

LOSING CITE: A Rule's Evolution

To what extent courts should be able to preclude citation of their unpublished decisions? That longstanding debate has been renewed in recent years. Now, it has reached Arizona, where the State Bar Civil Practice and Procedure Committee has formed a subcommittee on the issue. The status of the nationwide debate is informed by a centuries-old history on the topic.

A Brief History

In the English common law system, judicial decisions have been published for centuries.¹ From 1292 to 1535 judicial acts were reported in unofficial manuscripts called "Year Books."² By the early nineteenth century, a number of more comprehensible "official" reports began appearing, "but they lacked organization and efficiency,"³ according to one commentator. These reporters also only selectively published decisions, the notion being that deciding what to include required some editorial judgment.⁴ Then in 1882, John B. West formed the West Publishing Company "to collect, arrange in an orderly manner and put into convenient and inexpensive form in the shortest possible time, the material which every judge and lawyer must use."⁵

In light of the ballooning growth of the federal reporters that resulted from publishing all decisions, in 1964 the Judicial Conference of the United States recommended that federal appellate courts publish only opinions "which were of general precedential value."⁶ In 1972, the conference refined the earlier directive by recommending that each circuit review its publication policy and implement rules (1) prohibiting publication of decisions unless ordered by a majority of the panel rendering the decision and (2) discouraging citation of unpublished opinions.⁷

By 1974, each circuit had developed its own rules to implement the directive.⁸ Congress subsequently appointed a commission to study, among other things, the circuits' nonpublication and no-citation rules. That commission, commonly known as the Hruska Commission after its chairman, concluded that the no-citation rules generated controversy, but the nonpublication rules did not. The commission referred the matter back to the Judicial Conference, which recommended continued experimentation.⁹

The Renewed Debate

In 1999, Eighth Circuit Judge Richard S. Arnold authored an essay on the use of unpublished opinions.¹⁰ In that essay, he acknowledged that he "felt uneasy" about issuing unpublished opinions because "judges must respect what they have done in the past, whether or not it is printed in a book."¹¹

The following year, the Eighth Circuit in *Anastasoff v. United States*, which Judge Arnold authored, held that a court could not,

consistent with Article III's definition of "judicial power," deem an opinion non-precedential.¹² Although later vacated as moot, *Anastasoff* renewed the debate concerning unpublished opinions, resulting in what one commentator has described as a "nationwide reexamination of non-precedent practice."¹³

Status Among the Circuits and States

In the wake of this debate, several federal circuit courts of appeals modified their citation rules.¹⁴ In 2001, the D.C. Circuit amended its rules so that its "unpublished orders or judgments" entered after January 1, 2002, could be "cited as precedent."¹⁵ The First Circuit modified its rule, effective December 2002, to "discourage" citation to its unpublished opinions, while noting that they could be cited if (1) "the party believed that the opinion persuasively addresses a material issue in the appeal," and "(2) there is no published opinion from [the First Circuit] that adequately addresses the issue."¹⁶

Four circuits have made no changes to their citation rules and continue to forbid citation to their unpublished opinions except in related cases (the Second, Seventh, Ninth and Federal Circuits).¹⁷ But a proposal was made in 2003 to adopt proposed Rule 32.1 of the Federal Rules of Appellate Procedure (FRAP 32.1), which

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would effectively eliminate the restrictions on the citation of unpublished opinions among all federal circuit courts of appeals.¹⁸ On April 13, 2004, the U. S. Judicial Conference Advisory Committee on Appellate Rules voted 7 to 1 in favor of FRAP 32.1, provoking more than 500 comments from federal judges and lawyers, including vigorous opposition from the Ninth Circuit.¹⁹

In light of the comments, particularly those that predicted ill effects on the judiciary, the Federal Judicial Center was charged with conducting empirical research to help better understand the impact of the proposed rule change.²⁰ The Committee on Rules of Practice and Procedure then referred the proposed rule back to the Advisory Committee for further study and consideration in light of the comments and empirical research.²¹

The Advisory Committee, Standing Committee and the Judicial Conference all approved the proposed rule change, and on April 12, 2006, the Supreme Court voted to adopt the proposed rule. Although Congress must still officially act, the rule is expected to become effective in January 2007.

With respect to the states, at least seven have modified their citation rules since 2000, including Texas, Utah and West Virginia (which now permit unpublished decisions to be cited as precedent), and Alaska, Iowa and Kansas (which now permit unpub-

lished decisions to be cited for persuasive value).²² Ohio also modified its rule from allowing citation for persuasive value to whatever value the court deems appropriate, whereas Wisconsin considered but rejected modifying its rule.²³ With these recent changes, 22 states now allow citation and 24 do not (with several others states' rules too unclear to call).²⁴

Other states are currently considering the issue. The Illinois Supreme Court Rule Committee, for example, has recommended modifying Illinois' rule to permit citation, and the Illinois Supreme Court is expected to take action this year. Hawaii considered changing its rule but has decided to await the resolution of FRAP 32.1 before taking any further action.²⁵

Arizona's Current Rules

In Arizona, citation to unpublished or memorandum decisions has been prohibited since 1973 pursuant to Arizona Supreme Court Rules 48 and 111 and Rule 28 of the Arizona Rules of Civil Appellate Procedure (ARCAP 28).²⁶ In 1997, as part of a global overhauling of the appellate rules, the Arizona Supreme Court adopted the recommendation of its Appellate Case Processing Implementation Task Force to permit citation of memorandum decisions for "(1) the purpose of establishing the defense of *res judicata*, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review."

Both the Arizona Supreme Court and the Arizona Court of Appeals have interpreted Rule 28(c) as "mak[ing] it improper to cite unpublished decisions as authority," and "appl[ying] to memorandum decisions from any court."²⁷

The Current Study

In 2004, the State Bar of Arizona's Civil Practice and Procedure Committee formed a Subcommittee to study Arizona's rules concerning the citation of memorandum decisions for potential recommended changes. The Subcommittee is also examining the issue of whether memorandum decisions should be readily accessible to the public via an online searchable database.

The Subcommittee has recommended to the Committee that Arizona's citation rule be modified to permit the citation of out-of-state memorandum decisions (at least if the issuing jurisdiction permits such citation). A majority of the Subcommittee also has recommended to the Committee that changes be made to make memorandum decisions more readily accessible. The Subcommittee has not come to a consensus on other possible changes; the Civil Practice and Procedure Committee has not yet made a recommendation to the State Bar's Board of Governors, and the Board of Governors has not yet been asked to take any action on the topic.

As this makes clear, there are many issues raised by publication rules, and there are many variants to such rules, including making all decisions citable as binding precedent, making unpublished decisions citable for persuasive purposes only, allowing the citation of other jurisdictions' unpublished

decisions (at least if they allow such citation), or keeping the current prohibitions in place. Changing the rules also raises issues concerning what procedures, if any, would be required if litigants could cite unpublished decisions (*e.g.*, noting in the citation that the decision is unpublished and attaching a copy to the pleading). ²⁷

The views and mistakes, if any, contained herein are entirely the authors' own and should not be considered the views or work of either the State Bar of Arizona, the Civil Practice and Procedure Committee, the Subcommittee, or their respective employers.

endnotes

1. See Suzanne O. Snowden, "That's My Holding and I'm Not Sticking to It!" *Court Rules That Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, WASH. U. L.Q. 1253, 1258-61 (Jan. 2001) (summarizing the history of published opinions).
2. *Id.* at 1258.
3. *Id.* at 1259.
4. *Id.* at 1260.
5. A Symposium of Law Publishers, 23 AM. L. REV. 396, 406 (1889), cited in Snowden, *supra* note 1, at 1259-60; see also K. K. DuVivier, *Are Some Words Better Left Unpublished? Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 409 (2001).
6. Administrative Office of the United States Courts, Judicial Conference Reports 1962-64, at 11 (1964), quoted in Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).
7. Snowden, *supra* note 1, at 1263-64.
8. *Id.* at 1264.
9. Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 292-94 (2001). Sen. Roman L. Hruska, who chaired the commission, is best known for his defense of several unsuccessful nominations to the United States Supreme Court by President Richard Nixon.
10. Arnold, *supra* note 6.
11. *Id.*
12. *Anastoff v. United States*, 223 F.3d 898 (8th Cir.), vacated as moot en banc, 235 F.3d 1054 (8th Cir. 2000).
13. See Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 758-59 (2003). Other articles framing the issues raised by the *Anastoff* and the nonpublication and no-citation rules include Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?* 3 J. APP. PRAC. & PROCESS 175 (Spring 2001); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Katsh and Chachkes, *supra* note 9; Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (Spring 2001); Daniel H. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 344 (2001); R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastoff v. United States*, 3 J. APP. PRAC. & PROCESS 353 (2001); DuVivier, *supra* note 5; J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastoff*, 3 J. APP. PRAC. & PROCESS 425 (Spring 2001); see also www.non-publication.com.
14. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battle Field Report and Analysis*, 5 J. APP. PRAC. & PROCESS 474 (Jan. 2004) (summarizing changes made by the federal circuits and states); see also Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Rules Governing Publication and Citation: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) (summarizing the circuits' and states' current rules).
15. See D.C. CIR. R. 28(c); see also Barnett, *supra* note 14, at 474.
16. 1ST CIR. R. 32.3(a)(2); Barnett, *supra* note 14, at 474.
17. Six circuits (the First, Fourth, Sixth, Eighth, Tenth and Eleventh) discourage citation to their unpublished opinions but permit it when there is no published opinion on point, whereas three circuits (the Third, Fifth and District of Columbia Circuits) more freely permit citation to their unpublished opinions. See also Federal Judicial Center, *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report 1* (April 14, 2005) (describing the circuits' rules).
18. See www.uscourts.gov/ttb/May04ttb/hearing. FRAP 32.1 provides:
Citation of Judicial Dispositions:
(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions. (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.
19. See, e.g., Statement of Hon. Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit, available at http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0f.htm; see also *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (criticizing *Anastoff*); Alex Kozinski & Stephen Reinhardt, "Please Don't Cite This!" *Why We Don't Advocate Citation to Unpublished Dispositions*, CAL. LAW. 43 (June 2000).
20. The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.
21. See www.uscourts.gov/rules/index.htm/#standing0105.
22. See Barnett, *supra* note 14, at 478-79; see also Serfass & Cranford, *supra* note 14, at 349.
23. Barnett, *supra* note 14, at 480.
24. Serfass & Cranford, *supra* note 14, at 349-50.
25. *Id.*
26. See Historical Notes to Arizona Supreme Court Rule 111 found in 17A Arizona Revised Statutes at 849 (2004). By order dated Nov. 1, 1977, the Supreme Court abrogated Supreme Court Rule 48 as it applied to civil appeals, substituting ARCAP 28. See Nov. 1, 1977, order found at 17B A.R.S. at 2 (2003) and comment to ARCAP 28 found at 17B A.R.S. at 85 (2003). The Supreme Court renumbered Rule 48 as Rule 111 in 1985. See Historical Notes to Supreme Court Rule 111 at 17A Arizona Revised Statutes at 849 (2004). Thus, Rule 111 prohibits the citation of unpublished decisions in all courts except in civil appeals and ARCAP 28 prohibits such citation in any civil appeal.
27. *Walden Books Co. v. Arizona Dep't of Revenue*, 12 P.3d 809, 814 (Ariz. Ct. App. 2000). *Accord Kriz v. Buckeye Petroleum Co. Inc.*, 701 P.2d 1182, 1185 n. 3 (Ariz. 1985); *Southwest Airlines Co. v. Arizona Dep't of Revenue*, 4 P.3d 1018, 1021 (Ariz. Ct. App. 2000); *First Interstate Bank of Arizona v. State Dep't of Revenue*, 916 P.2d 1149, 1153 (Ariz. Ct. App. 1995). Cf. *Simat Corp. v. AHCCCS*, 56 P.3d 28, 35 and nn. 4-6 (Ariz. 2002) (whereas it is improper to cite to out-of-state memorandum decisions to an Arizona court, court took judicial notice of such cases for purpose of thoroughness).