



The "Secret" History of Memoranda Decisions

Does the Honor System Separate the Wheat From the Chaff?

BY RICHARD D. COFFINGER

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Is there really a need for another article in this issue on unpublished memorandum decisions? After all, Thom Hudson and Judge Donn Kessler have done an excellent job of examining a proposed rule change that would allow citation and online access to Arizona's memorandum decisions.

But we have to ask: Does the published opinion rule based on the honor system effectively separate the wheat from the chaff.¹

The Published Opinion Rule

The "rule" is actually two identical rules. In 1973, former Rule 48 was added to the Supreme Court Rules. Four years later, it was abrogated for civil appeals and replaced with Rule 28, ARIZ.R.CIV.APP.P. In 1985, the Supreme Court rule was renumbered as current Rule 111. It states in part:

(b) When disposition to be by opinion. *Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:*

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial pub-

lic importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

* * *

(h) **Memorandum Decision.** When the Court issuing a decision concludes that only a portion of that decision meets the criteria for publication as an opinion, the Court shall issue that portion of the decision as a published opinion and shall issue the remainder of the decision as a separate memorandum decision not intended for publication.² [Emphasis supplied]

Because an appellate court's disposition of all matters presenting an issue of first impression *a fortiori* "establishes ... a rule of law," all such dispositions should be by a published opinion. Every appellate court disposition that reverses the judgment, order or decision of a lower court or agency *a fortiori*, clarifies a rule of law.

In spite of the clear mandate of the rule, currently many such cases are resolved in memorandum decisions. The appellate judges are on the honor system to follow the rule, and the workload considerations described by Judge Kessler can make it difficult for even the most conscientious judge to commit the extra time and effort necessary to write a published opinion in such cases. He or she could

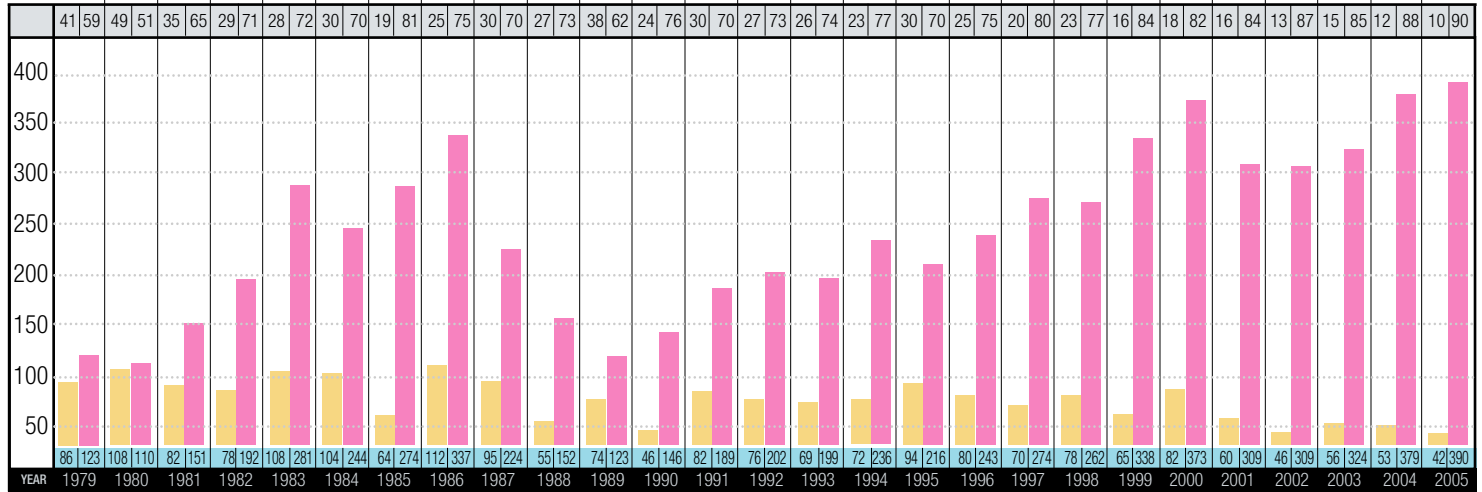


The "Secret" History of Memoranda Decisions

ARIZONA COURT OF APPEALS DIVISION 1 CIVIL CASES, FISCAL YEARS 1979-2005

PERCENTAGE OF WRITTEN OPINIONS TO MEMORANDUM DECISIONS

W/O
MEMO



NUMBER OF CIVIL CASES BY YEAR

simply rationalize that, although the case presents an issue of first impression, it is not important enough to be published, in spite of the rules mandate. After all, the decision not to publish is not subject to public scrutiny because currently memorandum decisions are not readily available to the public. Also, the decision to not publish is not subject to review.

In 1975, the late James Duke Cameron, then Chief Justice of the Arizona Supreme Court, described the Court's application of the rule:

[T]he justices who will hear the case read the briefs. ... [A] conference is held and the cases heard are discussed. A tentative vote is then taken, with the newest member of the court traditionally voting first. ... *A decision is usually reached at this time whether to publish a full opinion or memorandum decision.*^{FN}

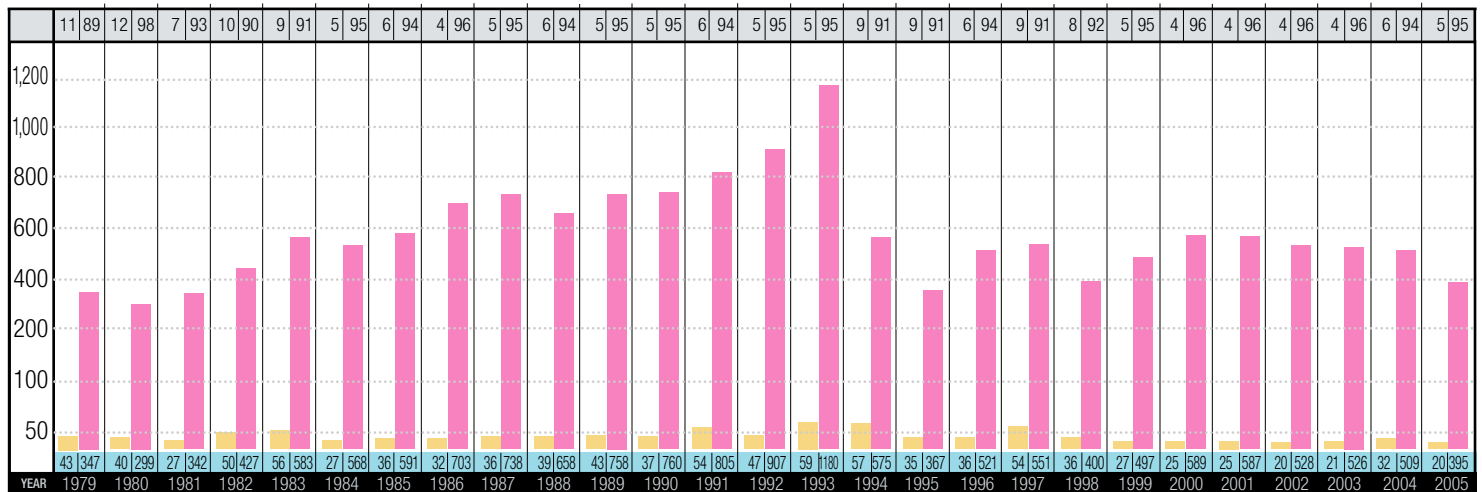
^{FN} Two types of opinions are issued by the court. First, memorandum decisions state briefly the question pre-

sented and dispose of it with a short citation or authority. See Ariz. Sup. Ct. R. 48. Memorandum decisions are the law of the case only and are not published; they cannot be cited as authority. *Id.* 48(a)(2), (c). *About one-third of the opinions are now memorandum decisions. As the workload of the court grows, it is expected that the percentage will increase.* Second, full opinions contain a complete exposition of the case and are published in *Arizona Reports* and

ARIZONA COURT OF APPEALS DIVISION 1 CRIMINAL CASES, FISCAL YEARS 1979-2005

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Pacific Reporter. Id. 48(a)(1), (4). These opinions establish precedent and may be cited as authority. *See id.* 48(c). [Emphasis supplied]³

The chief justice could never have imagined that, from the Supreme Court's 1975 ratio of 67 percent published opinions to 33 percent memorandum decisions, in 2005, in both divisions of the Court of Appeals, the ratio would have declined to only 12 percent to 88 percent.

The four graphs included in this article present a comparison of the published opinions to memorandum decisions for civil and criminal cases only in both Divisions 1 and 2.⁴ Since 1979, the ratio of the number of memorandum decisions to published opinions has substantially increased. Also, the number of published opinions per judge has decreased significantly. In 2005, the Arizona Court of

Appeals total case activity was as follows:

Division 1—A total of 2,789 cases were resolved consisting of 79 written opinions, 1,008 memorandum decisions, 47 decision orders and 1,655 other decisions or various unpublished orders. Thus, for the 18 judges, the 2005 per judge averages were: 4.4 written opinion; 56 memorandum decisions; 2.6 decision orders; 92 other decisions or various unpublished orders.

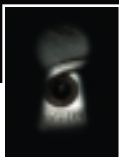
Division 2—A total of 991 cases were resolved consisting of 41 written opinions, 443 memorandum decisions, 167 decision orders and 340 other decisions or various unpublished orders. Thus, for the six judges, the 2005 per judge averages were: 6.8 written opinion; 74 memorandum decisions; 28 decision orders; 57

other decisions or various unpublished orders.

In Division 1 for the 20-year period beginning in 1979, the average ratio of written opinions to memorandum decisions in civil cases was 30 percent to 70 percent. After 1999, the average ratio dropped significantly to only 15 percent to 85 percent.

In Division 1 for the two-year period from 1979 to 1980, the average ratio of written opinions to memorandum decisions in criminal appeals was 12 percent to 88 percent. The graph shows a shift that began in 1981. For the next 25 years through 2005, this average ratio dropped to only 6 percent to 94 percent.

In Division 2, for the 15-year period beginning in 1979, the average ratio of written opinions to memorandum decisions in civil cases was 51 percent to 49 percent. Beginning in 1993, through the

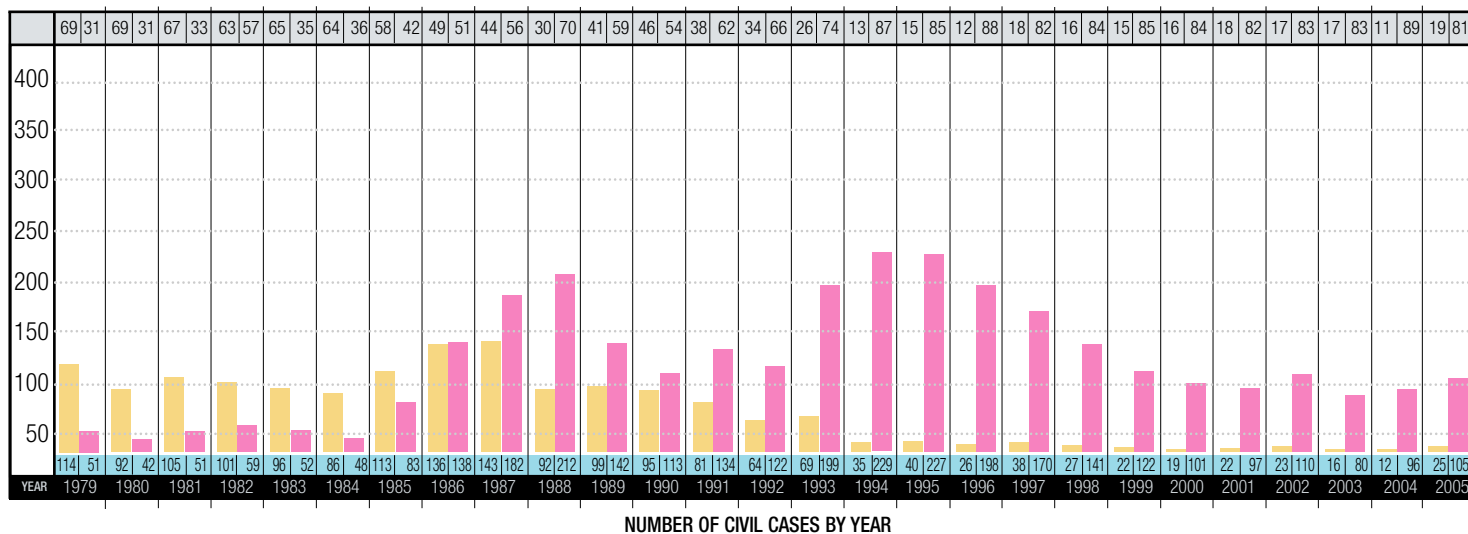


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past 12 years, this average ratio dropped to only 15 percent to 85 percent. In Division 2, for the 15-year period from 1979 to 1993, the average ratio of written opinions to memorandum decisions in criminal cases was 43 percent to 57 percent; however, during the past 11 years, this average has dropped to only 6 percent to 94 percent.

For the past decade, the odds of either division issuing a published opinion in a criminal appeal is nearly as remote as the four percent odds in 2004 of the U.S. Supreme Court granting a petition for

review on its appellate docket.⁵

Merit Selection of Judges

The February 2006 edition of ARIZONA ATTORNEY included a three-part article on "Fair Courts Under Fire." In Ted Schmidt's article titled "Merit Selection of Judges," he stated, "When we speak of accountability, we must respect that the very cornerstone of our judicial system requires judges to first and foremost be accountable to the Constitution and law."

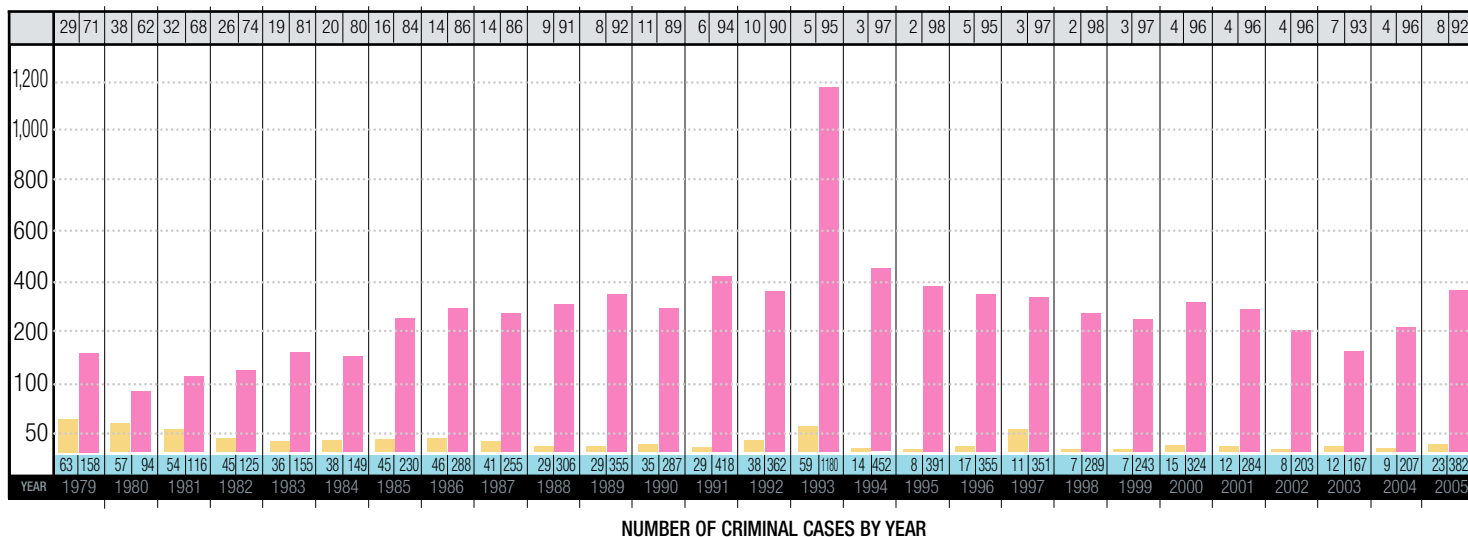
All of us who support merit selection

of judges in Arizona must acknowledge that a memorandum decision from the Court of Appeals that reverses a superior court judge from Maricopa or Pima County deprives the public of evaluating the performance of four merit selected/retained judges—the superior court judge who was reversed and the three appellate judges who ruled on the appeal. Ensuring the integrity of the retention aspect of merit selection is a sufficient reason, by itself, to change the publication rule to require that all reversals be published.

ARIZONA COURT OF APPEALS DIVISION 2 CRIMINAL CASES, FISCAL YEARS 1979-2005

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Proposed Change

Briefly set out, here is my recommendation for a change to the rule.

1. Repeal Rule 28, ARIZ.R.CIV.APP.P., and Rule 31.26, ARIZ.R.CRIM.P., because they are redundant with Rule 111.
2. Amend ARIZ.R.S.Ct. 111 by replacing in (b) the current text following (4) with the following:
 5. IN WHICH THE APPELLATE COURT REVERSES IN WHOLE OR IN PART, THE JUDGMENT, RULING OR DECISION PRESENTED ON APPEAL, OR ACCEPTS JURISDICTION OF A PETITION FOR SPECIAL ACTION, REGARDLESS OF WHETHER OR NOT IT GRANTS RELIEF.

Add the following to (h):

ALL MEMORANDUM DECISIONS SHALL INCLUDE (1) A CITATION TO A CONTROLLING PUBLISHED ARIZONA APPELLATE COURT OPINION DISPOSITIVE OF EVERY ISSUE PRESENTED; AND (2) A STATEMENT ENTITLED, "BASIS FOR MEMORANDUM DECISION" IN WHICH THE JUDGES CERTIFY⁶ THAT (a) THE DECISION DOES NOT DISPOSE OF ANY ISSUE OF FIRST IMPRESSION, (b) IS NOT SUBJECT TO PUBLICATION UNDER THE REQUIREMENTS IN SUBSECTION (B), AND (c) IT DOES NOT INCLUDE A DISSENT OR A CONCURRENCE.

3. Revise the reporting of the Arizona Supreme Court annual statistics to reflect the number of opinions in each category that were combinations of published opinions and memorandum decisions. This would allow the legal scholars to keep track of how often

Rule 111(h) is being used.

If It's Broken and the Court Doesn't Fix It...

In 1964, the legislature passed A.R.S. § 12-120.07, which provides in subsection (B) for the publication and distribution of opinions of the Court of Appeals. Apart from minor technical amendments in 1969 and 1973, for the past 42 years the legislature has not changed this law in spite of several major changes in appellate courts, including the publication rule and merit selection of judges.

The Supreme Court's rule-making power is provided in Art. 6, § 5(5) of the Arizona Constitution. However, it has held:

That we possess the rule-making power does not imply that we will never recognize a statutory rule. We will recognize "statutory arrangements which seem reasonable and workable" and which supplement the rules we have promulgated. ...

However, when a conflict arises, or a statutory rule tends to engulf a general rule ... *we must draw the line.*⁷

[Emphasis supplied]

If the Supreme Court declines to change its publication rule as proposed in this article and/or that of Mr. Hudson, but the legislature adopted such proposals by statute, would the Court rule that it had "crossed the line" and invalidate such a law?

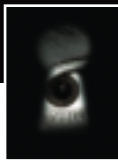
As Jimmy Buffett's song says, "Only Time Will Tell." 

—See endnotes on p. 53

WHAT OTHERS HAVE SAID

Legal scholars have researched and written extensively about publication plans similar or identical to Arizona's rule in effect in all 13 circuits of the U.S. Court of Appeals. There has been no similar research in Arizona. This may be a result of the fact that in Arizona, unlike the federal system, memorandum decisions are much less readily available.

Due to the similarity of Arizona's pub-



lication rule and various federal circuit publication plans, the comments of some of the scholars in the federal studies may have validity here (footnotes in original omitted for brevity):

Precedent, Stare Decisis and the Common Law

- Not only do such publication plans violate the doctrines of precedent and stare decisis, but they also artificially distort our common law system. By leaving the decision of whether to publish a judicial opinion entirely to the discretion of judges, the publication plans allow judges to decide which cases become “law” and which do not. Published opinions become “law” because courts grant them future precedential authority. In contrast, unpublished opinions do not become “law” because they are deprived of future precedential authority.

...

As a result of this process, the body of American common law no longer flows naturally as each new judicial opinion is added to the river of precedent. Instead, publication plans allow judges to decide which opinions join the river and which ones do not. When judges exercise their discretion and withhold thousands of judicial opinions from publication, they actually distort our common law system.⁸

- The intent of the publication rules is ... to ensure that “law-making” opinions are published, leaving unpublished only those opinions that add nothing to the development of the law. These rules, however, have failed to secure that result, either because they are unclear or because the courts fail to follow them. ... Judges cannot accurately determine at the time of disposition which cases require published opinions. Indeed, Justice Stevens states that this practice “rests on a false premise” in that it “assumes that an author is a reliable judge of

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the quality and importance of his own work product.” Likewise, Judge Holloway notes that “when we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe.” Future developments may well reveal that the ruling is significant indeed.⁹

Real-World Considerations

- What about “stealth jurisprudence”? ... [S]ome judges have observed that a colleague might plant the seed of a new doctrine in [an unpublished decision] drawing on it later (without citation) in a published ruling. The frequency with which this occurs is in the eye of the beholder, but these purported judicial misdeeds seem to be based on an implicit assumption of a cabal. Nearly thirty years ago, in claiming that not-for-publication rulings were being used to bury intracircuit inconsistencies, James Gardner was almost conjuring up a picture of judges sitting at post-argument con-

ference, saying, “Let’s hide this one.”

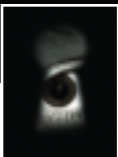
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This is not to say, however, that judges do not discuss the matter, as we can see in a judge’s comment about not wanting to “bury[] the bones of a difficult bunch of legal questions in the unpublished landfill,” and in the remark of a law clerk to a judge during a panel’s consideration of whether to use an unpublished disposition in a case where lawyers had not handled important issues well: “If we were to bury the holding in a memorandum disposition it seems no less ‘tidy’ than the solution we proposed yesterday.”

...

Whether burying is intentional, as critics imply, or results only from judges’ sincere belief that the cases before them do not deserve publication, the effect can be substantial, particularly in producing a diversity of approaches to a single question which remains unresolved by a published opinion establishing circuit precedent. This was evident on an important question of what a Supreme Court ruling required of district judges in whose courts people had been convicted of illegal reentry after deportation under two different statutory provisions. By the time a panel published an opinion to set the matter straight, *there were almost twenty unpublished memorandum dispositions taking three different approaches* [*United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000)].¹⁰ [Emphasis provided]

- According to Judge Patricia Wald, formerly of the U.S. Court of Appeals for the DC Circuit, unpublished opinions “increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of ‘secret law’ practically inaccessible to many lawyers.” [*National Classification Comm’n v. United States*, 765 F.2d 164, 173 n.2 (D.C.



Cir. 1985)] For example, although subsequent panels are bound to follow the prior decisions of other panels of the same court [*United States v. Killion*, 7 F.3d 927, 930 (10th Cir. 1993) (stating that panels are bound by decisions of prior panels "absent en banc reconsideration or superseding contrary decision of Supreme Court"), *cert. denied*, 114 S. Ct. 1106 (1994)] it is not possible to do so (except by happenstance) if prior judicial decisions are unavailable to judges in later cases. Two unacceptable results are imaginable: the subsequent panel, unaware of a prior unpublished decision, might reach a contrary result, creating a conflict in the law of the circuit; or the subsequent panel might decline to publish an opinion to avoid calling attention to the fact that its decision conflicts with the holding of a prior panel.¹¹

- A perverse twist on the mechanics of the publication decision further illustrates that some unpublished opinions are indeed important. Judge Philip Nichols, Jr. of the Federal Circuit candidly admitted that, if dissenting, he would never insist on publication. His rationale: Better to have the opinion banished from existence than be bound by what he considers bad precedent in the future. Judge Nichols also notes that in circuits which require the publication of opinions accompanied by a dissent, an even more disingenuous practice likely occurs. In these circuits, he believes, "tying up the question of dissenting with publication may work adversely on the dissenter, constraining him not to dissent. ..." Apparently this practice is more than mere speculation. A 1991 article

attributed one scholar as saying that law clerks had told her "that judges sometimes would agree not to dissent if an opinion remained unpublished." ... [S]uppressing precedent in this fashion is directly at odds with the fundamental nature of an evolving common law.¹²

- With unpublished dispositions being used in proportionately more cases, those cases are less likely to be routine.

Judges sometimes would agree not to dissent if an opinion remained unpublished. ... [S]uppressing precedent in this fashion is directly at odds with the fundamental nature of an evolving common law.

Factors affecting a circuit's overall publication rate ... may not be reflected equally across all subject matters. Thus it is necessary to study publication patterns both in less contentious areas of the law and in those more likely to engage the judges' ideological juices, such as criminal procedure and requests for asylum under immigration law, where one might expect more dispute over whether to publish and a greater possibility of manipulation of the criteria for publication.

... However, there are times when members of a panel disagree over publica-

tion; when they do, it is likely to occur in the post-conference period. They may disagree because a judge does not believe an issue needs to be reached in order to decide the case and would prefer an unpublished disposition based on simpler grounds, or it may result when a judge is willing to go along and concur if the disposition is unpublished but would feel compelled to dissent were the ruling published. ... As Brudney and

Ditslear put it, "The subtle interactive process among three repeat players" that characterizes within-panel interaction in the courts of appeals means that "appellate judges may occasionally agree that if an opinion remains unpublished they will forgo their inclination to dissent." Former D.C. Circuit Chief Judge Patricia Wald has said that "wily would-be dissenters go along with a result they do not like as long as it is not elevated to a precedent."¹³

- [There is] a significant difference between publication rates for appeals by "upperdogs" [government and corporations] and "underdogs"

[labor unions, individuals, minorities, aliens and convicted criminals]. Decisions in which the appellant is an upperdog are published 58.3 percent of the time, in contrast to a 33.5 percent rate of publication for decisions in which the appellant is an underdog. This finding suggests the presence of subtle biases in the judicial decisionmaking processes in that certain litigants and their concerns are considered more important than other litigants.¹⁴

Reversals

- If the rules and criteria for publication are being followed strictly and

consistently by the appeals court judges, it becomes difficult to explain the significant number of reversals that are found in the unpublished decisions. This finding therefore suggests that the criteria are not being applied in all instances and concomitantly there are many controversial cases that are ending up in unpublished decisions. When a reversal occurs in a case it is almost inevitable that there has been a question of law and that the court has had to address a legal mistake from below. It would seem that in any case where the court of appeals felt it necessary to overturn a decision from below, one might assume that existing law was unclear. Otherwise, the district judge would not have made an erroneous decision. Therefore, a reversal should be taken as an objective indicator that at least for the district judge (and presumably for others) the law is in need of clarification. Moreover, if another judge reached a conclusion contrary to the position taken by a particular panel of the courts of appeals, it might also be assumed that there was a strong enough case on each side that any judge sitting on the case would have some discretion over how to decide the case. This finding may therefore be seen as supporting the claim that many non-trivial cases and cases with precedential value are ending up with unpublished decisions.¹⁵

- With few exceptions, when one court reverses another, it means that the system has not worked properly. Almost by definition, the opinion on appeal is of sufficient interest to warrant publication.

Some reversals reflect mistakes in routine matters on the part of district judges. The inability of judges to apply common-law correctly should be a matter of concern to all. Including such reversals among the unpublished opinions conceals the problem.

...
Reversal on routine matters may signify more than poor craftsmanship by the trial judge. It may, for example, point to uncertainty about the content of governing law. The court of appeals may not publish a reversal because, to it, the governing law was clear; such may not be the perception of others. Put differently, the unpublished opinion may clarify precedent to such a degree that the opinion should be published.

...
Reversals in routine cases may also reflect a continuing battle over the correct legal standard to apply.

...
Finally, for all the reasons discussed above, reversals are quite likely to create law. Many of the decisions discussed in the analysis of separate opinions and suppressed precedent also were reversals. That observation should come as no surprise; where the reversal does not turn on

correction of plain error, it is likely that the court below could not possibly have known the “true” state of the law, because it had never been declared. Thus the circuit court is forced to make law. If it does not publish its opinion, it creates a suppressed precedent.

All of the phenomena just discussed weigh strongly in favor of publication of all reversals. They tell us interesting things about the workings of our legal system, they provide helpful discussion of legal concepts, and they sometimes create—or at least clarify—precedent. Furthermore, reversal is an easy criterion to apply. Unlike most of the criteria used to select opinions for publication, reversal requires no subjective evaluation.¹⁶

- There may, however, also be a public relations problem when reversals are released as unpublished dispositions. Use of a memorandum disposition to reverse a lower court or to refuse enforcement of an agency ruling might lead one to ask why a reviewing court that finds it necessary, despite deferential standards of review, to overturn a lower tribunal will not put the disposition out in more open view, counter to an unstated presumption that an explanation for disagreeing with lower court colleagues should be made public. Even if reversal is seen as only error-correction, the reviewing court needs to explain what is error and why the lower court’s action was error.¹⁷


Judicial Accountability

- Nonpublication also reduces judicial accountability, making evaluation of judges’ work more difficult. Indeed, it can make their work invisible. Nonpublication is especially disturbing in that percentage of cases—in some circuits, an alarming percentage [In 1984, the Third Circuit decided 52 percent of its cases without either oral argument or a published opinion]. ... In these cases, parties have little assurance that the judges have paid attention to their case.

Besides diminishing the judges’ accountability to the parties, nonpublication can diminish the judges’ responsibility to the development of law and to fully explicate intra-court disagreements concerning the application of law. ... Unpublished decisions ... can make it more difficult for the traditional critics (the bar and the scholarly community) to discern trends in a number of areas, from the effect of agency decisionmaking on the implementation of a statute, for example, to the way in which legal principles play out in application.

Justice Stevens has even argued that the use of unpublished opinions encourages “decisionmaking without the discipline and accountability that the preparation of [published] opinions requires [*County of Los Angeles v. Kling*, 474 U.S. 936, 940 (1985) (Stevens, J., dissenting)].¹⁸

- When a circuit court completely denies public access to judicial opinions, it removes an important check on judicial activity from the legal system. Public availability of judicial opinions helps to hold judges accountable to society for the decisions they reach. Public scrutiny helps to maintain the integrity of the judicial system and assure that individual cases are fairly decided.

Forcing judicial decisionmaking into the light of day helps not only to assure fairness in fact, but, perhaps as importantly, to promote the appearance of fairness. When a judge’s reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair. Therefore, the public availability of unpublished opinions promotes judicial accountability, which may also enhance public confidence in the legal system.¹⁹ 

endnotes

1. Kirt Shuldberg commented that the intent of court rules or plans providing for the selective publication “is to serve as a sorting device, separating the wheat from the chaff.” *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 551 (1997). Suzanne O. Snowden also cited Mr. Shuldberg’s analogy in “*That’s My Holding and I’m Not Sticking to It!*” *Court Rules That Deprive Unpublished Opinions of Precedential Value Distort the Common Law*, 79 WASH. U. L.Q. 1253, 1264, 1270 (Jan. 2001), stating:

[Appellate court] judges attempt to “separate the wheat from the chaff” by following the guidelines contained in publication plans.

...

Judges decide which opinions become “law” based solely on their guesses as to whether a particular opinion is likely to have future “precedential value.” In other words, the publication plans are “intended to serve as a sorting device, separating the wheat from the chaff.” However, “separating the wheat from the chaff” is not as easy as it sounds. Judges cannot always accurately predict which decisions have future importance [footnotes omitted].

2. Rule 28(g), ARIZ.R.CIV.APP.P., and Rule 31.26, ARIZ.R.CRIM.P., include identical provisions.

In 1993, former Division 1 Chief Judge Noel Fidel wrote the first Arizona appellate court opinion that resolved some issues presented in a published opinion, and the remaining issues that were not deemed worthy of publication, in a companion memorandum decision. *Fenn v. Fenn*, 847 P.2d 129 (Ariz. 1993). Since then, the publication rule has been amend-

- ed to expressly authorize this procedure. The publication plans of several of the federal circuit courts of appeal contain similar provisions. The commentators have generally praised the issuance of split rulings when appropriate. To date, both divisions of the Arizona Court of Appeals have issued a total of 78 split rulings. Such split rulings are one method by which the court can satisfy its requirements of the publication rule, and at the same time exclude its resolution of issues “which merely applies settled law to facts that concern the parties alone.” *Id.*
3. *Internal Operating Procedures of the Arizona Supreme Court*, 17 ARIZ. L. REV. 643 (1975).
 4. In 1979, the Case Activity portion of the Arizona Supreme Court’s annual report of the Arizona Judicial Branch included the following under the heading “Types of Action”: Civil, Criminal, Post Conviction Relief, Industrial Commission, Unemployment Insurance, Special Actions, Habeas Corpus, Delayed Appeals, and Juvenile Appeals. The court has made numerous changes in the Type of Action list. The data in the graphs only includes information regarding criminal and civil cases because these two classes of cases represent a substantial majority of the cases filed.
 5. *The Supreme Court, 2004 Term*, 119 HARV. L. REV. 415, 426 (2005), states that in the Court’s Appellate Docket, for the 2004 term, it received 1,727 petitions for review and granted 69 (a rate of four percent).
 6. Current court rules require attorneys to certify many documents (e.g., certificate of good faith in filing a motion to continue provided in comment to Rule 8.5(a), ARIZ.R.CRIM.P.; compliance with word or page limitations and typesize requirements for appellate briefs in Rule 14(b), ARIZ.R.CIV.APP.P.; avowal of good faith in notice of change of judge required by both Rule 42(f), ARIZ.R.CIV.P., and Rule 10.2(b), ARIZ.R.CRIM.P.).
 7. *State ex rel. Collins v. Hon. Seidel & Deason (RPI)*, 691 P.2d 678 (Ariz. 1984).
 8. Snowden, *supra* note 1, at 1270.
 9. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions To Explain and Justify Judicial Decisions Post a Great Threat?* 44 AM. U. L. REV. 757, 786 (1995).
 10. Steven Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L. J. 67, 72, 73 (Fall 2004).
 11. Dragich, *supra* note 9, at 787.
 12. Shuldberg, *supra* note 1, at 552.
 13. Wasby, *supra* note 10, at 67, 77.
 14. Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 981 (1989).
 15. Donald R. Songer, *Criteria for Publication of Opinions of the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality in Judicature*, 73 J. AM. JUDICATURE SOC’Y 311 (April-May 1990). The author further states:

[A] large proportion of all of the reversals in each of the circuits was unpublished. Specifically, in the Fourth Circuit, 47 percent of all reversals announced during 1986 were unpublished, in the Eleventh Circuit 36.3 percent of the reversals were unpublished and in the District of Columbia the judges concluded that more than half (56.8 percent) of all decisions to reverse the decision below were not worth of an explanation in a published opinion.
 16. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 618, 619 (1981).
 17. Wasby, *supra* note 10, at 98.
 18. Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, BYU L. REV. 3, 52 (1990).
 19. Shuldberg, *supra* note 1, at 553.