are writing to express our opposition to proposed Rule 32.1, which would preempt circuit rules, such as our Rule 53(e), that forbid lawyers to cite unpublished opinions when the court rendering the opinion, such as our court, does not deem such opinions to have authority as precedents. Under the proposed rule, while a court will no longer be allowed to forbid the citation of unpublished opinions, it will be allowed to deny precedential force to them, a combination that puzzles us. If the opinions have no force as precedent, their citation value is small. As a practical matter, we expect that they will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions.

Most of our unpublished orders are issued in cases in which the appeal has not been orally argued and the appellant is not represented by counsel. The purpose of the written order that we issue in such a case is to give the parties an explanation of the reason for the decision. (If there is a complicated issue or one that raises a novel question of law, we usually appoint counsel and order the case orally argued.) Because the order is not citable, the judges do not have to spend a lot of time worrying about nuances of language. Moreover, process is attenuated when there is no argument and only one side is represented, which means that an attempt to formulate a statement of law that would be appropriate for later citation as precedent would lack the deliberative basis of the fully argued case with fully represented parties. We do issue orders in some argued cases, if they are fact-bound and involve either unremarkable state law or clear and settled federal law, and again do not need to worry about nuances of language because the order will not be thrown back in our faces someday as a precedent. And thrown back they will be, no matter how often we state that unpublished orders though citable (if the proposed rule is adopted) are not precedents. For if a lawyer states in its brief that in our unpublished opinion in *A v. B.* we said X and in *C v. D* we said Y and in this case the other side wants us to say Z, we can hardly reply that when we don't publish we say what we please and take no responsibility. We will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel. Citability would upgrade case-specific orders that this circuit has intentionally confined to the law of that particular case to de facto precedents that we must address.

If courts are forbidden to designate certain decisions as nonprecedential, they may cease issuing detailed written explanations in such cases at all, but instead abbreviate the explanation of their results in these cases down to a paragraph or a sentence or even the single word "Affirmed," which is already the practice in some of the busier circuits. Our court has always given full reasons for all of its decisions, but if those reasons can come back to haunt us because of infelicities of language we may stop doing so. Thus the proposed rule if adopted may—ironically—reduce the quality and quantity of information available to the bar and to the public at large.

The proponents of the new rule may hope that citability will lead the courts to spend more time on unpublished orders, improving their quality. The hope is unrealistic. The judges are already working flat out. Time taken to refine the wording of unpublished orders will be time taken from other tasks that the judges regard as more important—such as giving full attention to decisions in complex cases and cases involving novel issues of law, the decisions that ought to be published and citable. Court rules can require judges to allow citation everywhere, but rules will not (and for the reason just given—the effect on other decisions—should not) require judges to draft opinions of some minimum length. Such a change would be unfortunate because it would diminish the quality of the result for the individual litigants.

The practice of state courts is instructive. For example, Illinois Supreme Court Rule 23 provides standards for the publication of decisions of the intermediate appellate courts. Rule 23(a) permits the disposition of a case by written opinion "only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied... (1) the decision establishes a new rule of law or modifies, explains, or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." While we are not suggesting that such a strict rule is appropriate for the federal courts, it is telling that busy state courts have recognized the need to be discriminating in their publication practices. It would be a step backward to deprive the federal courts of similar docket management tools.

Proponents of the new rule may be concerned that the existing practice in those courts that limit citations to unpublished opinions may encourage some courts to flout precedent by burying decisions that do not comply with precedent in unpublished opinions that because they are not citable never force the court to confront its inconsistencies. Our court has never been accused of such a practice. One way to deal with it, moreover, would simply be to liberalize the provisions for later publication (and thus full citability) of a decision originally issued in unpublished form. Our circuit rule 53(d)(3) authorizes any person to move for the publication of any unpublished decision of the court, and these motions are routinely granted. The rule could be strengthened to make clear that if the movant shows that publication would be consistent with the criteria for publication set forth in the rule (which guide panels' decision on whether to publish a decision), the motion shall be granted; at present the decision whether to grant is discretionary.

The adverse effects of the proposed rule on the quality of the federal judicial process go far beyond the effect that we have already identified of tending to curtail the statement of reasons in unpublished opinions. A second and greater effect is on the research and

analysis that go into published opinions when the lawyers have cited unpublished as well as published cases. This court alone decides hundreds of cases each year without a published opinion. As a result, there is a pool of thousands of cases that, if the proposed rule were to be adopted, would become citable to us. Undoubtedly they would be cited, and for the reason stated earlier we could not ignore them. (If we did ignore them, it would mean that the proposed rule had accomplished no purpose at all.) Lawyers, moreover, will consider themselves duty-bound to research and cite a host of currently uncitable opinions. The costs of legal research and therefore advocacy will rise, and will be passed on in large measure to clients.

For the foregoing reasons, we urge the committee not to recommend the proposed rule to the Judicial Conference.

Sincerely,

John L. Coffey, Circuit Judge
Richard D. Cudahy, Circuit Judge
Terence Evans, Circuit Judge
Michael S. Kanne, Circuit Judge
Daniel A. Manion, Circuit Judge
Richard A. Posner, Circuit Judge
Ilana Diamond Rovner, Circuit Judge
Diane P. Wood, Circuit Judge
Ann Claire Williams, Circuit Judge

cc: Hon. Carl E. Stewart
Hon. John G. Roberts, Jr.
Hon. T. S. Ellis, III
Prof. Carol Ann Mooney
Mr. W. Thomas McGough, Jr.
Mr. Sanford Svetcov
Mr. Mark I Levy
Hon. Theodore B. Olson

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February 17, 2004



03-AP-396
Addendum

Hon. Samuel A. Alito, Jr.
United States Court of Appeals
Room 357, 50 Walnut Street
Newark, NJ 07101

Dear Judge Alito:

This is by way of a follow-up to our letter of last week to your committee, in which a majority of our court expressed opposition to the proposed appellate rule 32.1. The two of us were the principal drafters of the letter, which however expresses our court's consensus. Indeed, at the meeting of the court to discuss the issue, only one judge voted in favor of the proposed rule, although some of the opponents did not sign the letter.

We understand that your committee will be meeting on April 13 to discuss the proposed rule, and that Chief Judge Walker of the Second Circuit will be attending that meeting to express the views of the members of his court. We would be very grateful if you would permit one of us also to attend to elaborate briefly on our written submission and answer any questions that the committee may have.

Thanking you for your consideration, we are,

Very truly yours,

Richard A. Posner

Diane P. Wood