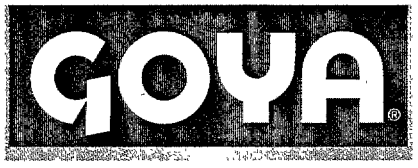

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03-AP-434

IRA BRAD MATETSKY
General Counsel

February 10, 2004

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

To the Committee on Rules:

I am writing concerning the proposed amendment to the Federal Rules of Appellate Procedure that would add new Rule 32.1, dealing with the citation of "unpublished" opinions or dispositions. I am strongly in favor of the proposed new rule.

I know that your Committee has already been inundated with comments, favorable and otherwise, on this subject and will not add to your reading burden by repeating the justifications for the proposed rule that I am sure many commenters have already offered. Suffice it to say that the Advisory Committee Note submitted with the proposed rule is in full accord with my own position and that I will add only a few additional remarks.

From my 17 years as a practitioner (including 12 years as a litigator at a large law firm in Manhattan before taking my current position in which I have also drafted several appellate briefs), I can think of several instances in which the most relevant, and sometimes the only, appellate precedent on point was a disposition that the Court of Appeals had designated as a "summary order" or "nonpublished" and which was, accordingly, not available for citation. This situation was frustrating and disappointing on two levels, because it meant not only that I could not provide the court deciding my case with the most useful briefing possible, but equally because it meant that my client would not have the benefit of the prior ruling in favor of its position. I know that any lawyer can understand the feelings engendered when one must tell a client or a senior partner, "There is a Second Circuit opinion squarely on point, directly in our favor – but we can't use it." *See also* American College of Trial Lawyers & William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions, reprinted in* 208 F.R.D. 645 (2002).

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More recently, I have noted that even some U.S. District Judges have begun either to express their great frustration with, or flatly to ignore, their circuits' prohibitions against citation of or reliance on unpublished opinions. I have discussed this phenomenon in the Second Circuit in an article that appeared yesterday in the New York Law Journal, titled "Second Circuit Should Join Emerging Trend by Permitting Citation of Summary Orders." For your convenience, I am enclosing a copy of that article.

Although I am strongly in favor of the concept behind proposed Rule 32.1, as well as the rationale for it offered by the Advisory Committee, I also agree with those who believe that the precise wording of the rule might possibly be subject to improvement. On that topic, I would associate myself with the views expressed in Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis,* 5 J. App. Prac. & Process 473, 489-98 (Fall 2003) (available at http://ssrn.com/abstract=485823).

I hope that these comments (including those in my article) are of assistance to the Committee in its work and would be pleased to provide any further information that might be helpful.

Very truly yours,

Ira Brad Matetsky

enclosure

OUTSIDE COUNSEL

BY IRA BRAD MATETSKY

Ignoring Rule 0.23: Citing Summary Orders in the Second Circuit

The U.S. Court of Appeals for the Second Circuit resolves about 60 percent of its cases in short opinions designated as "summary orders."[1] Typically, a summary order explains briefly why the court has resolved the case as it has, but without the level of background or detail of a full opinion.

The court's rules state that a case will be resolved via summary order, rather than in an ordinary published opinion, only when "the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion."

Although these summary orders were formerly unpublished and therefore difficult for attorneys to research, they now are printed in West's Federal Appendix and accessible from a variety of online sources.

Second Circuit Local Rule 0.23 has provided since 1973 that "[s]ince [summary orders] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court." But even though the rules forbid citation of these summary orders, and even though counsel risk judicial criticism if they do cite them, a computer search yields more than 50 instances in which federal district judges in New York have noted that counsel cited a Second Circuit summary order in violation of the rule.

Recently, several judges within the Second Circuit have issued opinions that not only cite a summary order but do so while acknowledging that the circuit states that summary orders must not be cited.

Rise in Citations

It is not only practitioners who sometimes conclude that a Second Circuit summary order articulates the court's position on a legal issue better than any published opinion, and that therefore they should cite the unpublished opinion even though they are prohibited from doing so. Recently, several judges within the Second Circuit have reached the same conclusion, and issued opinions that not only cite a summary order but do so even while acknowledging that the circuit states that summary orders must not be cited.

For example, in *Feinberg v. Katz*, No. 99 Civ. 45, a 2002 case decided by Southern District Senior Judge Charles S. Haight, defendants relied on an earlier Southern District decision, *Schmidt v. Fleet Bank*, 16 F.Supp. 2d 340 (1998), and Judge Haight agreed that defendants would prevail if *Schmidt* were still good law. But he continued:

> The defendants' reliance on *Schmidt* and its progeny is as disturbing as it is unavailing. The Second Circuit pointedly disagreed with *Schmidt* on precisely the point for which defendants cite it, months before defendants filed their reply brief on this motion. See *Pavlov v. Bank of New York Co., Inc.*, 25 Fed. Appx. 70, 2002 WL 63576 (2d Cir. Jan. 14, 2002) (unpublished decision).

Based on the Second Circuit's analysis in *Pavlov*, among other authorities, Judge Haight rejected defendants' position. His opinion would be unexceptionable if *Pavlov* were a published Second Circuit decision, but because that case was resolved in a summary order, the opinion's reliance on it is questionable under Rule 0.23.

Acknowledging this issue, Judge Haight added a footnote[2] to his discussion of *Pavlov*, observing that "[a]lthough the Second Circuit rules do not permit citation to unpublished decisions ... I believe that it is appropriate for me to consider *Pavlov* because the case expressly disapproves of the main case cited by the defendants."

Thus, despite the rule, Judge Haight gave significant precedential weight to the Second Circuit summary order in *Pavlov* and asserted that defendant's counsel should have done the same. In addition to Judge Haight's decision in *Feinberg*, at least two other District Court decisions have cited and relied upon the summary order in *Pavlov*.[3]

In *Fernandez v. Artuz*, 175 F.Supp. 2d 682, 684, a 2001 habeas corpus case, Southern District Judge Kimba M. Wood relied on, among other authorities, the Second Circuit's summary order in *Milbank v. Senkowski*, No. 98-2958 (2000).

Shortly after citing *Milbank*, Judge Wood's opinion did point out that "[p]ursuant to the Rules of [the Second] Circuit, an unpublished opinion does not constitute binding authority." It appears that Judge Wood apparently considered the *Milbank* summary order as non-binding but persuasive, or at least relevant, authority for her consideration.

But Rule 0.23 does far more than deprive summary orders of "binding authority." Under that rule, summary orders are no form of authority, rather than permissible links in a chain of legal reasoning. Interestingly, in addition to *Artuz*, at least two other District Court opinions have cited the summary order in *Milbank*.[4] Apparently, just as with *Pavlov*, at least three jurists rejected the Second Circuit's conclusion that "no jurisprudential purpose would [have been] served" by a precedential disposition of the *Milbank* case.

The current leader in citing Second Circuit summary orders among sitting district judges appears to be Southern District Judge Gerard E. Lynch.[5]

In *Harris v. United Federation of Teachers*, No. 02 Civ. 3257 (GEL), a 2002 decision, Judge Lynch noted and

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Ignoring Rule 0.23: Citing Summary Orders in the Second Circuit

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relied on the Second Circuit's affirmance of a prior district court decision, even though that affirmance had been handed down as a summary order.[6] Like Judge Haight, Judge Lynch appended a footnote to his opinion explaining why he felt it was appropriate to rely on the Second Circuit summary order despite the dictates of Rule 0.23:

> There is apparently no published Second Circuit authority directly on point for the proposition [at issue]. In the "unpublished" opinion in *Corredor*, which of course is published to the world on both the LEXIS and Westlaw services, the Court expressly decides the point. ... Yet the Second Circuit continues to adhere to its technological[ly] outdated rule prohibiting parties from citing such decisions, Local Rule §0.23, thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one.

More recently, in *Security Insurance Co. v. Old Dominion Freight Line, Inc.*, No. 02 Civ. 5258 (2003), Judge Lynch again followed the reasoning of a (different) Second Circuit summary order, and again derided in a footnote the fact that "the Court of Appeals prefers to pretend that such 'unpublished' opinions ... do not exist."

Thus, within the past two years, at least three of the Southern District's most distinguished judges have felt justified in relying upon Second Circuit summary orders in their opinions, even while citing and discussing the Second Circuit's rule specifically barring the citation of those dispositions.

Plainly, these judges would not have discussed such summary orders unless they believed doing so added value to the reasoning of their opinions. In numberless other cases, district judges have cited Second Circuit summary orders without noting the rule against such citations.

These repeated district court citations of summary orders undercut the Second Circuit's position that the prohibition on citing summary orders is justified because summary orders are issued only when "no jurisprudential purpose would be served by a [citable] opinion." It also is ironic that district judges can, and increasingly do, rule on matters before them based (at least in part) on Second Circuit authority that the prevailing party could not properly have relied upon, and which the unsuccessful party was forbidden to distinguish or try to explain.

National Trend

Like the Second Circuit, most of the federal appellate courts around the country have historically restricted citation of their "unpublished" or "non-precedential" opinions.

Within the past several years, however, these restrictions have become increasingly controversial, and today there is a clear trend in the federal courts toward allowing the citation of all appellate court opinions.[7]

For example, the appeals courts for both the First Circuit and the District of Columbia Circuit have amended their circuit rules within the past two years to permit citing "unpublished opinions" of those courts.[8]

While a uniform national rule allowing citation of unpublished opinions, including Second Circuit summary orders, would be a welcome development, it is at least two years away.

Moreover, on May 15, 2003, the Advisory Committee on Appellate Rules proposed to amend the Federal Rules of Appellate Procedure to require all circuits to allow citation of all court decisions, no matter how designated.[9]

This proposed rule is pending review by the Judicial Conference's Standing Committee on Rules of Practice and Procedure, and the earliest that it could take effect is Dec. 1, 2005.

Conclusion

While a uniform national rule allowing citation of unpublished opinions, including Second Circuit summary orders, would be a welcome development, it is at least two years away and may be further delayed if the Advisory Committee's proposal garners substantial opposition during the comment process.

In the interim, the ability of lawyers to marshal all relevant authority supporting their clients' positions continues to be hampered by a Second Circuit rule that an increasing number of federal judges within the circuit themselves seem unable or unwilling to follow.

The Second Circuit's practice of issuing summary orders and prohibiting their citation was adopted as the entirely understandable result of case load pressures that increased throughout the 20th century, placing unprecedented workload demands on federal judges and their staffs.

The court has previously rejected requests from the bar to modify the non-citation requirement of Rule 0.23, so the current rule represents a carefully considered policy.[10] Nonetheless, the considerations discussed here warrant the Second Circuit's taking a fresh look at this issue and adopting a revised Local Rule 0.23 that would permit citation of all the court's dispositions, including those designated as summary orders.

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(1) "Second Circuit Handbook: Everything You Ever Wanted to Know About the Second Circuit," available at www.ca2.uscourts.gov. See also George C. Pratt, Summary Orders in the Second Circuit Under Rule 0.23, 51 Brooklyn L. Rev. 479 (1985).

(2) Most of the observations regarding citation of summary orders in the district court opinions discussed in this article appear in footnotes rather than the main text of the opinions. For discussion of the status of the footnotes to a judicial opinion as an integral part of the court's opinion, see Ira Brad Matetsky, The Footnote Argument: Sustained at Last?, 6 Green Bag 2d 33 (Autumn 2002).

(3) *USA Certified Merchants v. Kuchel*, 262 F. Supp. 2d 319, 339 (S.D.N.Y. 2003) (Marrero, J.); *Wilson v. Toussie*, 260 F. Supp. 2d 530, 530 (E.D.N.Y. 2003) (Hurley, J.)

(4) *Robinson v. Ricks*, 163 F. Supp. 2d 155, 170 (E.D.N.Y. 2001) (Gleeson, J.), vacated and remanded on consent on other grounds, 56 Fed. Appx. 7, 2003 U.S. App. LEXIS 1261 (2d Cir. Jan. 22, 2003); *Rosario v. Bennett*, No. 01 Civ. 7142 (RMB) (AJP), 2002 U.S. Dist. LEXIS 24495, at *38 (S.D.N.Y. Dec. 20, 2002) (Peck, M.J.), report and recommendations adopted, 2003 U.S. Dist. LEXIS 751 (S.D.N.Y. Jan. 21, 2003).

(5) Another judge has also twice asserted "the propriety of asserting an unpublished decision" in two Eastern District of New York opinions that cited Second Circuit summary orders within the past two years. See *Perks v. Town of Huntington*, 251 F. Supp. 2d 1143, 1161 & n.17 (E.D.N.Y. 2003) (William G. Young, J., of the District of Massachusetts, sitting by designation); *Payne v. Huntington Union Free School Dist.*, 215 F. Supp. 2d 273, 280 & n.3 (E.D.N.Y. 2002) (same).

(6) In this instance, Judge Lynch could have referred to the Second Circuit's acknowledgement two decades ago that "[i]t could be argued that [Rule 0.23] should not be applied with full rigor to an order ... which affirmed 'substantially for the reasons stated by [the district judge]' " *Wolkenstein v. Reville*, 694 F.2d 35, 38 n.3 (2d Cir. 1982) (Friendly, J.).

(7) Among the many excellent discussions of the propriety and current status of appellate court non-citations rules, see, e.g., American College of Trial Lawyers & William T. Hangley, Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions (March 2002), and a full issue of the Journal of Appellate Practice and Procedure, vol. 4, no. 1 (Spring 2001).

(8) 1st Cir. Loc. R. 32.3(a)(2) (effective Dec. 16, 2002); D.C. Cir. Loc. R. 28(c)(1)(B) (effective Jan. 1, 2002).

(9) See Memorandum from Judge Samuel Alito Jr., chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, chair, Standing Committee on Appellate Rules 30-31 (May 22, 2003), reprinted in 217 F.R.D. no. 2 (October 2003).

(10) See Deborah Pines, "Report Examines Summary Orders' Use, Precedent," NYLJ, July 26, 1995; Pratt, supra note 1.