



2001

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Recommended Citation

Coleen M. Barger, *Preface: Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol3/iss1/10>

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

DEVELOPMENTS AND PRACTICE NOTES

ANASTASOFF, UNPUBLISHED OPINIONS, AND “NO- CITATION” RULES

PREFACE

After last summer’s publication of *Anastasoff v. United States*,¹ a new round of spirited debate began over the propriety of unpublished opinions and their status as precedent. *The Journal* issued a call for papers for a “mini-symposium” on the case, as well as other issues concerning unpublished opinions and “no-citation” rules. In December 2000, on petition for rehearing, the Eighth Circuit vacated the original *Anastasoff* decision on mootness grounds. This action, however, has not foreclosed the question whether unpublished opinions carry precedential weight. The court carefully explained that

the case having become moot, the appropriate and customary treatment is to vacate our previous opinion and judgment, remand to the District Court, and direct that Court to vacate its judgment as moot. We now take exactly that action. The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no

1. *Anastasoff v. U.S.*, 223 F.2d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

precedential effect *remains an open question in this Circuit.*²

Indeed, the issue remains open,³ and not just within the Eighth Circuit. The chief judge of the District of Massachusetts seems determined to force the issue in the First Circuit,⁴ as he has begun to routinely insert the following footnote in his opinions whenever he cites unpublished opinions to support his reasoning:

For the propriety of citing unpublished decisions, see *Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir.) (R. Arnold, J.) (holding that unpublished opinions have precedential effect), *vacated as moot*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000); *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103 (D. Mass. 1999) (relying on unpublished opinions' persuasive authority), and Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).⁵

In California, a district court has recently granted a motion dismissing an attorney's challenge to the validity of rules governing unpublished opinions in the Ninth Circuit.⁶ Michael Schmier⁷ sought either a writ of mandamus or a writ of

2. 235 F.3d at 1056 (emphasis added).

3. See *Lederman v. Cragun's Pine Beach Resort*, 2001 WL 402701 at *8 n. 3 (8th Cir. Apr. 23, 2001) (affirming district court's interpretation of issue of state law and noting, "[W]e leave for another day the constitutionality of rules prohibiting the use of unpublished opinions for precedential value. In the meantime, we have no doubt that the propriety of such rules will continue to gain the attention of the legal journals.").

4. See 1st Cir. R. 36(b)(2)(F): "Unpublished opinions may be cited only in related cases . . ."

5. *Suboh v. City of Revere*, 2001 WL 327118 at *17 n. 18 (D. Mass. Mar. 30, 2001) (Young, C.J.); see also *Berthoff v. U.S.*, 2001 WL 396368 at *14 n. 4 (D. Mass. Apr. 09, 2001); *Gonzalez v. U.S.*, 135 F. Supp. 2d 112 n. 10 (D. Mass. Mar. 27, 2001) (adding, "It is especially unfortunate that the First Circuit saw fit to designate an opinion as important as *McCarthy v. U.S.*, 187 F.3d 622 (table), 1998 WL 1085766 (1st Cir. Dec. 18, 1998)] as unpublished."); *Musto v. Halter*, 2001 WL 327122 at *11 n. 8 (D. Mass. Mar. 23, 2001); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69, 136 n. 40 (D. Mass. Jan. 19, 2001); *MacNeill Engr. Co. v. Trisport, Ltd.*, 126 F. Supp. 2d 51, 58 n. 3 (D. Mass. Jan. 10, 2001); *Massachusetts Hous. Fin. Agency v. Evora*, 255 B.R. 336, 343 n. 3 (D. Mass. Nov. 13, 2000).

6. *Schmier v. U.S. Ct. App. for 9th Cir.*, 2001 WL 313583 at *1 (N.D. Cal. Mar. 23, 2001).

7. As a candidate for attorney general of the State of California in 1998 and for U.S. Senate in 2000, Schmier's platforms have stressed his views that all judicial opinions be citable and published. See Michael Schmier, *Affordable, Dependable Legal System*

prohibition from the district court requiring not only that all future circuit court opinions be given precedential effect, but also that they be published. He also sought an injunction preventing the enforcement of Ninth Circuit rules restricting the use of unpublished opinions to issues concerning law of the case, *res judicata*, and collateral estoppel.⁸ While doubtful that it even had jurisdiction to consider the propriety of a higher court's rule, the court found that Schmier lacked standing to raise the issues, as he had not tried to cite an unpublished opinion or demonstrated that he had been harmed by the rules' existence. To qualify for such standing, the court emphasized that "the party must cite an unpublished opinion in an actual case," and that "[o]therwise, there are no facts for which the litigant can demonstrate an injury."⁹

Even when a court agrees that it is proper for litigants to cite unpublished opinions, whatever their provenance, it may yet consider that it is not *bound* by such opinions and may be comfortable rejecting the value of existing case law within its own jurisdiction. For example, in *In re Mays*,¹⁰ a bankruptcy court in New Jersey had little trouble deciding that it would not be bound by its sister court's treatment of an "identical issue":

Generally, courts treat the reliance on and the precedential value of unreported or unpublished cases somewhat differently than those cases which are published. For example, 3rd Cir. IOP 5.8 (2001) states, "[B]ecause the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority." While the Third Circuit Rules do not apply to this court, and although this rule does not appear to bar a party's reliance on unpublished decisions, it still leaves room for the court to consider these opinions in their decisionmaking process.¹¹

<<http://members.aol.com/MKS4Senate/Justice.html>>; League of Women Voters, *Smart Voter* <http://sunsite.berkeley.edu/smartvoter/1998jun/ca/state/vote/schmier_m/> (voter information for June 2, 1998 primary).

8. *Schmier*, 2001 WL 313583 at *1.

9. *Id.* at *4.

10. 256 B.R. 555, 557 (Bankr. D.N.J. 2000).

11. *Id.* at 558.

Curiously, despite telling attorneys they could “*rely* on unpublished opinions”¹² and acknowledging “an underlying presumption that precedent should be followed,”¹³ the court rejected the proffered case law:

Although the unpublished opinion in *Gomez* is not binding on this court, stare decisis might suggest that it should be followed.

However, the United States Supreme Court has stated that stare decisis is a “principle of policy, and not an inexorable command.” *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (stare decisis is “[n]ot 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.”). To the extent that an earlier unreported decision of a bankruptcy court in our district addresses the identical issue in this case, the earlier opinion is precedent which may be persuasive but is not binding and need not be followed.¹⁴

One wonders how long this question will remain a matter of individual choice and local rule. Should a circuit split on the constitutional question develop, certainly the question—for the federal courts, at least—should be resolved by the Supreme Court.¹⁵ Others prefer that the issue be resolved by alternative measures. In August 2001, the American Bar Association’s Section of Litigation will present its report and recommendation to the ABA House of Delegates¹⁶ that the circuit courts of appeals uniformly do the following:

12. *Id.* (emphasis added).

13. *Id.* at 559.

14. *Id.* at 559 (refusing to give weight to the unpublished decision *In re Gomez*, No. 97-27459 (Bankr. D.N.J. Dec. 8, 1997)).

15. Whether state constitutional provisions on separation of powers will support similar challenges to no-citation rules in state appellate courts remains to be seen.

16. Memo. from Ronald J. Cohen, Chair, Section of Litigation, to State Delegates to the House of Delegates, ABA Standing Committees, ABA Sections and Other Entities, *Report and Recommendation to the House of Delegates: Use and Effect of Unpublished Opinions in the Federal Courts of Appeal* (Apr. 6, 2001) (copy on file with *The Journal of Appellate Practice and Process*).

1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMS, and/or Internet Websites; and

2) Permit citation to relevant unpublished opinions.¹⁷

The Journal's call for papers elicited a lively and diverse array of opinion, theory, and empirical research to contribute to the ongoing debate about the uses and value of unpublished decisions and rules limiting citation. As these authors make clear, the issues are far from being resolved.

CMB/Developments Editor
Little Rock
May 8, 2001

17. ABA Section of Litigation, *Report to the House of Delegates* (draft of Mar. 30, 2001) (copy on file with *The Journal of Appellate Practice and Process*).

