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## SUMMARY ORDERS: Report of Joint Subcommittee on Use of Summary Orders by the United States Court of Appeals for the Second Circuit

New York County Lawyers' Association

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# REPORT OF JOINT SUBCOMMITTEE ON USE OF SUMMARY ORDERS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT\*

*New York County Lawyers' Association*

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## SUMMARY OF RECOMMENDATIONS

The Subcommittee makes the following recommendations, all of which are discussed in detail at the end of the Report:

- The Subcommittee's principal recommendation is that the Second Circuit should provide its summary orders to the electronic media, including electronic data base services, in a manner that makes the orders accessible to the public in the least expensive, most widely accessible method consistent with the publication of its reported decisions. The Subcommittee believes that making the summary orders available electronically will remove the veil of secrecy that many members of the bar have identified as one of their primary

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concerns about the current rule. They further point out this change will not impose any significant burdens on the court or on the bar.

- The Second Circuit should provide a more detailed elaboration of the criteria used by the court in deciding to issue a summary order decision. The circuit's current Rule 0.23 is relatively vague regarding the standard used to determine whether a decision should be published or should be issued as a summary order. Most of the other circuits provide more detail about the criteria used, and the Subcommittee believes that providing more detailed criteria will serve to reduce the mystery surrounding the rule and its use that has led to some of the criticism by the bar. Furthermore, providing these criteria will lead to a more uniform application of the rule by the court itself.

- The Second Circuit should notify counsel that, if counsel disagrees with the court's decision to issue a summary order in the case, counsel may request that the court publish the order. The court does publish summary orders occasionally, when it is persuaded that a useful purpose would be served by publication, and the Subcommittee believes that it would be helpful for all attorneys who receive a summary order decision to know that the option to make this request of the court exists.

- The Second Circuit should give additional consideration to whether to permit citation to summary orders as persuasive authority when no published decision of the circuit on the issue involved is available. While a summary order would not ordinarily be rendered where there is no Second Circuit decision on point (because then a jurisprudential purpose would be served by a published decision), on occasion counsel may believe that there is no Second Circuit precedent, and therefore may wish to refer the court to an unpublished decision as persuasive authority.

## I. BACKGROUND

The Joint Subcommittee on the Use of Summary Orders by the United States Court of Appeals for the Second Circuit was created to study the Second Circuit's practices with respect to summary orders. The impetus for the formation of the Subcommittee was a *New York Law Journal* article which noted that the circuit's use of this device had increased more

than 20% from 1990 to 1993.<sup>1</sup> The article also noted that the Second Circuit was more restrictive than several other circuits, which made their summary orders available to the bar via electronic data base services and permitted attorneys to cite summary decisions in unrelated cases. The article quoted Second Circuit Judge Wilfred Feinberg as stating that the notion that summary orders are a means for "sweeping tough decisions under the rug [remains] a legitimate concern," and suggesting that the bar periodically review a sample of unpublished cases to ensure that the circuit is properly applying its own standards. The New York Bar Association last studied the Second Circuit's summary order practice in 1981, when the Federal Courts Committee of the Association of the Bar of the City of New York issued a report critical of the Second Circuit's extensive reliance on the practice.

In response, the New York County Lawyers' Association Committee on the Federal Courts, chaired by Richard A. Williamson, and the Appellate Courts Committee, chaired by Alan I. Raylesberg, formed a Joint Subcommittee to study the Second Circuit's use of summary orders and to compare this circuit's practice with that of other circuits.

## II. JOINT SUBCOMMITTEE ACTIVITY

The Joint Subcommittee, co-chaired by Marjorie M. Smith of the Committee on the Federal Courts and Ravi Batra of the Appellate Courts Committee, held an initial meeting to discuss the topic. The Subcommittee decided to collect information on the practices of other circuits, review the literature on the practice in the Second Circuit, obtain and review a sample of summary orders from the Second Circuit and meet with the circuit Executive to discuss the topic. On February 8, 1995, the Subcommittee co-chairs and several Subcommittee members met with circuit Executive Steven Flanders, Court of Appeals Clerk George Lange III, and Chief Deputy Clerk Carolyn Campbell to discuss the circuit's summary order practices. On April 12, 1995, the Subcommittee co-chairs met with Chief

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<sup>1</sup> Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, N.Y. L.J., Aug. 2, 1994, at 1.

Judge Jon O. Newman. In addition, Subcommittee members reviewed two months' worth of unpublished summary orders which were furnished by the clerk's office.

### III. DISCUSSION

#### A. *Second Circuit Practices Regarding Use of Summary Orders*

While there was a period in the 1970s when the Second Circuit issued summary orders from the bench at the conclusion of argument, that practice stopped by the mid-1980s.<sup>2</sup> Since then, the circuit has issued written summary orders, which range in length from a few paragraphs to several pages.<sup>3</sup>

##### 1. Content of Second Circuit Rule

The rule providing for disposition by summary order is Second Circuit Rule 0.23, captioned "Dispositions in Open Court or by Summary Order." It states:

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, *in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.*

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since *these statements* do not constitute

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<sup>2</sup> According to senior Second Circuit Judge George Pratt, in 1975 70% of the dispositions under Rule 0.23 were oral decisions, but by 1984 only 1% of summary order decisions were oral. George Pratt, Foreword, *Summary Orders in the Second Circuit under Rule 0.23*, 51 BROOK. L. REV. 479, 484 (1985). The practice fell into disuse because it was distasteful to arguing counsel, and because it suggested that oral argument was a mere formality.

<sup>3</sup> Judge Pratt observed that "[t]he longer summary orders read much like the circuit's per curiam opinions or the shorter signed opinions," although the shorter summary orders may be as short as a sentence or as long as a paragraph in length. Summary orders are available at the clerk's office, and the Federal Reporter service publishes a notation of whether a case decided by summary order was affirmed or reversed, remanded or otherwise disposed of. Pratt, *supra* note 2, at 481.

formal opinions of the court and are unreported and not uniformly available to all parties, they *shall not be cited or otherwise used in unrelated cases before this court.*<sup>4</sup>

The circuit adopted its rule in 1973, in response to suggestions that the federal courts limit the number and length of published opinions.<sup>5</sup> Chief Judge Jon O. Newman explained that summary orders are employed when an appeal involves a frivolous legal issue or when a case can be decided by referring to a previous Second Circuit decision.<sup>6</sup> Judge Thomas Meskill has written that a panel considering whether to issue a published opinion or a summary order asks "will a published opinion in this case be helpful to the bench or bar generally or will it add anything to the established law of the circuit?"<sup>7</sup>

The use of summary orders has also been explained as a necessary reaction to the burgeoning caseload of the Second Circuit, which went from 1,739 cases in 1975 to 3,528 in 1990,<sup>8</sup> over a 100% increase, whereas the number of authorized judges increased only from nine to thirteen during the same period. Since judging is a deliberative process, it is impossible for each judge to be responsible for more than a certain number of signed opinions each year. The decision of cases by summary orders is thus a concomitant of the court's growing per-judge caseload.<sup>9</sup>

The Second Circuit's use of summary orders is consistent with a 1994 recommendation of the Committee on Long Range Planning of the Judicial Conference of the United States, which urges that

publication of opinions should be restricted to those of precedential import. Not all appellate decisions warrant publication. Opinions prepared for publication tend to take considerably more judicial and

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<sup>4</sup> 2D CIR. R. 0.23 (emphasis added).

<sup>5</sup> In 1964, the Judicial Conference of the United States adopted a resolution asking judges of the district courts and courts of appeals to "authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1964 ANNUAL REPORT 11.

<sup>6</sup> Adams, *supra* note 1.

<sup>7</sup> Thomas J. Meskill, Foreword, *Caseload Growth: Struggling to Keep Pace*, 57 BROOK. L. REV. 299, 304 (1991).

<sup>8</sup> In 1993, there were 4,321 appeals; in 1994, there were 3,986.

<sup>9</sup> Meskill, *supra* note 6, at 303.

law clerk time than opinions not prepared for publication. In addition the proliferation of published opinions may increase the likelihood of conflicting interpretations of circuit law . . . .<sup>10</sup>

## 2. Quantity of Summary Order Dispositions

The Second Circuit's use of summary orders has fluctuated over the past several years, from a low of 58% of total decisions in 1991<sup>11</sup> to a high of 63% in 1993 and 1994.<sup>12</sup> The pro se portion of the court of appeals' docket is responsible for a disproportionate number of summary orders; according to Chief Judge Newman, pro se appeals frequently are "frivolous and present no issue meriting publication."<sup>13</sup> If pro se cases are removed from the statistics, the percentage of summary order dispositions has actually declined over the past two years (from 54% in 1993 to 50% in 1994); and was the same in 1994 as it was in 1991.

At least as of 1985,<sup>14</sup> and presumably up to the present, summary orders are overwhelmingly used to affirm lower court decisions.<sup>15</sup> If the district court has written an opinion whose reasoning is acceptable to the panel, the summary order's explanation of the circuit's decision will often be limited to the one line: "Affirmed substantially on the basis of the opinion

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<sup>10</sup> COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 51 (Draft for Public Comment No. 36D, Nov. 1994).

<sup>11</sup> The annual figures are based on the statistical year for the federal courts, which runs from October to October. Some of the statistics in this Report were provided to the Subcommittee by the Clerk of the Second Circuit, George Lange III, for which the Subcommittee is grateful.

<sup>12</sup> The City Bar Association's 1991 Report stated that in 1969 summary orders constituted approximately 25% of the total decisions of the court. Pratt, *supra* note 2, at 489.

<sup>13</sup> In a letter to the *New York Law Journal* published on August 25, 1994 [hereinafter Newman Letter], Chief Judge Jon O. Newman attributed any increase in unpublished opinions (also known as summary orders) to the increase in the number of pro se cases on the court's docket. The pro se docket has ranged from 20% of the court's total caseload in 1991, to 31% in 1994. Of the pro se cases, the overwhelming majority are decided by summary order, ranging from 88% in 1991 to 93% in 1994.

<sup>14</sup> See Pratt, *supra* note 2, at 479.

<sup>15</sup> According to Chief Judge Newman, during the 1989-1991 period, only 3% of summary orders involved reversals (defining a reversal as any alteration of the district court's judgment), compared to a reversal rate of 46% when published opinions alone were considered. Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 632 (1992).

below." Chief Judge Newman noted that when the court issues a summary order affirming on the basis of the district court's decision, the affirmance does not take on the status of "law of the circuit."<sup>16</sup>

### 3. Quality and Appropriateness of Summary Orders in Particular Cases

The quality and appropriateness of summary orders are obviously much more difficult to evaluate. Indeed, the Subcommittee believes that the bar is not well-positioned to assess the appropriateness of summary orders in particular cases. Summary orders by their nature contain only an abbreviated discussion of the facts of the particular case and a conclusory discussion of the applicable law. It is therefore generally impossible to tell from the four corners of the decision whether the case meets the Rule 0.23 standard that "no jurisprudential purpose would be served by a written opinion," because the law applicable to the facts of the case is well-settled.<sup>17</sup>

Interestingly, the 1994 *New York Law Journal* study supports the view that different Second Circuit judges may have different perceptions of which cases do not involve issues of precedential or other jurisprudential significance. The *Law Journal* study concluded, for example, that in 55% of the cases heard by panels which included Judge Oakes, a published decision was issued; in contrast, only 26% of the cases heard by panels including Judge Jacobs resulted in a published opinion. Judge Oakes said that he is "a great believer in the published opinion, because it exposes your reasoning to the light of day."<sup>18</sup> Judge Cardamone, who also had a high publication rate, said that it was the court's duty to explain "why we decide as we do."<sup>19</sup>

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<sup>16</sup> Joint Subcommittee Meeting, Apr. 12, 1995.

<sup>17</sup> Chief Judge Newman observed that the bulk of the time saved in deciding a case by summary order derives from the reduced attention the panel can give to the facts, since the parties who receive the decision will be familiar with the facts; in published opinions, the panel will usually devote a substantial portion of the opinion to a statement of the underlying facts. *Id.*

<sup>18</sup> Edward A. Adams, *Tendency to Issue Published Rulings*, N.Y. L.J., Aug. 3, 1994, at 8.

<sup>19</sup> The *New York Law Journal* study of Second Circuit rulings was conducted over a nine-month period and involved a review of every case decided by the Sec-



After considering the subject carefully, the Subcommittee has concluded that the only way the bar could evaluate sensibly the appropriateness of the use of summary orders in particular cases would be to read the briefs, examine the record and perhaps speak with counsel to ascertain whether they thought the case involved issues that warranted a published opinion. Without such an in-depth evaluation, it is impossible to conclude whether the circuit is using summary orders in cases where such use is not justified, even if the percentage of cases decided by summary order increases from one year to the next. What can be said, however, is that the percentage of counseled cases decided by summary order has not fluctuated significantly over at least the past several years, ranging from a low of 50% (in 1991 and 1994) to a high of 54% (in 1993).

The Subcommittee notes that George Yankwitt, former President of the Federal Bar Council, has stated that he "cannot accept the proposition that 63 percent of [Second Circuit] appeals are routine mundane matters."<sup>20</sup> The Subcommittee disagrees with the notion that there is some percentage of summary order decisions that is necessarily "appropriate" and anything above that percentage excessive. At the same time, the Subcommittee is concerned about the high percentage of cases being decided by summary order. The Subcommittee believes that implementation of its recommendations, set forth below, for changes in current practice will help to insure that the summary order rule is being applied in appropriate circumstances and will enhance the bar's understanding of the circuit's practice.

#### 4. Citation and Publication of Summary Orders through Electronic Data Bases

Since promulgation of Rule 0.23 in 1973, the circuit has prohibited attorneys from referring to summary orders in unrelated cases. The rationale for this prohibition is two-fold: (1) since the orders are supposed to be utilized only when the case presents no issues having precedential importance, there is no

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ond Circuit from 1989 through 1993, a total of 5,681 cases. *Id.*

<sup>20</sup> Edward A. Adams, *Lawyers Object to Increased Use of Summary Orders*, N.Y. L.J., Aug. 2, 1994, at 4.

reason to cite to them; and (2) although the orders are available in the court's files, they are unpublished, and therefore permitting citation would unfairly advantage institutional litigants, such as the United States Attorney's offices, which have access to large numbers of the orders.<sup>21</sup> The circuit does permit anyone to petition to have a summary order published, and it reportedly publishes a handful of orders each year that have been the subject of such requests.<sup>22</sup>

The Second Circuit Court of Appeals does not make summary orders available to the electronic data base services such as Westlaw and LEXIS.

### B. *Other Circuits' Practices Regarding Use of Summary Orders*

All circuits have adopted plans allowing for unpublished opinions, embodied in circuit rules; some circuits have publication plans in addition to circuit rules.

#### 1. Content of Summary Order Rules

The Second Circuit's rule is relatively vague on the standard for determining whether an opinion should be published. This vagueness has been noted as a controversial feature of the rule.<sup>23</sup> Almost all the other circuits provide more detail about the considerations that go into a decision to publish.<sup>24</sup> For example, the First Circuit's rule states: "If a district court opin-

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<sup>21</sup> According to Judge Pratt, "Because the orders are unpublished . . . they are largely unexamined except by the parties to the case." Pratt, *supra* note 2, at 482.

<sup>22</sup> Chief Judge Newman's letter to the *New York Law Journal* stated that the court stood ready to entertain a motion to publish a summary order in any case where publication would be useful. Newman Letter, *supra* note 13, at 2. Judge Pratt has also noted the possibility of publishing an initially unpublished summary order, which "may come at the request of counsel who were not involved in the case at all who argue that they wish to quote from an order in connection with a petition for certiorari in a different case. [Or] the panel originally adopting the summary order . . . may decide that publication is appropriate, either because the panel finds in a later case that it wants to refer to its earlier order, or because of second thoughts on the 'importance of the case.'" Judge Pratt stated that a LEXIS search turned up a dozen cases between 1980 and 1985 in which a published opinion noted that the case had first been decided by summary order. Pratt, *supra* note 2, at 486-87.

<sup>23</sup> Pratt, *supra* note 2, at 483.

<sup>24</sup> See *infra* Appendix.

ion has been published, the order of court upon review shall be published even when the court does not publish an opinion."<sup>25</sup> The Fourth Circuit's rule states:

Opinions will be published only if they satisfy one or more of the standards of publication: i) it establishes, alters, modifies, or explains a rule of law within this circuit; ii) it involves a legal issue of continuing public interest; iii) it criticizes existing law; iv) it contains an historical review of a legal rule that is not duplicative; v) it resolves a conflict between panels of this Court or creates a conflict with a decision in another circuit.<sup>26</sup>

## 2. Citation and Publication of Summary Orders

Six of the thirteen circuits (the First, Seventh, Eighth, Ninth, D.C. and Federal Circuits) impose the same or similar limitations on citation as the Second Circuit. The other six circuits do not prohibit citation of unpublished opinions in unrelated cases, although the Fourth, Fifth<sup>27</sup> and Sixth Circuits disfavor the practice except when it is used to establish *res judicata*, collateral estoppel and the law of the case.<sup>28</sup> Two circuits (the Third and Eleventh) have no rules addressing the citation question. Only the Tenth Circuit specifically allows unrestricted citation as "persuasive authority."<sup>29</sup> When a circuit does allow citation in an unrelated case, its rules usually require that a copy of the cited opinion be served on other parties and filed with the court.<sup>30</sup>

Judicial accountability is a prime reason the Sixth Circuit allows attorneys to cite unpublished opinions, according to Chief Judge Gilbert Merritt.<sup>31</sup> "The public should have some kind of access to [all of the circuit's decisions] if for no other reason than to keep judges on their toes."<sup>32</sup> In 1994, the Tenth Circuit changed its policy to allow citation to unpub-

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<sup>25</sup> 1ST CIR. R. 36.2(b)(5).

<sup>26</sup> 4TH CIR. R. 36.2(b)(5), Note.

<sup>27</sup> The Fifth Circuit's Rule 47.5.3 states that citation of unpublished opinions is normally allowed only in support of claims of *res judicata*, collateral estoppel or the law of the case, or in situations where the case involves related facts.

<sup>28</sup> See *infra* Appendix Question 5.

<sup>29</sup> See *infra* Appendix Question 5.

<sup>30</sup> See *infra* Appendix Question 5.

<sup>31</sup> Adams, *supra* note 1, at 4.

<sup>32</sup> Adams, *supra* note 1, at 4.

lished decisions.<sup>33</sup> Tenth Circuit Chief Judge Stephanie Seymour said limiting unpublished decisions to those with no precedential value "is the theory but it's not always the practice. Some turn out to have precedential value even when the panel of judges thought they didn't."<sup>34</sup> As a result of the Tenth Circuit's change, its unpublished rulings can be cited if "the opinion has persuasive value on a material issue."<sup>35</sup>

Unpublished decisions by most circuits are available from the computerized data bases LEXIS and Westlaw. Only four circuits, including the Second Circuit, do not make unpublished decisions available to the electronic data base services.<sup>36</sup>

### C. Critique of Second Circuit Rule and Practice

A number of criticisms have been made of the Second Circuit's rule and practices concerning summary orders, beginning with the criticism by the City Bar Association's Federal Courts Committee in its 1982 report.<sup>37</sup> The criticisms fall into the following categories:

- Some counsel feel that their time invested in the appeal and their client's expense merit more in the way of an end product.<sup>38</sup>
- The proscription on publication and citation of summary orders deprives the bar of useful material, because any circuit decision provides insight as to the circuit's thinking and might assist a practitioner briefing an issue which has been dealt with by summary order.<sup>39</sup> Even though published decisions deal with the same point of law (otherwise the summary

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<sup>33</sup> Adams, *supra* note 1, at 4.

<sup>34</sup> Adams, *supra* note 1, at 4.

<sup>35</sup> Adams, *supra* note 1, at 4.

<sup>36</sup> Adams, *supra* note 1, at 5.

<sup>37</sup> The Committee concluded that the increasing use of summary orders was "an unacceptable 'means of saving judicial time,' in part because a legal doctrine 'derives its power to shape conduct not only from its persuasive articulation in a single appellate opinion, but also from its repeated application to a wide variety of real situations' in other cases." Adams, *supra* note 1, at 5.

<sup>38</sup> Judge Meskill noted this complaint in *Caseload Growth*. Meskill, *supra* note 6, at 304.

<sup>39</sup> Judge Pratt wrote that some would argue that "any summary order, no matter how routine, provides significant information about how particular legal principles are applied to particular situations." Pratt, *supra* note 2, at 491.

order would not meet the rule's standard of having no precedential value), the bar would find it helpful to see how many times an issue has been decided by the court. If an issue has been dealt with on numerous occasions via summary orders, counsel may decide that it is not worth briefing the issue in the current case.

- While there are decisions that may have no precedential or other jurisprudential importance, no panel can tell when it is deciding a case if future events will confirm that the decision was correctly viewed as being of this type. For example, in areas where there is recurring district court litigation, it might be useful to have a published opinion, even if only an affirmance based "substantially upon the opinion of the court below," since the summary order resolution of a case would not create a precedent for application by the district court.

- Although a decision may not establish or modify a rule of law within the circuit, the court's application of a well-established rule to a particular set of facts may be significant to litigants in a similar case. Indeed, the very fact that the court thought that the application of a rule of law to a new set of facts was so obvious that a summary order could be used may itself help a practitioner to understand better how that rule of law will be applied in subsequent cases.

- The use of summary orders tends to impose a "veil of secrecy" over a significant portion of the circuit's work, "generates distrust for the whole system and deprives the court of desirable feedback on its work."<sup>40</sup> A variant of this objection is that the use of summary orders makes it possible for the court to avoid exposing to the "light of day" decisions that it does not want the bar or public to know of. As Judge Pratt put it, the summary order process gives rise to a concern about "intentional or careless abuse in using Rule 0.23's power to 'hide,' or to make relatively inaccessible, a decision or the considerations which have gone into a decision."<sup>41</sup>

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<sup>40</sup> Pratt, *supra* note 2, at 492.

<sup>41</sup> Pratt, *supra* note 2, at 490.

- The non-publication rule gives an unwarranted advantage to institutional litigants like the U.S. Attorney's office, which can compile large numbers of summary orders in cases it handled.

- The summary affirmance of a district court's published opinion gives rise to speculation about whether the circuit adopted the district court's reasoning without the bar being readily able to check on whether this is so.

- The court's prohibition of citation of summary orders should be revised to allow the bar to cite to summary orders, provided that a copy of the cited order is served and filed. Citation might be permitted with the proviso that a summary order is only a "non-binding example" of what the court did when faced with a similar issue.

- The court should spell out in greater detail, as most of the other circuits do, the criteria used to determine whether a case should be decided by summary order.

#### D. *The Circuit's Reaction*

- Chief Judge Newman's response to the suggestion that unpublished opinions are "a great place to hide difficult cases" was that it was an unfair aspersion, since there had been no citation by anyone to "a single example of 'hiding' a 'difficult' case in an unpublished order."<sup>42</sup> Moreover, if there is a tendency to abuse the summary order device by sliding over troublesome issues, pressure from circuit colleagues should be sufficient to prevent judges from succumbing.<sup>43</sup> Chief Judge Newman pointed out that some years ago the court had invited a responsible bar association to analyze two years' worth of summary orders and identify any they thought should have been published, and they came up with "barely a handful."<sup>44</sup>

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<sup>42</sup> Newman Letter, *supra* note 13, at 2.

<sup>43</sup> Pratt, *supra* note 2, at 496.

<sup>44</sup> Chief Newman Letter, *supra* note 13, at 2. Judge Newman went on: "After looking at five years' worth of summary orders, your reporters identified as worthy of publication only two summary orders, both of which were considered by the Supreme Court. Yet in both instances, the summary order relied on a previously published opinion. Publishing summary orders in these instances would have been pointless."

- Since the overwhelming number of summary orders deal only with routine, run-of-the-mill cases, it is unlikely that institutional litigants have any tremendous advantage by virtue of their being in receipt of large numbers of such orders.

- With respect to the lack of specificity of the Second Circuit's summary order Rule 0.23, Judge Pratt acknowledged that perhaps "publishing a longer and more detailed explanation of [what the] jurisprudential purpose" language of Rule 0.23 means would be worthwhile "as part of a circuit plan for implementing Rule 0.23, or as an amendment to the rule itself," since it would enable the bar to "better understand why certain cases either did or did not go by summary order, and some judges' conceptions of how 'jurisprudential purpose' should be interpreted might also be affected."<sup>45</sup> But at least as of 1985, most circuit judges thought that Rule 0.23's "jurisprudential purpose" standard was much the same as the longer rule promulgated by other circuits.<sup>46</sup>

- The court's fundamental objection to either publishing or allowing citation of summary orders in unrelated cases is that both of these changes are perceived as requiring a significant adjustment in the way that summary orders are written.

—If summary orders could be citable as precedent, "there would be an unacceptable risk of panels creating precedents through [the] use of simplified generalizations of black-letter law or . . . imprecise language, which could come back to haunt the court at a later date . . . ."<sup>47</sup>

—If summary orders were published, the court would need to polish more carefully the order and include more detail about the factual background of a case, which would entail "an immense and unacceptable time cost. . . . One of the major purposes of using summary orders is to speed up the appellate process; taking more time to write them would largely defeat that purpose."<sup>48</sup>

- Chief Judge Newman has suggested that publication of all summary orders would "inundate the bar with more

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<sup>45</sup> Pratt, *supra* note 2, at 497-98.

<sup>46</sup> Pratt, *supra* note 2, at 497-98.

<sup>47</sup> Pratt, *supra* note 2, at 494.

<sup>48</sup> Pratt, *supra* note 2, at 494.

material than they can possibly read. It is doubtful that they can digest the high volume of published opinions" that exists now.<sup>49</sup> Along the same lines, Judge Pratt wrote:

[I]f summary orders add little or nothing to the development of the law, it would be inefficient to publish them. They would simply double the number of decisions published each year and therefore the number of cases to be researched by attorneys and courts. The added time costs for finding and reading summary orders in a given area of the law would probably exceed any benefits that might be gained.<sup>50</sup>

• With specific regard to making summary orders available to Westlaw and LEXIS, Judge Oakes mentioned that one reason not to do so is that it would give an advantage to larger firms; he thought it would also tend to lengthen already overly long briefs.<sup>51</sup> Chief Judge Newman is reported to have said that "if every decision of the court were on-line, attorneys would have difficulty keeping up with the court's output."<sup>52</sup>

#### IV. SUBCOMMITTEE RECOMMENDATIONS

Based on its study, the Joint Subcommittee makes the following recommendations:

1. The Joint Subcommittee's primary recommendation is that the Second Circuit make its summary orders available to the electronic media, including electronic data base services, in a manner that makes the orders accessible to the public in the least expensive, most widely accessible method consistent with the publication of its reported decisions.<sup>53</sup>

2. The Subcommittee also favors some elaboration on the criteria used in deciding to issue a summary order decision, such as the criteria used by the Fourth Circuit.<sup>54</sup> The Sub-

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<sup>49</sup> Newman Letter, *supra* note 13, at 2. Judge Meskill similarly observed that the non-publication of summary orders was probably welcomed by Federal Reporter series purchasers since it reduced the number of volumes published and hence the expense.

<sup>50</sup> Pratt, *supra* note 13, at 494.

<sup>51</sup> Judge Oakes's address at a joint meeting of the New York County Lawyers' Association Committee on the Federal Courts and the Appellate Courts Committee, Oct. 10, 1994.

<sup>52</sup> Adams, *supra* note 1, at 4.

<sup>53</sup> See *infra* pp. 800-03.

<sup>54</sup> See *infra* Appendix Question 4.



committee believes that having more detailed criteria will serve a two-fold purpose: it will educate the bar as to when a summary order is deemed appropriate by the court, and as Judge Pratt observed, it might affect "some judges' conceptions of how 'jurisprudential purpose' should be interpreted" in deciding whether a decision should be by summary order.<sup>55</sup>

3. The Subcommittee also recommends that the circuit consider adopting the First Circuit's practice of publishing a brief order in cases where the circuit is affirming a district court opinion that has been published.

4. The Subcommittee also favors advising counsel, in cases decided by summary order, that they can request that the order be published and of the criteria applied by the court in deciding whether to grant such requests.

5. The Subcommittee recommends that the circuit give additional consideration to whether to permit citation of summary orders, along the lines of the Fourth, Fifth, Sixth or Tenth Circuits' rules. In the Fourth, Fifth and Sixth Circuits, summary orders may be cited, although citation is disfavored except to establish *res judicata*, collateral estoppel or the law of the case; if an unpublished opinion is cited, copies of the order must be served and filed. The Tenth Circuit permits unrestricted citation, with the same requirement that the order be served and filed. Particularly in a case where a summary order has been rendered and counsel believes that there is no Second Circuit decision on point, counsel may wish to refer the court to an unpublished decision as persuasive, not binding, authority.

6. Except as reflected in the above recommendations, the Subcommittee does not believe it practicable, or even necessarily desirable, for the circuit to alter its use of summary orders in cases meeting the Rule 0.23 criteria.

To elaborate on the Subcommittee's first recommendation (which calls for making Second Circuit summary orders available "on-line"), the Subcommittee believes that the Second Circuit last considered whether to make its decisions available to the electronic data base services Westlaw and LEXIS in the 1980s. Since then, use of these services has become much more widespread, extending to small firms and solo practitioners.<sup>56</sup>

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<sup>55</sup> Pratt, *supra* note 2, at 498.

<sup>56</sup> See, e.g., Richard Sloan, *Automation in the Law Library of Today*, N.Y. L.J.,

This change reduces the validity of the concern that providing summary orders to Westlaw and LEXIS would discriminate in favor of large firms or wealthier attorneys and their clients. Indeed, the circuit now makes significant use of Westlaw and LEXIS, citing to district court opinions available only on these data bases, or using them as research tools and incorporating the results into the court's opinions.<sup>57</sup>

Making summary orders available through Westlaw and LEXIS should not require any change in the court's preparation of these orders. The decisions of the other circuits that make their summary decisions available on-line appear to be no more "polished" than this circuit's summary orders. Making the Second Circuit's summary orders available to LEXIS and Westlaw would make them more available to the bar, without requiring the court to alter its style of writing these orders.

Nor would the circuit need to alter its rule prohibiting citation of summary orders in unrelated cases. Summary decisions appear in LEXIS or Westlaw with a heading at the top of the first page advising attorneys of that circuit's rule. For example, Westlaw includes the following notice before the Sixth Circuit's summary decisions:

37 F.3d 1498 (Table) Unpublished Disposition

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing *res judicata*, collateral estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

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Feb. 28, 1995, at 5-6. The article noted:

Fifty years ago, library machines consisted of a manually operated typewriter and a telephone. The IBM electrics came later. Copiers did not exist . . . .

Basic research was conducted then, and at least until 1975 or 1980, mainly through West digests, legal encyclopedias, law reviews, treatises and statutory compilations.

By contrast today, most library management routines are handled through computers, as is much legal research—chiefly with Lexis and Westlaw. The computer revolution in large firms and small is no longer a prophecy. It is here.

<sup>57</sup> See, e.g., *United States v. Moetamedi*, 46 F.3d 225 (2d Cir. 1995) (citing the unpublished district court opinion as "see *Moetamedi*, 1993 WL 147461 at 5").

The Tenth Circuit's summary decisions are preceded by the following Westlaw notice:

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

Lastly, concern that the court and counsel will be inundated if summary orders are provided to the electronic services seems overstated. Both Westlaw and LEXIS permit searches to be conducted either for all decisions of a particular court, or for published decisions only.<sup>58</sup> Nor would making summary orders available on-line result in longer briefs, since parties will continue to be precluded from citing the orders in unrelated cases, unless the circuit alters Rule 0.23.

Making summary orders available to, *inter alia*, Westlaw and LEXIS would have the following positive effects:

- It virtually would eliminate the concern that the circuit is "hiding" decisions of difficult issues through its use of the summary order format; with electronic publication, the decisions will move from being relatively hidden (in court files at Foley Square) to being easily accessible (accessing summary orders on Westlaw or LEXIS is undeniably easier than traveling to the Court of Appeals and poring through uncategorized case files).

- By making the order readily available, attorneys in other cases would be able to request publication of a decision. Generally, litigants in a case have little or no interest in obtaining publication of a decision for use in future cases, while future litigants remain unaware that the circuit has issued a decision that may be relevant to their case.

- It would enable attorneys to learn easily the basis for an unpublished affirmance of a district court published opinion.

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<sup>58</sup> For example, using Westlaw to search the Court of Appeals ("CTA") data base, the attorney would add the following "but not" limitation at the end of his or her query: % ci(not unreport! unpub!). To limit district court searches to published opinions, the command "dct" immediately followed by "r" (for restricted) would be used.

- It would make the bar more aware of issues that have been the subject of frequent unpublished decisions, providing counsel with a better sense of which issues the court is unlikely to be interested in revisiting.

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#### POSTSCRIPT

The Joint Subcommittee acknowledges and expresses its appreciation for the cooperation of the Second Circuit, its Chief Judge, Jon O. Newman, its Circuit Executive, Steven Flanders, its Clerk, George Lange III, and its Chief Deputy Clerk, Carolyn Campbell, given to the Joint Subcommittee in its study.

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Karen G. Leslie, a member of the Association, submitted a dissent from the draft report in the form that it was presented to the Association's Board of Directors.

# APPENDIX

## PROVISIONS CONCERNING UNPUBLISHED OPINIONS 1985 & 1994

### QUESTION 1

*What rule or plan covers unpublished opinions?*

- 1st Circuit 1985 - Circuit rule 14; plan in appendix I.B to rules  
1994 - Rules 36.2 and 2
- 2nd Circuit 1985 - Circuit rule 0.23  
1994 - Same
- 3rd Circuit 1985 - Appendix 1 to rules (chapters V and VI) of Internal Operating Procedures [hereinafter IOP]  
1994 - Appendix 1, IOP, chapters 5 and 6
- 4th Circuit 1985 - Circuit rule 18  
1994 - IOP 36, 3-6
- 5th Circuit 1985 - Circuit rule 47.5  
1994 - Same
- 6th Circuit 1985 - Circuit rule 24  
1994 - Same
- 7th Circuit 1985 - Circuit rule 35  
1994 - Circuit rule 53
- 8th Circuit 1985 - Circuit rule 8(i); plan in appendix II to rules  
1994 - Circuit rule 28A(k); appendix I
- 9th Circuit 1985 - Circuit rule 21  
1994 - Circuit rules 36-1 through 5
- 10th Circuit 1985 - Circuit rule 17  
1994 - Circuit rules 36.1 through 3

- 11th Circuit 1985 - Circuit rule 25  
1994 - Circuit rules 36-1 through 2
- D.C. Circuit 1985 - Circuit rules 13 and 8(f)  
1994 - Rule 36
- Fed. Circuit 1985 - Circuit rule 18  
1994 - Circuit rule 47.6

## QUESTION 2

*Who makes the decision to publish an opinion?*

- 1st Circuit 1985 - Majority vote of panel  
1994 - Any judge can require publication; any interested person or party can request publication
- 2nd Circuit 1985 - Unanimous panel required for non-publication  
1994 - Same
- 3rd Circuit 1985 - Majority of panel decides whether a per curiam or signed opinion should be published; unanimous panel required for a "judgment order," which is never published (IOP 6.1)  
1994 - Same
- 4th Circuit 1985 - Author or majority of judges joining the opinion  
1994 - Unanimous panel required for non-publication
- 5th Circuit 1985 - Unanimous panel required for non-publication  
1994 - Same
- 6th Circuit 1985 - Majority of panel determines publication  
1994 - Same
- 7th Circuit 1985 - Majority of panel determines publication  
1994 - Same
- 8th Circuit 1985 - Court, panel or author  
1994 - Same
- 9th Circuit 1985 - Majority of panel  
1994 - Same

10th Circuit 1985 - Court or panel  
1994 - Same  
11th Circuit 1985 - Court  
1994 - Same  
D.C. Circuit 1985 - No rule addresses the question  
1994 - Same  
Fed. Circuit 1985 - No rule addresses the question  
1994 - Same

### QUESTION 3

*Can a single judge publish a separate opinion?*

1st Circuit 1985 - No  
1994 - Same  
2nd Circuit 1985 - No  
1994 - Same  
3rd Circuit 1985 - No  
1994 - Same  
4th Circuit 1985 - No  
1994 - Same  
5th Circuit 1985 - No  
1994 - Same  
6th Circuit 1985 - No  
1994 - Same  
7th Circuit 1985 - Yes  
1994 - Same  
8th Circuit 1985 - Yes  
1994 - Same  
9th Circuit 1985 - Author of separate opinion can request  
publication  
1994 - Same  
10th Circuit 1985 - No  
1994 - Same  
11th Circuit 1985 - No  
1994 - Same  
D.C. Circuit 1985 - Yes  
1994 - Rule does not address the question  
Fed. Circuit 1985 - No rule addresses the question  
1994 - Same

QUESTION 4

*How detailed are the criteria for deciding whether to publish an opinion or order?*

- 1st Circuit 1985 - Detailed criteria not provided  
1994 - Rule 36.2(a). Somewhat detailed criteria provided. Note: If a district court opinion has been published, the order of court upon review shall be published even when court does not publish an opinion. Rule 36.2(b)(5)
- 2nd Circuit 1985 - Detailed criteria not provided  
1994 - In those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion, disposition will be made in open court or by summary order
- 3rd Circuit 1985 - Detailed criteria not provided  
1994 - Same
- 4th Circuit 1985 - Detailed criteria  
1994 - Opinions will be published only if they satisfy one or more of the standards of publication: i) it establishes, alters, modifies, or explains a rule of law within this circuit; ii) it involves a legal issue of continuing public interest; iii) it criticizes existing law; iv) it contains a historical review of a legal rule that is not duplicative; v) it resolves a conflict between panels of this court or creates a conflict with a decision in another circuit
- 5th Circuit 1985 - Detailed criteria  
1994 - Same
- 6th Circuit 1985 - Detailed criteria  
1994 - Same
- 7th Circuit 1985 - Detailed criteria  
1994 - Same
- 8th Circuit 1985 - Detailed criteria  
1994 - Same



- 9th Circuit 1985 - Detailed criteria  
1994 - Same
- 10th Circuit 1985 - Moderately detailed criteria  
1994 - Same
- 11th Circuit 1985 - Moderately detailed criteria  
1994 - Same
- D.C. Circuit 1985 - Detailed criteria  
1994 - Same
- Fed. Circuit 1985 - Detailed criteria not provided  
1994 - Same

### QUESTION 5

#### *Can an unpublished opinion be cited?*

- 1st Circuit 1985 - Rule 14: "never to be cited in unrelated cases." App. I.B(b)(6): "Only published opinions may be cited."  
1994 - "[N]ot to be cited in unrelated cases." "Only published opinions may be cited otherwise."
- 2nd Circuit 1985 - Only in related cases  
1994 - Same
- 3rd Circuit 1985 - No rule addresses the question  
1994 - No rule addresses the question, although IOP 5.6 states that because only published opinions have precedential value, the court does not cite to its unpublished opinions as authority
- 4th Circuit 1985 - Yes, but it is disfavored "except for the purpose of establishing res judicata, estoppel, or the law of the case"; if an unpublished opinion is cited, copies must be served and filed  
1994 - Same
- 5th Circuit 1985 - Yes, although "normally" only for purposes of res judicata, collateral estoppel, the law of the case, or where facts are related; if cited, copies must be attached to brief  
1994 - Same

- 6th Circuit 1985 - Yes, but citation is disfavored "except for the purpose of establishing res judicata, estoppel, or the law of the case"; if an unpublished opinion is cited, a copy must be served and filed  
1994 - Same
- 7th Circuit 1985 - Only for the purposes of res judicata, collateral estoppel, and the law of the case  
1994 - Same
- 8th Circuit 1985 - Citation prohibited "except when the cases are related by virtue of an identity between the parties or the causes of action"  
1994 - Same
- 9th Circuit 1985 - Only "when relevant under the doctrine" of res judicata, collateral estoppel, and the law of the case  
1994 - Same
- 10th Circuit 1985 - Yes, citation allowed; if an unpublished opinion is cited a copy must be served upon opposing counsel  
1994 - Per general order of the Court of Appeals to December 31, 1995 or until further order of the Court. Citation copy allowed; if an unpublished opinion is cited a copy must be served upon opposing counsel
- 11th Circuit 1985 - No rule addresses the question  
1994 - Unpublished opinions may be cited as persuasive authority provided that a copy of the opinion is attached to brief
- D.C. Circuit 1985 - Rule 8(f): citation permitted "for such purposes" as res judicata, collateral estoppel, and the law of the case  
1994 - Rule does not address the question
- Fed. Circuit 1985 - Only for purposes of res judicata, collateral estoppel, and the law of the case  
1994 - Same

