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Hallelujah? Rule 23 has been revised

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Ding-dong, the witch is dead. Mostly.

Illinois practitioners of all stripes have long clamored for the elimination of Rule 23. On Nov. 20, and after a hearing on a proposal to eliminate Rule 23 by the Illinois Supreme Court Rules Committee on June 24, the Illinois Supreme Court modified Rule 23 to allow for the use of unpublished decisions issued after Jan. 1, 2021, as persuasive authority only.

Allowing for the prospective use of such decisions is a substantial improvement over the current rule, which forbade the use of such decisions altogether. The outcome could have been much worse had the court allowed for the citation of Rule 23 orders issued prior to the rule change.

As detailed in this space on April 7, Rule 23 should have been eliminated altogether, but in the process of those discussions, it became apparent that some sought the use of previously unpublished decisions. Among the arguments for allowing the citation of previously unpublished decisions is that a wide variety of sources can be relied upon by Illinois trial courts, including song lyrics, poetry, foreign and federal decisions, and dictionaries, but that it was incongruous to preclude the use of unpublished decisions of the Illinois Appellate Court.

On its face, that argument may be persuasive, but ultimately it is incorrect because when the court decided not to publish a decision, it never intended for such decision to be relied upon except by the parties in that case. The Illinois Appellate Court, unlike the Illinois Supreme Court, is a court that has as one of its functions to correct errors made by the circuit court. If, in that process of correcting error the appellate court made the decision that the opinion would not be precedential or able to be cited for any purpose under the then applicable version of Rule 23, then that decision should be respected.

The appropriate conclusion to draw from the decision not to publish is that the appellate court would have applied different reasoning or made different emphasis in its reasoning if it intended for the decision to be cited. Any future change to Rule 23 to make all decisions of the Illinois Appellate Court citable, like this most recent change, should be on a prospective basis only.

And that brings us to the problems with the current rule change which should be addressed by the Supreme Court to make the change clearer. The amendment to Rule 23(e)(1) now states:

"An order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel, or law of the case. However, a nonprecedential order entered under subpart (b) of this rule on or after Jan. 1, 2021, may be cited for persuasive purposes. When cited, for these purposes, a copy of the order shall be furnished to all other counsel and the court."

The amendment is ambiguous as it could be read that the removal of the words "and may not be cited" to mean that now any order dealing with double jeopardy, res judicata, collateral estoppel or law of the case is precedential and thus binding authority. It was likely not the intention of the Supreme Court to allow such a use in these situations and the rule should be modified to make that clear.

In addition, the amendment removes the explicit prohibition on citation of unpublished decisions by the parties. The courts have held that citation to a Rule 23 order, as expressly stated in the former rule, was a limitation on the parties. *Dzierwa v. Ori*, 2020 IL App (2d) 190772, Para. 13. It could not have been the intention of the court to allow parties to cite pre-Jan. 1, 2021, unpublished decisions with impunity and without consequence, and it would be best for the amendment to be revised to make that clear.

Even with these issues, the amendment is a victory for the bar and the evolution of the law. Credit is due to all of those who advocated for more than a decade to effectuate this change and to the Supreme Court for making the change.

The effect of this change remains to be seen. It could be that there will be fewer unpublished decisions. A sample done last year showed that around two-thirds of decisions from the Illinois Appellate Court were unpublished. It also could be that the court could begin to issue more Rule 23(c) summary orders. That would be unfortunate, and it is sincerely hoped that does not happen.

As Miracle Max taught, "There's a big difference between mostly dead and all dead." Rule 23 is only mostly dead, which, in this situation, is better than completely alive, but not as good as all dead. Rule 23 should still be eliminated and on a prospective basis all decisions of the Illinois Appellate Court should be precedential.
