THE NATIONAL LAW JOURNAL
AUGUST 24, 2009
Daily Updates at NLJ.COM

Unpublished appellate opinions are still commonplace

The practice continues despite the U.S. Supreme Court's criticism of its use in consequential cases.

BY AARON S. BAYER

The U.S. Supreme Court's highly publicized Title VII decision in *Ricci v. DeStefano*, 129 S. Ct. 894 (2009), holding that a city cannot discard the results of a race-neutral promotional exam that had a racially disproportionate impact on minority firefighters, began its life as a series of unpublished decisions. The district court's "path-breaking opinion" was initially unpublished, see *Ricci v. DeStefano*, 530 F.3d 88, 94 (2d Cir. 2009) (denial of rehearing en banc) (Cabranes, J., dissenting), and the U.S. Court of Appeals for the 2d Circuit panel's initial one-paragraph affirmance was unpublished as well, though the panel subsequently issued the identical decision as a published per curiam opinion.

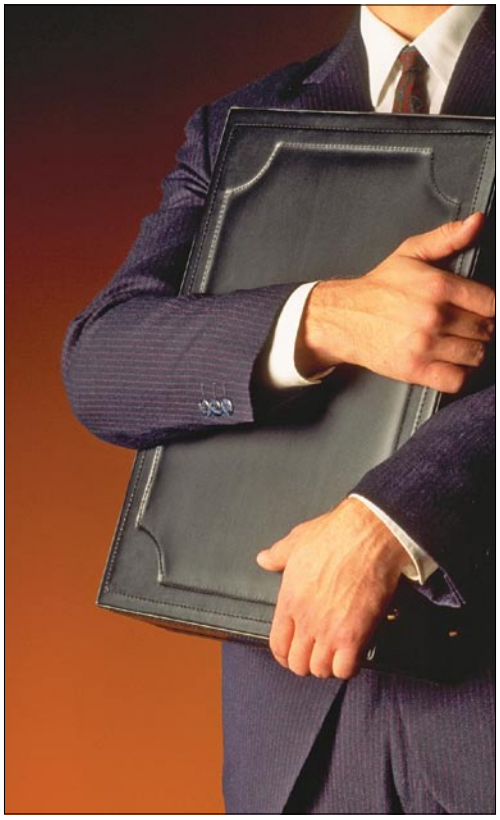
THE PRACTICE

Commentary and advice on developments in the law

Although the *Ricci* case is unusual because it addressed important issues of first impression, unpublished appellate opinions are, in fact, commonplace. From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the 4th Circuit had the highest percentage of unpublished opinions (92%), and more than 85% of the decisions in the 3d, 5th, 9th and 11th circuits were unpublished. Even the circuits with the lowest percentages during that period—the 1st, 7th and D.C. circuits—issued 54% to 58% of their opinions as unpublished. Id.

Publication rules vary among the circuits. The variation in publication rates may be due in part to different publication standards. For example, the 1st Circuit, which had the lowest unpublished rate at 54%, states in its local rules that, "[i]n general, the court thinks it desirable that opinions be published and thus be available for citation." 1st Cir. R. 36(b)(1). The D.C. Circuit, which also had a relatively low unpublished rate of 58%, has a policy favoring publication of opinions that are of "general public interest." D.C. Cir. R. 36(c)(1). Several circuits provide detailed standards for when a decision should be published, and the D.C. Circuit's standards are among the broadest, calling for publication when a decision reverses a published agency or district court decision or affirms on different grounds, criticizes existing law, or is of "general public interest." D.C. Cir. R. 36(c)(2).

A number of circuits require publication when there are concurring or dissenting opinions and in unanimous decisions if any of the panelists requests publication. See, e.g., 1st Cir. R. 36(b)(2)(B),(C); 2d Cir. R. 32.1(a). The 4th Circuit makes it a bit more cumbersome, publishing a decision when the author or a majority of joining judges favor publication—but only after all judges on the circuit have acknowledged in writing their receipt of the proposed opinion or the opinion has circulated for 10 calendar days. 4th Cir. R. 36(a). The 11th Circuit similarly provides that its decisions "shall be unpublished unless a majority of the panel decides to publish it," 11th Cir. R. 36-2, but emphasizes in its Internal Operating Procedures that "the basic policy of this court" is to "reduce the volume of published opinions." 11th Cir. I.O.P. 5.



CRITICISM OF THE PRACTICE

The Supreme Court has criticized the practice of issuing unpublished decisions in consequential cases. Reversing an unpublished

AARON S. BAYER *is the chairman of the appellate practice group at Wiggin and Dana of New Haven, Conn. He can be reached at abayer@wiggin.com.*

4th Circuit decision, the Supreme Court "deem[ed] it remarkable and unusual" that, in holding an Act of Congress unconstitutional, the court of appeals "found it appropriate to announce its judgment in an unpublished per curiam opinion." *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993). Similarly, Justice John Paul Stevens' dissent in *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985), denounced the 9th Circuit's decision not to publish its opinion as "plainly wrong," likening it to "spawning a body of secret law."

In 2000, the 8th Circuit went so far as to declare that a circuit rule allowing unpublished opinions without precedential value violated Article III of the Constitution. See *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000). Judge Richard S. Arnold's opinion held that the "judicial power" in Article III, though undefined, is limited and that courts do not have the power to issue decisions—whether published or unpublished—without precedential value, because precedent is the very foundation of the common law system. Although later vacated on other grounds, 235 F.3d 1054 (8th Cir. 2000), the decision generated much debate among judges and legal scholars. The 9th Circuit rejected *Anastasoff*'s constitutional theory, offering a more practical view of judges' Article III responsibilities: "[W]e believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit." *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001). The circuits, as a practical matter, have followed the view of the 9th Circuit.

In addition, rules on precedential effect vary. Federal Rule of Appellate Procedure 32.1 was adopted in 2006 to permit citation to unpublished decisions issued on or after Jan. 1, 2007, but the rule did not address what precedential effect should be given to unpublished opinions, leaving that decision to each circuit.

Most circuit rules state that unpublished decisions are not binding precedent, but that can vary even within a circuit depending on the date the decision was issued. See, e.g., 5th Cir. R. 47.5.3 & 47.5.4. Some circuit rules, though, allow reliance on unpublished decisions for res judicata, law of the case or other preclusive effect, see, e.g., 4th Cir. R. 32.1; 5th Cir. R. 47.5.4, and some allow limited reliance on unpublished opinions for their "persuasive value." See, e.g., 1st Cir. R. 32.3(a)(2). The 8th Circuit rules, for example, say that unpublished opinions are "not precedent," but they may be cited if they have "persuasive value on a material issue and no published opinion of this or another court would serve as well." 8th Cir. R. 32.1A.

Only the D.C. Circuit provides that its current unpublished decisions may be cited as precedent. D.C. Cir. R. 32.1(b)(1)(B). But the D.C. Circuit rules go on to say that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition," D.C. Cir. R. 36(e)(2), a message reinforced in its Handbook of Practice and Internal Procedures, XII.A.

Counsel should look closely at circuit rules for guidance on the limited circumstances in which reliance on unpublished decisions will be willingly, if not warmly, received.

Unpublished decisions are much more accessible today—on Westlaw, Lexis and West's Federal Appendix—than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The 4th, 8th and 11th circuits allow only parties to petition for publication, while the D.C., 1st, 7th and 9th Circuits allow anyone to petition. Appellate counsel should be mindful of varying deadlines for seeking publication of a decision. See, e.g., D.C. Cir. R. 36(f) (allowing motion within 30 days after judgment); 11th Cir. R. 36-3 (allowing motion before the mandate issues).

DEPUBLICATION

Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to "depublish" intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See Cal. R. Ct. 8.1125; Ariz. R. Civ. App. P. 28(f). For example, in a recent class action regarding insurance premiums, a California court of appeal issued a 50-page published opinion after the case had settled, over the objections of the parties. *Troyk v. Farmers Group Inc.*, 171 Cal. App. 4th 1305 (2009). Both parties, as well as third-party movants, petitioned the California Supreme Court to depublish the opinion, though the court declined to do so. See California Supreme Court Minutes, June 10, 2009, at 978.

The California Supreme Court's practice of depublishing was once more common than it is today. The court depublished only 14 appellate court opinions in its 2007-08 fiscal year, compared with 141 depublished opinions in its 1988-89 fiscal year. See Court Statistics Report, Judicial Council of California, tbl. 8 (2009). Even so, depublication remains an important part of appellate practice in California, providing an alternative to seeking reversal of an unfavorable decision and requiring appellate counsel to address possible third-party depublication efforts while planning their appellate strategy.