# THROUGH THE LOOKING GLASS:
## HUMPTY DUMPTY AND OPINIONS THAT AREN'T

by Fellow Edward J. Kionka

> "When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> Lewis Carroll
> *Through the Looking Glass*

The controversy over the status of so-called "unpublished opinions" and whether they may be cited continues. Judging by what has been written on both sides, the issue is surely one of the hottest topics in appellate jurisprudence. But more than that, it raises important questions about the nature and role of reviewing courts and perhaps even the meaning of "law."

The topic has been explored at length in dozens of articles, judicial opinions, and internet sites, including "blogs." This brief comment will not attempt to revisit the arguments on each side – for that I can send you a long list of citations. **Fellow Charles Carpenter** wrote on this subject in the Fall 2002 issue of this newsletter (and in 50 South Carolina Law Review 235 (1998)), and **Fellow Jerry Braun** had two articles in *Judicature* on *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). *Anastasoff*, you will recall, held that refusal to recognize the precedential effect of a prior decision was unconstitutional. Several months later, Judge Richard Arnold's panel vacated its earlier decision as moot (the case having settled) and declared that the precedential effect of unpublished opinions in the Eighth Circuit remained an open question.

Gone but not forgotten, *Anastasoff* fueled the heated debate. More articles and commentary appeared, and many courts were emboldened to modify their "no-citation" rules for "unpublished" opinions.

At the federal level, citation rules vary from circuit to circuit, often governed by a local rule. For example, Seventh Circuit Rule 53 distinguishes between "opinions," which are published and precedential, and "orders," which may not be cited or used as precedent in any federal court within the circuit except to support a claim of *res judicata*, collateral estoppel, or law of the case. Tenth Circuit Rule 36.1 states that citation of an unpublished opinion/order/judgment is "disfavored," but it may be cited anyway if it has persuasive value with respect to "material issues that have not been addressed in a published opinion" and would assist the court in its disposition. Fourth Circuit Rule 36(c) is similar. In the Fifth Circuit under Circuit Rule 47.5, unpublished opinions after January 1, 1996 are not "precedent," but may be cited as "persuasive" authority. Unpublished opinions prior to that date *are* precedent.

The topic is further clouded by confusion over terminology. What is an "opinion"? Dispositions can range from very short "summary" orders (one sentence, one paragraph) to documents that look very much like published opinions but are called by some other name. The controversy centers on the latter. If a document bears all the indicia of an opinion, why do we call it something else? In addition, what do we mean by "published"? In one sense, every disposition by a reviewing court is "published," but some to a very limited extent. Increasingly, however, so-called "unpublished opinions" are readily available. Many can be found in electronic form (on Westlaw, Lexis, etc.), and there is even a new West Reporter series, Federal Appendix, that "publishes" unpublished opinions (79 volumes at this writing!).

If one has doubts about the wisdom of classifying some decisions as "unpublished" and, therefore, uncitable "non-opinions," those doubts will be hugely increased by perusing a volume of the Federal Appendix. The old "duck" aphorism comes to mind. The "cases" in the Federal Appendix bear a striking resemblance to real, old-fashioned "opinions." And anyone who writes briefs (as we do) will, I think, be struck with the realization that at least some of those "cases" could be of real and unique value to arguments we might be making in some future brief. I suspect that the form and wide availability of "unpublished" opinions has increased the pressure to permit them to be cited. Anecdotal evidence of injustices resulting from "no-citation" rules is growing.

The argument for a uniform rule at the federal level seems to have finally prevailed. At its meeting on May 15, 2003, the Advisory Committee on Appellate Rules of the Judicial Conference of the United States voted 7-1 (with one abstention) to propose a new Rule 32.1 to be added to the Federal Rules of Appellate Procedure. (**Past President Sandy Svetcov and Fellow Tom McGough, Jr.** are members of that committee; Tom voted for the proposal and Sandy was the lone dissenter.)

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The text of the proposed new rule is as follows:

> **[Proposed] Rule 32.1. Citation of Judicial Dispositions**
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> **(a) Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
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> **(b) Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

The proposed rule is followed by an unusually lengthy Committee Note and preceded by an introduction that frankly acknowledges the issue is "controversial" and may be expected to generate a great deal of interest. The proposed rule was published by the Advisory Committee on August 15, 2003 with an invitation for public comment. Comments may be submitted by letter, fax, e-mail, or at the committee's website (see below). The deadline for comments is February 16, 2004. In addition, there will be public hearings on this and other proposed appellate procedure amendments in Los Angeles on January 20, 2004, and in Washington, D.C. on January 26. If you wish to testify, you must contact the committee secretary at least 30 days in advance. After the public comment period, the Advisory Committee will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. The proposed rules, comments, and further information as to the specific procedures for providing comments are available at the committee's web site: *http://www.uscourts.gov/rules/newrules1.html*. Assuming you have views on this very important issue, this is a great opportunity to be heard and perhaps to influence the future direction of the law.

Meanwhile, at the state level, a similar situation prevails. In many states with busy intermediate appellate courts, large numbers of dispositions that look like "opinions" are designated as "unpublished" and uncitable. For example, Illinois Supreme Court Rule 23 provides that an Appellate Court panel can issue a citable "opinion" only when a majority of the panel determines that the decision: (1) establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) resolves, creates, or avoids an apparent conflict of authority within the Appellate Court. And as if this were not enough to stifle publication, by an administrative order in 1994 the Illinois Supreme Court limited by district the number of opinions to be published – First (Chicago), 750; Second, 250; and 150 each for the Third, Fourth, and Fifth (the order also establishes page limits for opinions). And yet the Appellate Court disposes of some 9,000 cases per year. While some of these are procedural dismissals or summary dispositions, the great majority are "Rule 23" orders, which look for all the world like "opinions." Indeed, on several occasions when I had received a Rule 23 order, I filed a motion to publish. In every case the motion was granted, the only change in the order being to change the word "order" in the first line to "opinion." One opinion, originally a Rule 23 order, has since been cited a dozen times in later cases and another dozen times in secondary authorities.

In response to increasing dissatisfaction with Rule 23, the Illinois Supreme Court appointed a blue-ribbon committee (including **Fellows Michael Reagan** and **Michael Rathsack**) to study the rule and make recommendations. In its December 2002 report, the committee recommended revising Rule 23. The new rule would continue the three-part classification of dispositions into opinions, written orders, and summary orders. As now, only opinions would be published, but written (unpublished) orders, although "not precedential," could be cited "for the order's persuasive value." Summary orders, as now, would be used where: (1) the Appellate Court lacks jurisdiction; (2) the disposition is clearly controlled by case law precedent, statute, or rules of court; (3) the appeal is moot; (4) the issues involve no more than an application of well-settled rules to recurring fact situations; (5) the opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision; (6) no error of law appears on the record; (7) the trial court or agency did not abuse its discretion; or (8) the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

This sort of tripartite division seems to be a sensible one. Most opponents of existing "no citation" rules (such as yours truly) concede that certain dispositions are of such limited value that they can be handled by a summary order (a short paragraph or two). One can imagine, however, cases that would fit within Illinois' categories (5), (6), (7) or (8) that would nevertheless have precedential value, and therefore should be Rule 23 orders or opinions.

The proposed federal and Illinois rules appear to represent an emerging majority view that decisions with the

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indicia of opinions, but which are not "published opinions," should nevertheless be citable as persuasive authority even though they are not what we sometimes call "precedent." The traditional common law meaning of *precedent* was a decision that must be followed if it could not be distinguished, or else overruled. Today, legal realists (again such as yours truly) believe that relatively few published decisions are truly "binding precedent." Courts are adept at distinguishing, spinning, refusing to follow, or even ignoring prior decisions when they choose to do so. Therefore, a rule that permits decisions to be cited as persuasive authority gives us almost as much of what we want and need as if the decisions were "precedential."

There are many arguments on both sides of this issue which cannot be revisited here, but I will conclude with two comments. First, at the federal level, fewer than 20% of the Courts of Appeals' dispositions are by published (citable) opinions. In many states, the figure is even lower. According to Nonpublication.com's website, in the California Courts of Appeal in fiscal year 2000, only 6% of "majority opinions" were published. In Illinois, the exact percentage is elusive but appears to be around 10%. *Res ipsa loquitur* – it defies common sense to believe that all but a handful of a reviewing court's dispositions deserve to be precedential.

Second, the argument that courts do not have time to write quality opinions in most cases is self-impeaching. An opinion does more than serve the public interest in accountability and the private interest of the parties. It requires the court to be sure that it "got it right." To eliminate that requirement is to say that we can have two levels of appellate review – high quality and fast track. No doubt our reviewing courts need to find ways to deal with a per-judge caseload that is manifestly too high. But if a case deserves an opinion at all, it deserves one that is of publishable, citable quality. ❖

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# CONNECTICUT'S UNIQUE "TRANSFER UP" SYSTEM

by Fellow Wesley W. Horton

In the forty or so states that have two-tier appellate systems, appeals are generally taken as of right to the intermediate appellate court. After that court disposes of the appeal, the losing party can request further review from the state's highest court. Five states provide for all initial appeals to go directly to the highest court, which then decides which appeals are transferred down to the intermediate court. But only Connecticut provides routinely for a transfer up to the highest court.

The Connecticut system works as follows. Except for murder convictions, virtually all appeals are taken to the Appellate Court. The Appellate and Supreme Courts have an integrated staff that reviews incoming appeals for important legal issues. The staff makes recommendations to the justices, who can then transfer an appeal to the Supreme Court docket without further proceedings. Occasionally transfer happens immediately after the appeal is filed, but normally transfer will not happen until all the briefs are in. By that point there will also have been a mandatory pre-argument conference, at which a retired appellate judge attempts to settle the case and, if unsuccessful, issues a report recommending that the appeal be or not be transferred to the Supreme Court.

Counsel also have the right to move for transfer of the appeal to the Supreme Court at any time before oral argument is scheduled. Even if the motion is denied, the Supreme Court may (and often does) transfer the case to its docket at a later time.

The upshot of the Connecticut system is that in the twelve months from November 1, 2002 to October 31, 2003, of the cases the Supreme Court disposed of with a reported decision (which means virtually all its cases), 70% (111) were decided on transfer up. Only 30% (48) were decided by certification, either after a decision by the Appellate Court (36) or by direct review from the trial court (12). Transfer up is thus the workhorse of the Supreme Court's docket. The Connecticut Supreme Court has no original jurisdiction except once every ten years in reapportionment cases.

I have lived with the Connecticut transfer system since the Appellate Court was created in 1983, and I think it works. Any skilled appellate advocate can predict with some degree of

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