Appellate Courts' Authority to Dispose of Cases Without Written Opinions

By David F. Johnson

Federal courts of appeals can affirm or reverse a district court's order or judgment without a written opinion explaining the reasoning of their decision. Federal Rule of Appellate Procedure 36 provides that a clerk must enter a judgment "after receiving the court's opinion" or "if a judgment is rendered without an opinion, as the court instructs."[1] Some federal courts of appeals have local rules that govern when they can issue a judgment without an opinion.[2] Generally, these rules require a panel to be unanimous on the result and in agreement that there is no jurisprudential purpose in issuing an opinion. Accordingly, those courts routinely dispose of appeals, either after briefing or upon a motion to dismiss, by simply issuing a judgment, or by issuing a judgment and a one-line opinion. As an extreme example, some courts have dismissed cases and issued sanctions for filing a frivolous appeal without providing an opinion describing how the appeal was frivolous.

Before going further, this practice must be put into context. A party has no constitutional right to appeal, and the existence of the right to appeal and the parameters of that right find their roots in statutes and rules.[3] Moreover, in light of rising caseloads, the U.S. Supreme Court has said that courts of appeals should have "wide latitude" to manage their dockets by issuing judgments without opinions.[4] Not surprisingly, the courts of appeals that have addressed this issue have held that they have the authority to decide cases without issuing an opinion.[5] The majority of the states similarly allow courts of appeals to decide an appeal without issuing an opinion.[6] Some states call this process a "summary disposition."[7]

But there is a difference between whether a court *must* issue an opinion informing the parties why the court affirmed or reversed the case and whether a court *should* issue such an opinion. Either by constitution, rule, or common law, states are requiring appellate courts to issue opinions that provide content as to why the court either affirms or reverses a case.[8] For example, in Texas, an appellate court "must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."[9] Moreover, by Texas common law, if an appellate court holds that a verdict is not supported by factually sufficient evidence, the court must detail all the relevant evidence and explain how it outweighs evidence supporting the verdict or how the verdict is so against the great weight and preponderance of the evidence that it is manifestly unjust.[10]

Some states that allow for summary dispositions still require a court of appeals to at least disclose the prior dispositive precedent that disposes of the appeal in the order.[11] A few states differentiate between affirming a trial court, in which case an appellate court would not have to provide a reason for the affirmance, and reversing a trial court, in which case the appellate court must provide some reason for the reversal.[12]

Explaining why courts should provide reasons for their decisions, the Texas Supreme Court (in the context of new trial orders) recently provided:

> We [previously] held that a trial court may, in its discretion, grant a new trial "in the interest of justice." However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury. Parties and the public generally expect that a trial followed by a jury verdict will close the trial process. Those expectations may be overly optimistic, practically speaking, but the parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried.[13]

Commentators have provided the following reasons why appellate courts should issue opinions that provide the parties with a basis for a court's decision:

1. Opinions provide an "informational regulation" that places a check on judicial behavior.
2. Opinions provide a mechanism by which parties are better positioned to act in response.
3. Opinions require a court to justify its decision in a more systematic, logical way.
4. Opinions assure parties that their participation in the justice system was meaningful.
5. Opinions provide a party with a more meaningful opportunity for further review by a higher court.[14]

Indeed, there is a far less chance that the U.S. Supreme Court would accept a petition for writ of certiorari from a court of appeals' judgment where there is no opinion.[15]

Given the variety of approaches, an amendment to the Federal Rules of Appellate Procedure should be discussed, perhaps for the courts of appeals to issue an opinion in every case that would provide at least a succinct statement of the reasons behind the disposition. This would not

require that every opinion be a lengthy published opinion that discusses every issue in the case. There are many alternatives that address the courts' docket concerns yet provide the parties some indication of the courts' basis for their rulings. For instance, a Mississippi court of appeals may issue a short memorandum order with an attached "written statement" setting out the basis of the court's decision.[16] This "written statement" is not an opinion, is not precedential, but does provide the parties with some indication as to how the court ruled. This is just an example of an alternative to an order simply stating "the trial court's judgment is affirmed."

Of course, there are potential constitutional problems even with a court of appeals resolving an appeal with an opinion or a statement that is not precedent.[17] As one court has stated, concerns regarding the courts' dockets should not outweigh the judiciary's duty to properly adjudicate:

> We do not have time to do a decent enough job, the argument runs, when put into plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.[18]

Though there has been a plethora of commentary regarding the propriety of appellate courts' issuing non-precedential, unpublished opinions, there has been considerably less written about the common practice of simply not writing an opinion at all. It would seem that constitutional problems with the practice of using non-precedential, unpublished opinions would apply equally to a non-precedential disposition without an opinion. ■

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Endnotes

1. Fed. R. App. P. 36(a)(1), (2).
2. *See* Fed. Cir. R. 36; 1st Cir. R. 36(a); 4th Cir. IOP 36.3; 6th Cir. R. 36; 10th Cir. R. 36.1.
3. *See* Furman v. United States, 720 F.2d 263, 264 (2d Cir. 1983).
4. *See* Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972).
5. *See Furman*, 720 F.2d at 264; United States v. Baynes, 548 F.2d 481, 483 (3d Cir. 1977); NLRB v. Amalgamated Clothing Workers, 430 F.2d 966, 971–72 (5th Cir. 1970).
6. *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions As Informational Regulation*, 58 Fla. L. Rev. 743, 761 (2006).
7. *See, e.g.*, Kan. R. App. P. 7.041; N.H. S. Ct. R. 25; N.D. R. App. P. 35.1; Okla. S. Ct. R. 1.201; Utah R. App. P. 30-31.
8. *See, e.g.*, Ohio R. App. P. 1.201; Tex. R. App. P. 47.1, 63; Wis. Ct. App. IOP VI(5); B.E.T., Inc. v. Bd. of Adjustment, 499 A.2d 811, 811 (Del. 1985); People v. Garcia, 118 Cal. Rptr. 2d 662, 667 (Cal. Ct. App. 2002).
9. Tex. R. App. P. 47.1, 63; Gonzalez v. McAllen Med. Ctr., Inc., 195 S.W.3d 680, 682 (Tex. 2006).
10. *See* Maritime Over-seas Corp. v. Ellis, 971 S.W.2d 402, 407 (Tex. 1998). *See also* Citizens Nat'l Bank in Waxahachie v. Scott, 195 S.W.3d 94, 96 (Tex. 2006) (holding that an appellate court may not reverse a lower court judgment by "merely saying that the court has reviewed all the evidence and reach[ed] a conclusion contrary to that of the trier of fact" but must explain with specificity why it has substituted its judgment for that of the trial court).
11. *See, e.g.*, Kan. R. App. P. 7.041; La. R. Ct. App. 2-16.2; Okla. S. Ct. R. 1.201.
12. *See, e.g.*, Colo. R. App. P. 35(e); N.H. S. Ct. R. 25; N.D. R. App. P. 35.1.
13. *In re* Columbia Medical Ctr., 290 S.W.3d 204, 213 (Tex. 2009).
14. *See* Oldfather, 58 Fla. L. R.ev. at 743.
15. *See* Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (Court ordered Fifth Circuit to issue an opinion with reasons so that the Court could determine whether to accept a petition).
16. *See* Miss. R. Civ. P. 84.16.
17. *See* Anastasoff v. U.S., 223 F.3d 900 (8th Cir. 2000), *moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000).
18. *Id.* at 904.