

**BRIEF SUMMARY OF RECOMMENDATIONS
OF THE SECTION ON COURTS, LAWYERS
AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR FOR
AMENDMENTS TO PARTS VIII AND IX OF
THE INTERNAL OPERATING PROCEDURES OF
THE DISTRICT OF COLUMBIA COURT OF APPEALS**

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, recommend amendments to Parts VIII and IX of the Internal Operating Procedures of the District of Columbia Court of Appeals. The Section recommends that (1) Memorandum Opinion and Judgments ("MOJs") that are not formally published may be cited as precedent, (2) MOJs be made more accessible to the public, and (3) the standards for when the Court uses MOJs be made more rigorous and comprehensive. These changes will promote accountability, consistency, and public confidence in the appellate court. The Section previously made similar recommendations to the United States Court of Appeals for the District of Columbia Circuit.

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The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the Bar or its Board of Governors.

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The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, respectfully submit these recommendations for amendments to Parts VIII and IX of the Internal Operating Procedures of the District of Columbia Court of Appeals. The Section recommends that (1) Memorandum Opinion and Judgments ("MOJs") that are not formally published may be cited as precedent, (2) MOJs be made more accessible to the public, and (3) the standards for when the Court uses MOJs be made more rigorous and comprehensive.

Among the District of Columbia Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section's Committee on Court Rules serves as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

NO-CITATION RULE

Part IX of the Internal Operating Procedures addresses publication and citation of opinions. In general, Part IX now provides that MOJs are not published and that non-published decisions may not be cited as precedent. Because MOJs have for the last several years accounted for approximately 40 percent of dispositions by the Court, the effect of Part IX is that a large percentage of the Court's decisions cannot now be cited as precedent.

In its current form, Part IX(A) provides that signed and per curiam opinions shall be published and that MOJs shall not be published. Part VIII(C) provides that a MOJ shall be used only when a division "unanimously" determines that use of an MOJ is appropriate, noting that "[a]n objection by any member of the division to the use of a Memorandum Opinion and Judgment shall require publication." Part IX(B) provides for publication of MOJs but only in limited circumstances: "[a] party may request that a Memorandum Opinion and Judgment be published upon motion promptly filed stating why publication is merited" and that "[p]ublication shall be granted by a vote of two or more division members." Part IX(D) sets forth the current no-citation rule for MOJs:

Unpublished opinions shall not be cited to the court in any material prepared for the court except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

The Section recommends that the no-citation rule in Part IX(D) for unpublished MOJs be eliminated. A significant part of the legitimacy and accountability of the judicial process results from the expectation that a court's decision in one case will constrain its decision in cases involving similar facts and issues. *See Morague v. States Marine Lines, Inc.*, 398 U.S. 375, 408 (1970). The principle of *stare decisis* provides assurance that courts will treat similarly situated litigants in a consistent and uniform manner. If the parties in one case are prohibited from citing an earlier case that may be indistinguishable, the goals of the doctrine of *stare decisis* may be undermined.

The Section recognizes that at least in theory, the current no-citation rule for MOJs is not completely inconsistent with the doctrine of *stare decisis*. Because use of

MOJs is supposed to be confined to cases controlled by existing precedent (*see* Part VIII(C) and pages 6-8 below), there should be at most only rare cases decided through MOJs that are inconsistent with prior cases or that extend an existing rule of law. In fact, two prior studies of the Court's unpublished opinions concluded that the vast majority of opinions were published, or not published, in accordance with the Court's guidelines. Report and Recommendations of the Committee to Study Unpublished Opinions of the District of Columbia Court of Appeals (April 1986); Young Lawyers Section of the Bar Association of the District of Columbia, Report on Rules VIII and IX of the Internal Operating Procedures of the District of Columbia Court of Appeals (February 1979).

However, even if use of MOJs is inappropriate in only a relatively small number of cases, the problem ought to be corrected in those cases, and those cases may be important. Any mistakes could in theory be corrected on a case-by-case basis through a motion by one of the parties for publication, but that approach puts a burden on both the Court and the parties, who may not have a significant interest in publication because publication would not affect them directly. The Section believes that MOJs have been used in a not insignificant number of cases that, at a minimum, stretch the criteria for use of MOJs -- cases, for example, that extend an existing rule of law to arguably different facts or that modify an existing rule of law in subtle ways.

In addition, the members of a panel and the parties in a particular case may inadvertently overlook conflicting, or arguably conflicting, decisions by other panels. Parties in other cases may be aware of potentially conflicting decisions, and they should have the right to call such conflicts to the attention of the Court. If counsel are

prevented from citing conflicting decisions, such conflicts among decisions of different panels may be difficult or impossible to cure, and the quality and consistency of justice in the Court will suffer. See M. Rosenberg, P. Carrington & D. Meador, *Justice on Appeal* at 38-39 (West Publishing Co. 1976).

Furthermore, accessibility of MOJs may facilitate the prompt and fair disposition of appeals. If MOJs are available to a party, it may decide not to appeal, to dismiss an appeal once an MOJ is called to its attention, or to settle the case. Better information about how the Court interprets and applies its precedents can only assist the parties and promote the interests of justice.

The Section notes that it has recommended that the United States Court of Appeals for the District of Columbia Circuit adopt an equivalent rule permitting all of its decisions to be cited as precedent. The D.C. Circuit's Advisory Committee on Procedures Concerning Unpublished Dispositions made a similar proposal in its Report and Recommendations dated June 8, 1984.

PUBLIC ACCESS TO MOJs

Consistent with the principle that all decisions of the Court, including MOJs, may be cited as precedent, all decisions should be made readily available to the public. MOJs should be equally available to all parties, with no special advantage for institutional litigants that regulate handle cases in the Court. The right to cite MOJs as precedent is valuable only to the extent that litigants have a workable opportunity to locate MOJs that support their position.

Decisions other than MOJs are currently available under Part IX(A), which requires publication of all signed and per curiam opinions; those decisions are available to parties and their counsel both in formal bound volumes and through computerized legal research services. Public access to MOJs is significantly more difficult. Because MOJs are intended to be used only in cases largely controlled by existing precedent, and because formal publication of MOJs would tend to make bound volumes more unwieldy and increase the cost of purchasing these volumes, the Section does not recommend that MOJs be routinely published in bound volumes.

The Section does recommend that a less formal system be used for MOJs. MOJs would be made available by the Clerk's office on request to any person. In addition, MOJs should be included in the Court's electronic bulletin board, which will make them more accessible and easily searched. The Section expects that some MOJs on a selective basis will be printed by specialized publications or picked up by computer-data-base services, which will further increase their availability. The Court should publicize the availability of these options so that all practitioners are aware of them.

The Section also recommends that the Clerk's office prepare a simple subject-matter index of MOJs, or a list of published cases cited in MOJs and the MOJs that cite them, that would help counsel to identify MOJs that address relevant issues. Any indexing system need not be as sophisticated than the West key system. The numbering system currently employed by the Court identifies that general category of case, but further specificity would be desirable. If, however, the Court concludes that

any such system would impose an undue burden on the Clerk's Office, the Section's proposal should be implemented without this element.

To avoid increasing the burden and cost on parties before the Court or the Superior Court, attorneys should not generally be expected to research opinions made available only in the less formal format. Parties would continue to be expected to be familiar with opinions published in a printed, bound volume.

STANDARDS FOR USE OF MOJs

Part VIII(C) of the Internal Operating Procedures currently provides that a MOJ shall be used

when a division unanimously determines that a judgment of the trial court or a decision of an administrative agency should be affirmed or enforced, and this court's decision

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only, or only recent binding precedent on a particular point of law in this jurisdiction;
5. does not involve a legal issue of continuing public interest; and
6. does not find any error of law.

The Section recommends that Part VIII(C) be amended to make clear that use of an MOJ is not preferred and to include additional circumstances when use of an

MOJ is inappropriate. With additions underlined and deletions lined out, the Section recommends that Part VIII(C) read as follows:

when a division unanimously determines that a judgment of the trial court or a decision of an administrative agency should be affirmed or enforced, and this court's decision clearly

1. does not establish a new rule of law;
2. does not alter, modify, criticize, question, distinguish, or clarify an existing rule of law or opinion previously announced by the Court;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only, or only recent binding precedent on a particular point of law in this jurisdiction;
5. does not involve a legal issue of continuing public interest; ~~and~~
6. does not find any error of law;
7. relies on a prior decision of this Court appearing in a printed, bound volume report;
8. does not refer to to an existing rule of law that appears to have been generally overlooked;
9. does not affirm a decision of the trial court or an administrative agency on grounds different from those set forth in the trial court's or agency's published opinion;
10. is not accompanied by a concurring opinion; and
11. does not warrant publication in light of other factors that give it general public interest.

As explained above, the Section believes that the current standards for use of MOJs have not always been consistently applied. Particularly if the Section's recommendations concerning abolition of the current no-citation rule and broadened

accessibility to MOJs are not adopted by the Court, it is important that the standards for use of MOJs be clarified and made more comprehensive. Any limitation on the citation of MOJs would make it more crucial that the use of MOJs be limited only to those situations where their use is clearly warranted.

The Section notes that here too, it has made a similar proposal to the United States Court of Appeals for the District of Columbia Circuit. The Section's recommendation to the D.C. Circuit uses its current Rule 14(b) as a basis, although the Section's recommendation modifies some subparts of that rule and adds two additional subparts.