

Not for Publication Rules Versus Stare Decisis . . . If it's Not Picked for
Publication it Doesn't Exist - But Who Does the Picking?

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NOT FOR PUBLICATION RULES VERSUS STARE DECISIS...IF IT'S NOT PICKED FOR PUBLICATION IT DOESN'T EXIST BUT WHO DOES THE PICKING?

Go to www.NonPublication.com and you will find a fascinating and massive amount of material on the subject of so called “non-publication rules.” As we all know the United States Circuit Courts of Appeal have had these rules in place for decades. Largely unknown is the fact that nearly all states have been dealing with the same issue. What is the issue? To many in the judiciary it is simply a question of volume and quality control. To others it is a question of the integrity of our system of *stare decisis* and continued confidence in the judicial system of precedent.

To lawyers, the controversy ought to be much more significant than whether printed and signed authority can be used for arguments in briefs, why? Because the “not for publication” stamp on the decision has repeatedly resulted in decisions and awards so contradictory, unclear, and in some cases just plain arbitrary, that the task of advising clients who operate in several jurisdictions about legal risk management has become close to a guessing game. The uncertainty caused by inconsistent application of precedent essentially mandates inconsistent business practices to account for legal variations between jurisdictions. Worse, many courts routinely ignore their own nonpublication rules and actually rely on unpublished decisions from their own or other jurisdictions, ignoring the published decisions. This makes many critical business decisions legal gambles. Our system of precedent, once seemingly settled and consistent, is in jeopardy because of a growing body of private, unpublished rulings out of the same or other jurisdictions. This problem forecasts a judiciary and lawyers uncertain of precedent on critical issues.

The fact is that over eighty percent of all federal appellate decisions are not precedential law. They are solely the law of the case, or collateral estoppel because they are stamped “not for publication.” So how do cases make it into the selective twenty percent of decisions that should become full blown precedent available for citation? There are variant guidelines in each jurisdiction. There was a pending federal rule to deal with nonpublished decisions, but the reality is that judges appear to pick and choose largely as they please which cases become “law” and which do not. As of this writing, only about twenty percent of the decisions in the twelve federal circuits become precedent and nobody knows exactly how they are picked.

As noted, there was an attempt at drafting federal rule for all circuits regarding unpublished cases because of a groundswell of complaints from lawyers, judges and the public about decisional inconsistencies, poorly written decisions, and sometimes just plain wrong recitations of both fact and law in the unpublished decisions that conflicted with published cases. Finally, there is a growing public awareness that our third branch of government may be sacrificing quality for the sake of supposed efficiency. It should also be recognized that the many supporters of governmental “transparency” abhor any hint of private and unwatchable public official actions, which in turn affect the public - a criticism nonpublication rules cannot avoid. It is also vital to note that the state courts are well into this same issue, with roughly half allowing limited or no citation of unpublished opinions. See, Meliisa M. Serfass and Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J.App.Prac.&Process 251 (2001); Stephen R. Barnett, *No-Citation Rules Under Siege: A*

Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (2003). As noted by Judge Holloway of our Tenth Circuit:

[A]ll ruling of [the] court are precedents, like it or not, and [the court] cannot consign any of them to oblivion by merely banning their citation...No matter how insignificant a prior ruling might appear to us, any litigant who can point to [it] and demonstrate that he is entitled to prevail under it should do so as a matter of essential justice and fundamental fairness.¹

THE RULES AND THEIR IMPACT

In the period 1997 through 2003, approximately 80% of the written, decided and signed opinions of the federal circuits were “unpublished”.² In some circuits this number has reached nearly 95%.³ According to most circuit court rules, “unpublished” usually means that these decisions, although in some cases well written and fully reasoned three judge panel orders, are not to be viewed as precedent. In other circuits such decisions are not supposed to be referenced at all in briefs or arguments. These rules were never meant to be a vehicle to conceal orders, because all awards must now be made available. And, as we shall discuss, many circuits make their citation in briefs acceptable if the decision’s reasoning is on point or adds to pertinent arguments. However, this is a standard so loose that it is hard to avoid seeing unpublished cases in most appellate briefs used in principal arguments. In fact, an amended Federal Rule of Appellate Procedure would have allowed the routine citation of these cases, but would they have been precedent? According to the proposed rule itself, and its principal author, Judge Joseph Alito of the third circuits; the answer is a blunt “No.” The issue of their value or use in any case will be solely within the courts’ discretion, as will any future rule.

In a well written and timely article, Professor Emeritus Stephen Barnett of the University of California at Berkeley catalogues and discusses the state of these rules in the federal circuits, as well as the state civil and criminal appellate courts. Stephen R. Barnett, *No-Citation Rules Under Seige: A Battlefield Report and Analysis*, 5 J.App.Prac.&Process 473, (2003). Professor Barnett discusses the rules of each federal circuit, and most states, pointing out various inconsistent applications and conditions that are likely to produce more, not less uncertainty. Here in Oklahoma, for example, Professor Barnett points out that the Supreme Court of Oklahoma Rule 1.200(b)(5)-(8) specifically forbids the use of unpublished decisions; however, the State’s Court of Criminal Appeals *allows* citation of unpublished decisions in certain circumstances. Rule 3,5(c)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003). On the other hand, Texas allows citation of unpublished civil cases, but not criminal decisions—just the opposite of Oklahoma.

In short, this is a national problem with serious local consequences for criminal and civil cases. These rules can hardly be viewed as mere quirks of judicial administration that lawyers must simply learn to tolerate. The impact of these rule variances now creates problems ranging from the truly mundane to critical issues of monumental value to clients in both civil and criminal matters. It seems that what began as an effort to simplify an overburdened process has itself become a new and dangerous judicial discretion that unnecessarily adds to the uncertainty

of predictably living within the law. These rules take the judiciary further and further from its role as the interpreter of the interstitial spaces between unclear statutes and the interpreters of common law rules of *stare decisis* into a new forum that uses unknown and purely discretionary rules that look arbitrary because the stamp “not for publication,” is used in total privacy and by no apparent standard.

THE (MAYBE) PROPOSED FEDERAL RULE

One obvious measure of the scope of the problem is found in the testimony and comments leading up to the as yet unadopted change to the Federal Rules Of Appellate Procedure (hereafter FRAP). Proposed Rule 32.1 would have addressed the citation of unpublished decisions. It forbade any administrative rules against their citation so long as all litigants have access to the cases. Unfortunately, the proposed rule says absolutely nothing about actually requiring these decisions to be used as precedent, at least as most lawyers currently understand that term.⁴ Judge Alito at the third circuit headed the committee considering the rules and it is unclear why the rule was not adopted in 2005, though it will go into effect prospectively for decisions issued after January 1, 2007.

What does all of this mean to the average lawyer and litigant? Borrowing from the observation of William T. Hanglely who spoke on behalf of the American College of Trial Lawyers to the Advisory Committee,⁵ it means that courts have adopted administrative rules that divide appellate decisions into “A” piles, and “B” piles. The former are to be given the weight of precedent in the jurisdiction from whence they issue, whereas the latter are either to be ignored or given weight solely for their “reasoning.” Not a very meaningful change. However, rule change or not, the real question of who makes the decision to throw cases in pile “A” or pile “B,” as well as the exact methodology used for such a classification, or worst of all whether the decision involved any sort of deliberation over the categorization, remains murky. The comments made to the Committee, written and otherwise, are conspicuously devoid of significant discussion of how decisions are chosen or not. As of this date, these unpublished cases will be used or not, purely by judicial fiat. It doesn’t take a formal statistical analysis to safely conclude that serious mistakes and contradictions between and within courts and jurisdictions will continue and be harmful to the judicial process.

For example, Hanglely refers to an extensive comment authored by the American College of Trial Lawyers which discusses the impact of “hidden opinions” and the publication and nonpublication rules issued by the courts. William T. Hanglely, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). The College has uniformly condemned the variant and inconsistent practices by the courts, asked for uniformity, and sought the ability to cite these decisions, urging that everything turned out by the courts should be published.

It is thus surprising that Hanglely endorsed the proposed federal rule change before the Committee at all. It really does nothing but force the courts to accept citation of these unpublished decisions so long as everyone has a copy. It is a quarter measure. The courts are totally free to give them weight or flatly ignore them as useless paper. Worse, who really knows

how the published cases are chosen from circuit to circuit? Judge Alito of the Third Circuit issued and delivered the Committee report for the Advisory Committee rewriting the appellate rules. (See Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, (*Report of Advisory Committee on Appellate Rules*, (May 14, 2004)). In both his prior testimony and in his written endorsement of the proposed “comments” to follow the new federal rule, Alito essentially concurred with the notion that the practices regarding publication *vel non* had caused problems. However, he took the position that this was a judicial matter to be resolved solely by the judiciary. He noted that because of the passage of the E-Government Act of 2002, Pub.L.No. 107-347, §205(A)(5), 116 Stat. 2899, 2913, which requires the printing and availability of all such opinions anyway, coupled with the fact that the United States Supreme Court itself not infrequently reviews conflicting “unpublished opinions” and renders decisions on their content, he felt it unnecessary to go beyond the proposed federal rule change.⁶ Judge Alito asserted that the increased level of judicial and public scrutiny already demonstrated by various Supreme Court decisions and the new E-Government publication requirements assure that the sky will not fall on *stare desisis*. Unfortunately, Judge Alito’s comments ignore the obvious—wheat and chaff are being separated *a priori* by an unknown and largely untrusted judicial administrative process that acts outside of any public scrutiny and under no clear rule whatsoever. It is apparent that the courts have yet to appreciate the level of public concern and mistrust felt by the public when the courts met without transparency.

For one thing, administrative non publication rules are supposed to be “workload” related. This claim, however, makes no sense given that detailed unpublished decisions are often written anyway in most circuits on the vast majority of cases. Further, whoever must go through the opinions and segregate the “good” decisions from the supposed bad or nonuseful cases, must spend more than a little time at it. Since lawyers read nearly all these unpublished decisions anyway, searching for useful rationale, and the exact same computers catalogue the subject matter of all the decisions—published and unpublished—it seems specious to argue that administrative time is really saved.

If the judiciary wants to save time, why not rely on the already massive judicial discretion to write short succinct orders? These orders simply recite the appellate courts’ deference to a legitimate holding of the lower courts’ application of the law to the facts seeing no visible error, or else short reversals, based on critical points. Why write long, detailed, and often flatly wrong opinions that simply cause confusion? The appellate courts already have massive discretion and can use that discretion to leave appeals well, but quickly scrutinized. The courts may rely on facts or more narrow interpretations than usual in this way and the credibility of the system itself never comes into question. In contrast, twenty pages of unclear writing with a dissent that is stamped “not for publication,” does not add any helpful precedent. In short, non-publication rules, even if rewritten and clarified again and again, will jeopardize judicial credibility by throwing in a wild card - that card being 80% of the federal decisions are only the “law of the case.” Such rules produce decisions with all the earmarks of a judicial “Star Chamber” whether true or not. Appearances matter, and those appearances are more vital than ever for our judiciary.

THE STATE RULES

California actually allows for “depublication” of precedential cases, though these rules are being challenged.⁷ This article cannot hope to list all the variations in state rules, but, in fact, we need not as that task has already been well done. See Melissa M. Serfass and Jesse L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3.J.App.Prac.& Process 251 (2001). Interestingly since the Serfass/Cranford article was published, six or more of the nearly thirty eight states that prohibited citation of nonpublished decisions have changed their minds and rewritten their rules clarifying their use. Barnett has studied the early findings as well as the testimony of various witnesses before the Judicial Conference’s Standing Committee on Rules of Practice and Procedure. In his article he charts the differences that demonstrate the states moving away from non-publication.⁸ Barnett concludes that the sky will not fall if these cases are published, and refers to the examples of the more populous states that do allow citation. His point is simple, but the consequences of ignoring the public’s view of how the judiciary works is not. It must be observed that in state courts, the judiciary is most often elected and there is clearly more judicial concern about the opinion of the people. In contrast, the federal system is by lifetime appointment at the demand of our founding fathers.

IS THIS A REAL PROBLEM OR JUST INTERESTING JOURNAL MATERIAL?

Lawyers are used to rules, so what’s the problem with a few more rules about the type of citations allowed to be used as precedent? Probably not much for some lawyers, conceded Hengley in his remarks about the proposed Fed.R.App.P. 32.1. But for litigants and lawyers who believe that the playing field and the rules should be identical for everyone, even the occasional example of inconsistent decisions becomes a serious failure by the third branch of our government. In light of the fact that our system is based totally on public confidence, even a few examples of failure have impact far beyond unfairness to the litigants.

The Committee For The Rule of Law, the organization which sponsors www.NonPublication.com, notes that the problem of nonpublication currently permeates our system in both state and federal appellate courts, and urges that using these rules has rendered some appellate courts assembly lines that function without control. The Committee outlines the inherent inconsistencies and errors brought about by the unworkable effort to separate wheat from chaff by administrative methods uncontrolled by the rule of law, and suggests that an unfettered system of *stare decisis* itself will best preserve the integrity of the judicial system. The website provides example after example of just plain bad decision-making, and slavishly inconsistent adherence to procedural rules that guarantee inconsistent substantive results probably raising significant questions of constitutionality.

HOW THESE RULES AFFECT *STARE DECISIS*

It is beyond the scope of this note to examine *stare decisis* in detail, and there are excellent sources that explain how the American system defines and uses the doctrine in practice.⁹ Thus, only a brief summary is in order. The Constitution is the source of all American judicial power. It creates the federal system of superior and inferior courts, and despite an

ongoing theoretical question about the extent to which Congress can pass laws regulating the courts, it is simply assumed that the early American system borrowed heavily from the English system of common law in order to flesh out a legal system which was largely familiar to the new nation. Indeed, except for treason trials, the Constitution says nothing whatsoever about evidence (treason's two witness rule being the exception). Absolutely nothing is said about precedent. In theory the whole notion of *stare decisis*, and the obligation to follow precedent, could conflict with one interpretation of the way our system was structured. However, it is clear that even absent specific constitutional or statutory language referring the use of precedent, it is routine. Why? Because courts think *stare decisis* it is a fair and good idea. Thus, whether viewed as a metaphor for legislation, or more appropriately as sensible judicial reasoning that has become policy, the doctrine has been around in one form or another nearly seven hundred years. See, *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”); see also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

At this point, it is necessary to note that there are essentially two kinds of *stare decisis* -- vertical and horizontal. Vertical refers to the rule that courts must follow the precedent of courts above them in the appellate hierarchy, while horizontal refers to the notion that a court must follow its own precedents. The problem is that nonpublication rules not only set different jurisdictions against one another, but also result in the collision of decisions within the same jurisdiction. Worse, in the case of California's "depublication" rules, controlling authority can be and is withdrawn from the published body of precedent with no apparent rationale. The fact is that in the federal system, and in the copycat state systems, lawyers and litigants can no longer rely on the notion that jurisdictions are at the least bound by their own or superior court precedent with any confidence. In 18, *Moore's Federal Practice*, §134.02[i][c] (Mathew Bender 3d ed.) it is noted that in every jurisdiction a published decision of an appellate court carries with it the force of *stare decisis*. Indeed, a number of circuits have ruled in decisions that *en banc* courts will not overrule a three judge panel precedent simply because the court was wrong, but will necessarily be bound by published panel precedent. It must be asked, why can a "nonpublished" stamp wipe out a seasoned three judge panel decision? See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Commn.*, 975 F.2d 871, 875-76 (D.C. Cir 1992) (*en banc*). The point is a rule of interpretive law that has become known and relied upon over and over again should not be, but can be changed by thoughtful reconsideration of its rationale in the light of changing times or by higher courts of the jurisdiction. However, the use of that power to change precedent should be consistent with developed principles. To add to the mix, it is already well established that federal circuits are not bound by the precedents of other circuits. See, e.g., *Bonner v City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). Nevertheless, it is customary in briefs to argue the law of other circuits in support or opposition to the argument being presented or opposed. What real purpose then is served by artificially carving out huge chunks of decisions and placing a lable on them that supposedly forbids their use as precedent?

GENESIS OF THE NON PUBLICATION RULES

Apparently, in 1964 an “advisory council” of court administrators observed that the liberalization of the federal rules along with the projected increases in appellate volume would work to create an exponential rise in the number of appeals cases to an already overburdened system. Professor David Dunn of Cornell University chronicles all of this nicely in his article titled *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L.Rev. 128 (1978). Professor Dunn wrote that the administrative group known as “ACAP” set forth four principles for the circuits to adopt rules where the courts could cull out the frivolous from the serious, and thus decisions would only be “published” if they dealt with: (1) new law; (2) issues of public interest; (3) critical reexaminations or explanations of extant law; or (4) resolutions of conflicting areas in the law.

Professor Dunn watched as the circuit representatives went home and promptly created different sets of rules molded to each circuit. By 1977, Dunn had seen enough. In his article he wrote that these administrative rules jeopardized the seven hundred year old notion of *stare decisis*.

To allow judicial sleight-of-hand to create a body of law exempt from the doctrine would assault a rudimentary underpinning of our legal system. *Stare Decisis* is fundamental to our scheme of ordered liberty.

Id. at 144.

Clearly no fan of these “non-publication” rules, Professor Dunn suggested that if the appellate courts were that overworked, budgets could be adjusted or the courts could simply write limited opinions, or even no opinions at all. Dunn believed that the risk of inconsistency was too great and that public confidence in the courts would erode if these rules went unchecked and proliferated.

THE COURTS EXAMINE NON PUBLICATION.

In *Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235 (1996), the Supreme Court resolved a conflict between unpublished decisions of the Fifth, Ninth and Tenth Circuits. The first major circuit court to examine the issue head on was the Eighth. There, the well respected (now deceased) Judge Richard Arnold wrote in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir 2000) (often referred to as *Anastasoff I*) that the IRS could not rely on published versus nonpublished decisions in an enforcement proceeding. He further wrote that Article III of the Constitution had likely also been violated, because Article III federal judges do not have the power to ignore other Article III judges and their decisions. The IRS, being a fan of the published versus unpublished decision method, promptly withdrew its appeal and gave up on the action declaring it moot, thus nullifying Judge Arnolds’ opinion. See *Anastasoff v. United States*, 235 F3d 1054 (8th Cir. 2000) vacating 223 F.3d 898 (8th Cir. 2000). Nevertheless, Judge Arnold’s opinion set off a firestorm of legal articles both agreeing and disagreeing with his rationale.¹⁰ The Supreme Court issued an opinion entitled *Honda Motor Co., Ltd. v Oberg*, 512 U.S. 415

(1994), where it decided that an Oregon law refusing appellate review of punitive damage awards denied due process. Some commentators viewed this decision as instructive and predictive of the outcome should the Court be presented with the argument that these non-publication rules denied due process to litigants because they represent precedential decisions of Article III constitutional courts.

Not all courts have agreed with Judge Arnold. The Ninth Circuit, in *Hart v Massanari* 266 F.3d 1155 (9th Cir. 2001), strongly disputed Judge Arnold's arguments in an extensive opinion written by Judge Alex Kozinski, a strong advocate of non-publication rules. Judge Kozinski urged that Judge Arnold had either reached the wrong decision in *Anastasoff* 1 or the right decision but for the wrong reasons. In a rare interview on Nov. 3, 2003, Judge Arnold was interviewed in a now defunct Eighth Circuit appellate computer blog (<http://legalaffairs.org/howappealing/20q/>). In that unusual interview, he unabashedly acknowledged that he was an advocate of full publication and that he had read Judge Kozinski's rejection of his *Anastasoff* 1 opinion thoroughly. He did not agree that Judge Kozinski was appropriately viewing the concept of precedent accused in current times. Judge Arnold plainly stated that the concept of refusing to send cases to certain legal publishers which renders *a priori* those decisions to be without precedential value is incomprehensible. At the conclusion of his interview, Judge Arnold was asked if there were any good arguments for limiting the precedential value of unpublished cases. He replied

[t]here isn't any good argument. It's my opinion that judges who believe that unpublished decisions should be without precedential value are driven to that conclusion by the sheer volume of work. I don't know how the battle will be resolved. but ultimately I hope and believe that the idea of non-precedential opinions of any kind will be consigned to the dust bin. (Arnold, J. interview 11/3/03)¹¹

CONCLUSION

Given computerized word processing, scanning methods, and the reality that these "unpublished" decisions are carefully read and dissected anyway, one word comes to mind — why? The appellate caseload, though crushing, has not seen the exponential increases initially predicted generations ago. The continuing examples of three judge panels in their own circuits slavishly adhering to "precedent," when those same judges have written opinion after opinion reaching the opposite view in "unpublished" cases over the same issues (*See*, Testimony of William T Hengley before the Standing Subcommittee) does nothing but undermine the public confidence in the judicial system, which is currently one of the few public branches of government that evokes some favorable public opinion.

¹ Re: Rules of U.S. Court of Appeals for Tenth Circuit. Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992).

² Administrative Offices of the United States Courts (statistical table S-3).

³ *See*, www.uscourts.gov

⁴ Alitos' testimony at the spring standing committee on Appellate rules and practices...April 13-14, 2004 Wash D.C. The Rule did not appear in the 2005 edition of the FRAP but will go into effect as of January 1, 2007 prospectively.

⁵ Hengley comments.

⁶ Judge Alito referenced *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, (2002) (reversing an unpublished decision of the federal circuit) as well as *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing an unpublished decision of the Second Circuit Court of Appeals).

⁷ California State Senator Sheila Keuhl introduced SB 1655 to require that all decisions be published and capable of citation. See also *In the Matter of the Amendment of Wisc Stat. Rule 809.23(3)* regarding citation to unpublished opinions. 2003 WL 84.

⁸ Barnett, *infra*. “at” 499 Appendix A. Barnett notes that as of 2003 there were 25 states with no publication rules—21 allow citation in some form, and some five “fence sitters”(including Oklahoma) where citation of unpublished opinions are allowed in some state courts but not others.

⁹ See, e.g., John Harrison, *The Power of Congress over Rules of Precedent*, 50 Duke LJ. 503, (2000).

¹⁰ See Wade, *Honda meets Anastasoff; The Procedural Due Process Argument Against Rules Prohibiting Citation to unpublished Judicial Decisions*, www.bc.edu/bc_org/avp/law/lwsh/journals/bclawr/42_3/05TXT.htm.

¹¹ See also Stephen R. Barnett, From Anastasuf to Hart Wests’ Federal Appendix. *The Ground Shifts Under No-Citation Rules*. 4 J. App. Prac. & Process 1 (2002)