

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

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CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

February 13, 2004

03-AP-367

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Peter:

I offer a few comments on the pending amendments to the Federal Rules of Appellate Procedure.

The proposal that has drawn the most reactions within the appellate judiciary concerns the new Rule 32.1, which would end the no-citation practice now prevailing in four circuits (second, seventh, ninth, and federal). A majority of judges on my circuit has sent a letter opposing Rule 32.1.

What the reactions principally show is that all circuits like their current approach. The nine that now allow citations are content; the four also are content and opposed to change. This is understandable: Better the devil you know than the devil you don't. But I do not think that this preference for the familiar counsels against the adoption of Rule 32.1. What *would* matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished orders. And from that quarter no protest has been heard. This implies to me that the benefits of accountability and uniform national practice carry the day.

When the institution of unpublished opinions was created, these documents were unavailable to most lawyers. Local rules forbade citation in order to avoid the advantage that institutional litigants, such as the Department of Justice, otherwise could obtain. Today they are published on Westlaw, LEXIS, and the Federal Appendix. Under recent legislation every circuit must post them online in searchable form. The original justification for not citing these documents no longer applies. Nor is it possible to justify a non-citation rule by reference to the difficulty in handling the great volume of dispositions; computers build indexes on the fly and have made obsolete the old key number system that had been swamped by too many opinions. It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to "revised and extended remarks" inserted into the Congressional Record to op-ed pieces in local newspapers; why should the "unpublished" judi-

cial orders be the only matter off limits to citation and argument? It implies that judges have something to hide.

In some corners there is a perception that they do—that unpublished orders are used to sweep under the rug departures from precedent. I am confident that this is not a problem in the seventh circuit. We are at the high end among circuits in publishing our work as precedential opinions; the unpublished orders contain substantial reasoning; it does not take an insider to see that this court limits use of unpublished orders to the criteria listed in our local rule. Still, to the extent that other circuits may follow a different practice—or the bar *believes* that this occurs, whether it does or not—allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice.

Doubtless courts *could* respond to the prospect of citation by writing less in each case or even substituting a one-line disposition for a brief order. Then everyone would be worse off. In the seventh circuit, where the practice of issuing reasoned orders is entrenched, the worst plausible outcome would be for the judges to spend more time polishing the language of unpublished orders, and to make this time available would move dispositions from the “published” to the “unpublished” category.

Yet whether such changes will occur is an empirical matter. Some people predicted the same adverse consequence when “unpublished” opinions became widely published on Westlaw, LEXIS, and Federal Appendix. It did not happen. Nor, as far as I can tell, did it happen in the 9 circuits and 21 states that have changed their local rules to permit citation to unpublished material. Some of these courts used to issue one-line affirmances but no longer do so; I am not aware of any movement in the opposite direction after citation was allowed. I do not expect counsel to cite unpublished orders often (after all, they have no precedential force), and this will make judges comfortable in following current practices for preparing those orders.

It has never been true that judges write these orders for the parties and counsel alone, and thus are certain to include more (or less) when strangers can use them; the audience always has included the Supreme Court, which can and does review unpublished decisions. This may be why the nine circuits that allow citation to these documents have not experienced difficulty: the prospect of citation to a different panel requires no more of the order’s author than does the prospect of criticism in a petition for a writ of certiorari.

Although the idea behind Rule 32.1 is sound—and it can be rescinded if the gloomy predictions prove true—the implementation should be improved. I substantially agree with Professor Barnett’s assessment of the drafting and urge the Committee to rewrite the rule so that it is stated in an affirmative rather than negative fashion, and deals directly with what he calls the “discouraging words” issue. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. Appellate Practice & Process 473, 490–97 (2003).

The Committee Note to Rule 32.1 also needs a close review. I noticed this sentence at page 35 of the pamphlet: “At the same time, Rule 32.1(a) does not

prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow *The Bluebook* in citing judicial opinions).” In addition to stylistic infelicities (“as to” and “upon” were banished, as both Fowler’s *Modern English Usage* and Garner’s *Modern Legal Usage* suggest, when the appellate rules were restyled), this sentence clashes with Rule 32, which prevents appellate courts from requiring italics or any similar stylistic conventions in briefs. Rule 32 allows courts to be more permissive, but *not* more demanding, than the national norm, and the Committee should not suggest otherwise in the rule next door.

I am less sanguine about Rule 28.1 on cross appeals. This proposal, designed to bring the seventh circuit into conformity with the national four-brief norm, does not address the reason *why* the seventh circuit adopted its local rule, and thus does not offer a convincing reason for change. I have tried to squelch the preference for the familiar that I suspect underlies some of the opposition to Rule 32.1, but despite this effort at self-control a negative evaluation of Rule 28.1 remains.

Here is the problem: Many lawyers file unnecessary cross appeals either out of carelessness or, worse, an effort to obtain a self-help increase in the allowable type volume. Suppose plaintiff makes two arguments, A and B, in the district court in support of a single remedy. The district judge accepts A and rejects B, and awards plaintiff the remedy it seeks. Defendant appeals and argues against A. Plaintiff wants to defend its judgment by relying on B. It is unnecessary to file a cross appeal; any argument preserved in the district court may be urged in support of one’s judgment. See *Massachusetts Mutual Insurance Co. v. Ludwig*, 426 U.S. 479 (1976). But many lawyers do not know this and file cross appeals. Or they may know it full well and file cross appeals anyway, to increase the allowable volume of advocacy. The effect under the proposed Rule 28.1 would be substantial. For a single appeal, the three briefs are capped at 14,000, 14,000, and 7,000 words, a total of 35,000. Under Rule 28.1, cross appeals would produce four briefs with these caps: 14,000, 16,500, 14,000, and 7,000, a total of 51,500. That’s a 50% increase for the cost of one measly appellate filing fee!

Our circuit tried for a time to control this practice by screening cross appeals and dismissing them, or consolidating the briefs, when the second appellant wanted to support rather than alter the judgment. The effort flopped, for until the brief has been filed it is impossible to know whether the cross appellant will ask for an alteration of the judgment. So the circuit went to a three-brief system, with an invitation to counsel to apply for more words (or a fourth brief) when there was a genuine need. Very few such applications are filed, and the number of cross appeals has substantially declined, showing that many had indeed been strategic. When the benefit was removed, the strategy ended.

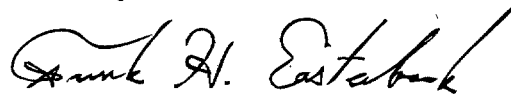
It is possible, I suppose, to treat an unnecessary cross appeal, used to file longer briefs, as frivolous and impose sanctions. But it would be better to avert the practice altogether, as the seventh circuit’s local rule does.

If the Committee believes nonetheless that a four-brief system must be used nationwide, it should adjust the rule so that the normal type volume is

spread across those briefs. Something like 9,000, 13,000, 9,000, and 5,000 (18,000 words on each side, or 36,000 total) would work nicely. That would eliminate any strategic conduct—and the burden of reading excess words—while allowing the sequence the Committee prefers. If the complexity of the issues in a given proceeding is such that 51,500 words are essential—and that would be rare, for even genuine cross appeals usually have only a simple issue on the second appeal—then the court of appeals could allow what is needed. Far better to start with 36,000 words in the normal case and go up if necessary, than to make 51,500 words the norm.

I hope these comments prove helpful to the Advisory Committee and the Standing Committee.

Sincerely,

A handwritten signature in cursive script that reads "Frank H. Easterbrook". The signature is written in dark ink and is positioned above the printed name.

Frank H. Easterbrook

cc: Hon. David F. Levi
Hon. Samuel A. Alito, Jr.
Patrick J. Schiltz