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The Seventh Circuit Plan For Publication Of Opinions-A Continuing Experiment

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The Seventh Circuit Plan For Publication Of Opinions—A Continuing Experiment

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The Judicial Conference of the United States at its October 1972 session recognized the right of a federal judge to file an opinion on any matter brought before him for decision and also to make such opinion available for publication. However, the Conference was also of the view that a judge, in determining whether or not to publish, should have in mind the potential harm which comes from the unlimited proliferation of published opinions. The Conference thereupon requested each federal circuit to develop a plan for the publication of opinions by January 1, 1973. Each circuit responded to this request and the publication plan of the Seventh Circuit was published and became effective February 1, 1973.

The background of the development of the Seventh Circuit Plan and its operation during the eleven remaining months in 1973 was set out in great detail through the comprehensive testimony of my learned colleague, Judge Robert A. Sprecher, and that of numerous officers and committee members of the Bar Association of the Seventh Federal Circuit, as well as by many interested legal scholars, in a public hearing by the Commission on Revision of the Federal Court Appellate System in Chicago, Illinois, June 10 and 11, 1974.[1]

The purpose of this brief commentary is to set out the Publication Plan of the Seventh Circuit, together with a summary of its operation from February 1, 1973 to October 31, 1975. The hope is that it may be of interest to members of the bar, and that they may have a better understanding of how this experiment is progressing. This experiment may result in paramount consideration being given to the quality of justice our court affords litigants rather than the quantity of final decisions.

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[1] The Commission was established pursuant to 28 U.S.C. § 41 (Supp. 1975). Senator Roman L. Hruska served as Chairman, with Professors A. Leo Levin and Arthur D. Hellman serving as Executive Director and Deputy Executive Director, respectively. *See* 1 SECOND PHASE HEARINGS, 1974–1975, 405–642 (1974).

ORDER

All active judges of the United States Court of Appeals for the Seventh Circuit having unanimously approved the attached new circuit rule,

IT IS THEREFORE ORDERED that the same be adopted as Circuit Rule 28, effective February 1, 1973, and added to the local Appellate Rules of the Court adopted July 1, 1968.

CIRCUIT RULE 28. (The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States):

POLICY

It is the policy of this circuit to reduce the proliferation of published opinions.

PUBLICATION

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published. "Published" or "publication" means:

(1) Printing the opinion as a slip opinion;

(2) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(3) Permitting publication by legal publishing companies as they see fit; and

(4) Unlimited citation as precedent.

Unpublished orders:

(1) Shall be typewritten and reproduced by copying machine;

(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;

(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation to prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for ny purpose, except to support a claim of *res judicata,* collateral estoppel or law of the case.

GUIDELINES FOR METHOD OF DISPOSITION

Published opinions:
Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;
(2) Involve an issue of continuing public interest;
(3) Criticize or question existing law; or
(4) Constitute a significant and non-duplicative contribution to legal literature
    (a) by a historical review of law;
    (b) by describing legislative history; or
    (c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be recorded by the Clerk of the Court, or in writing with only, or little more than, the judgement rendered, in appeals which
    (a) are frivolous or
    (b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where
        (i) a controlling statute or decision determines the appeals;
        (ii) issues are factual only and judgment appealed from is supported by evidence;
        (iii) order appealed from is non-appealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which
    (a) are not frivolous but
    (b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

RESPONSIBILITY FOR DETERMINING WHETHER DISPOSITION IS TO BE BY ORDER OR OPINION

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

EFFECTIVE DATE

The effective date of this rule is February 1, 1973.[2]

A reading of the Seventh Circuit Plan indicates that its policy follows that established by the Judicial Conference of the United States —"to reduce the proliferation of published opinions." The general consensus of the bar is that an effort in this general direction is welcome.

The rule, simply stated, provides for the disposition of appeals either by published opinions or by unpublished orders. The rule next defines each class of disposition, and by setting guidelines for the method of disposition, provides the meat to fill in the bare bones of the definitions. Published opinions may be signed or per curiam. The criteria for determining the form of disposition are set out. The responsibility for determining the method of disposition is in most instances that of a majority of the panel of three judges assigned to determine the appeal in question.

It should be noted that the respective plans of the eleven circuit courts of appeals may differ in various ways. Each plan is the creation of its own circuit. Publication plans generally follow the same overall pattern but differ widely in certain respects. It is not the purpose of this brief summary to indulge in a comparison of the various plans. Needless to say, however, many of them are derived from the same source materials.

Standards for Publication of Judicial Opinions, a report of the Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice, was published by the Federal Judicial Center in August 1973. This report represents an outstanding federal-state cooperative effort in providing a general summary of the problem and specific recommendations for state and federal courts adopting plans for the publication of appellate opinions.

The reports on the *Operation of Circuit Opinion Publication Plans* prepared and distributed in December 1973 and December 1974 by the Administrative Office of the United States Courts, Rowland F. Kirks, Director, and Joseph F. Spaniol, Executive Assistant to the Director, provide a helpful background study for those interested.

In January 1975, Jerry Goldman, Research Associate of the Federal Judicial Center, published an up-to-date study on *Attitudes of United States Judges Relating to Limitation of Oral Argument and Opinion-Writing in United States Courts of Appeals.* A brief addendum to this study was prepared by Robert E. Sutcliffe and published March 19, 1975.

[2] U.S. Ct. of App. 7th Cir. Rule 28, 28 U.S.C. (Supp. 1975).

Reference has earlier been made to the two-volume congressional publication of the Hruska Commission hearings. In addition to this report, the American Bar Association Commission on Standards of Judicial Administration is currently engaged in a study which will incorporate its position on publication of opinions at some future time. Much more has been written on various aspects of the plans but the foregoing should suffice to satisfy any who have an interest in such materials.

It should also be borne in mind that the current plan of the Seventh Circuit is purposely being carried out on an experimental basis and, given further experience, hopefully may achieve some final form. In the final eleven months of 1973, the first year of the operation of the plan, out of a total of 590 final dispositions on the merits, 223 or 38 percent were by published opinions and 367 or 62 percent were by unpublished orders.[3] In the calendar year 1974, out of a total of 952 final dispositions on the merits, 515 or 54 percent were by published opinions and 437 or 46 percent were by unpublished orders. In the first ten months of 1975, out of a total of 786 final dispositions on the merits, 413 or 53 percent were by published opinions and 373 or 47 percent were by unpublished orders. Thus, it will be noticed that final dispositions on the merits by published opinions increased from 38 percent in 1973 to 54 percent in 1974 and 53 percent in 1975. This record has almost erased an early justifiable criticism that the court was too light on published opinions and too heavy on unpublished orders in 1973.

Another noticeable change has been in the character of our unpublished orders. In most cases they now deal fully with the nature of the appeal, the issues presented, and the reasons and authorities for the rulings made. They have taken on the nature of an unpublished per curiam opinion. Infrequently cases are decided from the bench following oral argument, with an oral statement by the court giving the reasons for such disposition. This is followed by an unpublished written order restating the reasons given orally from the bench.

After the Seventh Circuit Plan was instituted, our then Chief Judge Luther M. Swygert took extraordinary measures to test the reaction of the representatives of the bar associations in the area, the case-reporting publishers, and a broad cross section of the practicing bar.

Much attention has been focused on the disposition of cases by unpublished orders. We have under consideration now an amendment to

[3] The statistics for 1973 on final dispositions do not include decisions of appeals submitted without oral argument. In the years 1974 and 1975, the statistics on final dispositions include all appeals decided on the merits whether they were after oral argument or after submission without oral argument.

Circuit Rule 28, our publication plan, which merely codifies our present practice. This amendment would read:

> Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

A number of such decisions have been published, usually based upon requests by either or all of the parties to the proceeding.

That the Seventh Circuit will continue to study the use of unpublished orders is evidenced by our honoring a request of Professor Arthur D. Hellman, former Deputy Director of the Hruska Commission and now a Professor of Law at the University of Pittsburgh. The court has sent to Professor Hellman about 200 unpublished orders decided in a six-month period, together with the briefs in each case. One of his third year students is undertaking a seminar paper on whether appeals which were decided by unpublished orders should have been decided by published opinions. The project will not be completed until later in the school year. We will receive a copy of this paper, but it is not now clear whether it will be published.

Implicit in the operation of the plan is the consideration to be given to the role of oral argument in cases heard on appeal. Our plan does not change the traditional use of oral argument and we continue to encourage its use in most cases. During the life of this plan we have heard oral argument in about 85 percent of the cases. The remaining 15 percent generally encompass prisoner pro se appeals, blatantly frivolous appeals, and cases where counsel for all parties waive oral argument with the consent of the court.

The provision in the plan prohibiting the citation of the court's unpublished orders as authority has aroused a diversity of viewpoints and is the most hotly contested provision in our circuit plan. Such "no-citation rules" have occasioned dispute in most of the circuits. It appears that nine circuit plans now have such a rule. Indeed, our own circuit judges in regular active service are divided in opinion. Some would abolish the rule, others would modify it, and a present majority would retain it for further study. We need not here repeat the pros and cons of the no-citation rule. It should be kept in mind, however, that all unpublished orders are matters of public record and are available to the public.[4]

[4] It appears that the first notice taken of the no-citation rule by the Supreme Court of the United States is in a dissenting opinion by Mr. Justice Brennan in Rose v. Hodges, 44 U.S.L.W. 3277 (U.S. Nov. 11, 1975). In that case the majority granted certiorari and

In sum, I think it is fair to say that the Seventh Circuit Plan is being generally well received by responsible groups and members of the bar. There is positive approval of the trend toward reducing the unlimited proliferation of published opinions. Members of the bar have welcomed our policy of insisting upon oral argument in our hearings on appeal. We are encouraged to believe that further study will result in a viable plan well-suited to promote the administration of justice on the appellate level in the federal system.

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reversed a judgment of the Sixth Circuit. Mr. Justice Brennan, presumably with tongue in cheek, raises the question of whether the Sixth Circuit's no-citation rule makes it unfair for a litigant to tell the Supreme Court about an intra-circuit conflict which could not be disclosed to the Sixth Circuit itself, and adds, "Am I to understand that this Court is not called upon to respect that prohibition." *Id.* at 3277 n.2.