

The Court of Appeals' No-Citation Policy for Unpublished Opinions

Let There Be Cites

by Peter J. Krumholz and Aaron Solomon

Colorado Appellate Rule (C.A.R.) 35(f) provides that “[t]hose opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.” Nothing in the rule prohibits the citation of unpublished opinions for their persuasive or other value, and no less a body than the Colorado Supreme Court has used them for this purpose.¹

The Colorado Court of Appeals, on the other hand, has a policy specifically prohibiting the citation and distribution of unpublished opinions.² Pursuant to this policy, “citation of unpublished opinions is forbidden,” with minor exceptions. The policy provides that unpublished opinions “are provided for private use and are not to be included in an electronic database or otherwise published.”³ The majority of the opinions issued by the Colorado Court of Appeals are unpublished,⁴ and unpublished opinions are not made available on the court’s website.

There is a healthy debate regarding whether opinions can and should be designated non-precedential.⁵ Setting aside this question, there simply is no good reason for refusing to allow parties to cite unpublished decisions for whatever persuasive value they may hold.⁶

A Policy Steeped in Irony

The court of appeals’ policy results in two ironies. First, the court prohibits citation of its own unpublished decisions, but no Colorado lawyer is prohibited from citing unpublished decisions

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A Sound and Effective Policy

by Andra Zeppelin

Most rules are subject to interpretation, so it is not surprising that my colleagues Peter Krumholz and Aaron Solomon don’t share my view of C.A.R. 35(f). For the benefit of readers, here is what the appellate rule provides in relevant part:

A majority of all of the judges of the Court of Appeals shall determine which opinions of that court shall be designated for official publication. . . . Those opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado.

No opinion of the Court of Appeals shall be designated for official publication unless it satisfies one or more of the following standards: (1) the opinion lays down a new rule of law, or alters or modifies an existing rule, or applies an established rule to a novel fact situation; (2) the opinion involves a legal issue of continuing public interest; (3) the majority opinion, dissent, or special concurrence directs attention to the shortcomings of existing common law or inadequacies in statutes; (4) the opinion resolves an apparent conflict of authority.

The Colorado Court of Appeals’ policy regarding citation of unpublished cases states:

Citation of unpublished opinions is forbidden, with the following exceptions: (1) [u]npublished opinions may be cited to explain the case history or to establish the doctrines of law of the case, res judicata, or collateral estoppel; (2) [t]his policy shall not apply to opinions that were designated as “Not Selected for Of-

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from other states or countries.⁷ In the words of Hon. Samuel Alito:

[I]t is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence except those contained in the court's own "unpublished" opinions.⁸

This sentiment eventually resulted in a significant amendment to the federal appellate rules. In December 2006, the U.S. Supreme Court amended the federal appellate rules to prohibit appellate courts from banning the citation of non-precedential opinions.⁹ Lawyers in federal appellate courts may now cite to unpublished opinions of federal appellate courts for whatever persuasive value the opinions may hold.

Second, the court of appeals' policy means that lawyers in a common law system are prohibited from informing the court of the vast majority of its own past decisions. As the late Judge Richard Arnold observed with respect to a similar policy in the Eighth Circuit, the court of appeals is essentially saying to the Bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday."¹⁰

Constructive Uses of Unpublished Opinions

In her counterpoint article, Andra Zeppelin argues in favor of the no-citation rule based in part on the argument that unpublished opinions, by their very nature, hold no value in helping to decide future cases, and therefore nothing is lost by banning citation to them. This position is belied by the Colorado Court of Appeals' own system, which, in the words of a former Reporter of Decisions, "guarantees that even the unpublished . . . opinions are carefully reasoned."¹¹ Unpublished decisions are reviewed and approved by the three-judge panel assigned to the case, and subsequently are distributed for review to the rest of the court of appeals.¹²

Moreover, a significant number of judges find unpublished decisions useful. In a 2004 Federal Judicial Center study, 44 percent of judges in the federal circuit courts of appeal who allowed citation said they found citations to unpublished decisions helpful "occasionally," "often," or "very often."¹³ The same study found that practicing attorneys research unpublished decisions, even when they

cannot cite to them, and that attorneys frequently find unpublished decisions that would aid their cases.¹⁴ Notably, the Colorado Court of Appeals has explicitly allowed citation to other courts' unpublished opinions for their persuasive value.¹⁵

Embracing the Digital Age

The court's no-citation policy is a solution to a problem of an earlier time, when the lack of accessibility to unpublished opinions created potential unfairness within the Bar, with large law firms and government counsel potentially having better access to hard copies of decisions than small law firms and sole practitioners. For example, New Mexico Appellate Rule 12-405(C) states that because unpublished decisions are "unreported and not uniformly available to all parties, [they] shall not be . . . cited as precedent in any court."

Now, more than a decade into the electronic age, the problem of accessibility is a thing of the past. Placing unpublished decisions on the court's website in a searchable form would be a relatively inexpensive undertaking and a better alternative to a no-citation policy. Many state courts have taken a step in this direction, construing their no-citation rules or policies to mean that although unpublished opinions are not precedent, they still may be cited for their persuasive value.¹⁶

Assessing the Risks

Our counterpoint colleague suggests that it harms the judiciary to make available a body of nonbinding opinions whose reasoning may be incorporated into other decisions. However, this risk already exists, because we are free to cite to persuasive authority from other jurisdictions. In any case, our state's appellate judges can be trusted to evaluate for themselves whether a particular unpublished opinion should be accorded any persuasive value. Not all unpublished opinions, after all, are created equal (an observation, incidentally, that is equally true of published decisions). As University of Denver Law Professor K.K. DuVivier has pointed out, "some of the unpublished opinions contain lengthy explanations of the court's analysis."¹⁷ Opinions that are so poorly reasoned as to be truly dangerous are also presumably insufficient to resolve individual disputes as a matter of procedural justice. One would hope that few or none of these exist.

Moreover, prohibiting lawyers from citing unpublished decisions may give rise to the temptation, in a difficult case, to decide the case in a results-oriented manner and sweep the difficulties under the unpublished rug. We're not suggesting this has ever happened in our appellate court—particularly given the court of appeals' practice of circulating unpublished decisions to a majority of the court. However, as Judge Arnold warned, "a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings."¹⁸

An Appeal to Logic

There is an inescapable tension between an incremental, common law system based on precedent and the practical demand for

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cial Publication” and were announced between January 1, 1970 and November 1, 1975, but nevertheless were published in the Pacific Second Reporter. . . .

Unpublished opinions are not displayed on this web site. Copies of unpublished opinions are provided for private use and are not to be included in an electronic database or otherwise published.¹

Contrary to my colleagues’ claim, the argument favoring the court of appeals’ current policy is not grounded on a blanket assertion that unpublished opinions hold no value, but rather on the plain reading of C.A.R. 35(f). That rule creates the framework for deciding what becomes a published or an unpublished opinion. Published cases lay down a new rule of law, involve an issue of public interest, highlight shortcomings of existing laws, or resolve a conflict of authority. Unpublished cases possess none of those attributes.

C.A.R. 35(f) allows the court the discretion to decide how to handle unpublished cases. It is true that nothing in the rule prohibits the citation of unpublished opinions for their persuasive value. However, nothing in the rule requires the court to allow the citation of unpublished opinions, either.

Arguments and Counterarguments

The current policy of the Colorado Court of Appeals is not only sound, but also effective in theory and practice. Several themes emerge from the case made for changing it. I will attempt to state the arguments against it accurately and address them in turn.

Common Law Tension

Speculating on the reasoning behind the federal system’s policy of citable unpublished cases, my colleagues suggest that it is incongruous to tell American lawyers in a common law system that they cannot rely on past court decisions. It is important to take a step back and remember that, unlike state courts, federal courts do not act as an independent source of common law. Instead, they act as interpreters of statutory provisions and the U.S. Constitution by elaborating and defining the language articulated in them. In 1938, the U.S. Supreme Court announced that there is no federal common law.² Subsequent cases have slightly limited this ruling,³ but federal courts have a vastly different role in the common law arena.

The common law, especially in state courts, calls on the judiciary to announce the law.⁴ However, this system is not merely a collection of every single ruling a judge has ever made. Although there are cases in which certain rules can be understood only by reference to others,⁵ the aim of the judiciary in issuing opinions is to create binding precedent that parties, lawyers, and judges can review and rely on in pursuing and arguing new issues.⁶

The policy of the Colorado Court of Appeals stays true to that aim. Its published cases are the law. They provide clarity and guidance to parties, a legal framework, and a complete picture of the rule that governs the case.

The stamp of approval by a judge does not make a case a stepping stone of the common law. Many such cases could, in fact, muddle the waters and create confusion. For each unpublished case issued, there is already a clear, complete, comprehensive published opinion announcing the law. What would be the benefit of citing

to three cases in which the distinguishing factor, irrelevant to the outcome, is the color of a vehicle? Must the common law pay more attention to the green Toyota than to the blue Toyota or the red one?

No Harm, No Foul

My colleagues suggest there is no risk or harm to the judiciary through the citation of unpublished cases as persuasive authority. They contend that any risk involved in that issue already exists with citation to other persuasive authority. According to this reasoning, unpublished opinions could be cited along the same lines as authority from another jurisdiction, the Bible, a newspaper article, or a work of literature.⁷

A Colorado trial court judge, however, will differentiate between *Moby Dick* and a judicial opinion from the state’s intermediate appellate court when making a decision under the laws of this state. A work of literature will have no immediate relevance or pertinence and will be taken with a grain of salt. An opinion from another jurisdiction likely will contain background information and facts, and will apply the laws of another state.

In Colorado, unpublished opinions are abbreviated versions of published decisions. Not faultless, they are neither imprecise nor less carefully worded than their published counterparts.⁸ An unpublished opinion simply lacks the recitation of extensive facts and procedural history. The parties to the case are aware of these missing details; outsiders, whether judges, lawyers, or parties to other cases, are not.

Abuse

My colleagues in this debate suggest that under the current policy, judges may be tempted to sweep the difficulties of a case under the “unpublished rug,” leading to results-oriented decision-making. This is a very conspiratorial view of the court. Unpublished opinions are far from secretive. They are approved by twenty-two judges on the court, distributed to the parties, and made available to the public.

Unpublished cases are not difficult; they are simply and utterly unremarkable. Most important, they do not comply with the

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efficiency created by an exploding caseload. The logical accommodation of these competing interests is to adopt the federal model: allow the court to designate some opinions as non-precedential, but allow practitioners to cite to those opinions when they deem them helpful to their case. The Colorado Court of Appeals' no-citation policy should be reversed.

Notes

1. *See Bittle v. Brunetti*, 750 P.2d 49, 52 n.2 (Colo. 1988) (citing unpublished opinions to illustrate that Colorado courts frequently have applied the no-duty rule).

2. The policy is available on the court's website at www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm. Although the current policy was adopted in 1994, counterpoint author Andra Zeppelin advises that the no-citation policy has been in place since the creation of the current Colorado Court of Appeals. We'll take her word for it. The policy should be thrown out no matter how long ago it was adopted.

3. In fact, unpublished opinions are not entirely private. According to the Colorado Court of Appeals website, paper copies of unpublished opinions less than six months old are available to the public from the Clerk of the Court; electronic copies of opinions from 1995 to the present "may" be available and can be requested through the court's website; and opinions predating 1995 may be requested from the Office of the State Archivist.

4. According to the most recent Colorado Judicial Branch Annual Statistical Report, in Fiscal Year 2009, the Colorado Court of Appeals issued 269 published opinions and 1,794 unpublished opinions.

5. Compare *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (vacated following rehearing *en banc*) (striking down Eighth Circuit's no-citation policy) with *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (upholding Ninth Circuit's no-citation policy). See also Cleveland, "Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions," 10 *J. App. Prac. & Process* 61 (June 16, 2009).

6. Notably, the Colorado Court of Appeals' policy not only prohibits citation to an unpublished opinion, but also implies that it would be im-

permissible for a party receiving such an opinion in his own case even to post it on the Internet. If applied in this manner, the policy would likely raise serious First Amendment issues.

7. Colorado lawyers are not prohibited from citing to literature, either. See *Muscarello v. United States*, 524 U.S. 125, 129 (1998), citing the King James Bible, *Robinson Crusoe*, and *Moby Dick* in a single paragraph attempting to define the term "carries a firearm."

8. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 33 (May 22, 2003), quoted in Cox, "Freeing Unpublished Opinions from Exile: Going Beyond the Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1," 44 *Washburn L.J.* 105, 105 (2004). Although our counterpoint colleague argues that a judicial opinion from another jurisdiction likely will contain its background and facts, we see no reason this is necessarily true, especially if the opinion is unpublished. Indeed, this was largely Judge Alito's point.

9. Fed.R.App.P. 32.1.

10. *Anastasoff*, *supra* note 5 at 904.

11. DuVivier, "Are Some Words Better Left Unpublished? Precedent and the Role of Unpublished Decisions," 3 *J. App. Prac. & Process* 397, 413 (Spring 2001). Professor DuVivier was the Reporter of Decisions from 1999 to 2000.

12. *Id.* at 412.

13. Cleveland, *supra* note 5 at 170.

14. *Id.*

15. *Waskel v. Guaranty National Corp.*, 23 P.3d 1214, 1220 (Colo.App. 2000).

16. See *McCoy v. State*, 80 P.3d 757, 763 (Alaska App. 2002) ("[W]e align ourselves with Minnesota, New Mexico, Tennessee, Texas, and Virginia—states that have interpreted their 'no citation' rules to mean only that unpublished opinions are not precedent for purposes of *stare decisis*.").

17. DuVivier, *supra* note 11 at 411 n.65, citing *Rodriguez v. Healthbone*, 2000 WL 674860 (Colo.App. May 25, 2000).

18. Arnold, "Unpublished Opinions: A Comment," 1 *J. App. Prac. & Process* 219, 223 (Summer 1999). Judge Arnold's short essay is widely regarded as having started the debate that ultimately resulted in the amendment to the federal appellate rule. ■

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C.A.R. 35(f) standard for publication. They do not present attributes that would make them useful to other litigants, attorneys, or judges, but repeat existing law, follow existing statutes, and create no conflict of authority whatsoever.

Non-Precedential but Citable

Ultimately, Peter Krumholz and Aaron Solomon urge the reversal of the court of appeals' no-citation policy and propose a new system in which some opinions would be designated non-precedential. Under this system, practitioners could cite to these non-precedential opinions when they find them helpful to their case.

Although this may sound attractive, the reasons cited by those proposing the change are unavailing. For unpublished cases truly to be helpful, they would need to be written in a vastly different manner to allow those unfamiliar with the facts a complete picture of the case. Judges certainly would feel an obligation to thoroughly explain the background of each of the cases, set the case in a detailed procedural background, and extensively outline the arguments and counterarguments made by the parties. Not only would this muddle the common law, but it also would bring the work of the court of appeals to a halt.

Practical Realities

Aside from the philosophical arguments underlying the court of appeals' policy on unpublished cases, several practical realities exist: there are only twenty-four hours in the day; judges are human; there is a right to an appeal; and the state budget and current economic climate do not favor creating more appellate judicial positions. In 2010—a relatively slow year for appeal filings—the court issued 1,752 opinions divided among the twenty-two judges. It does not take great math skill to conclude that an average of eighty cases a year is a heavy workload, even under the current unpublished policy.

The consequences of demanding appellate judges to write more could be twofold: (1) slower resolution of cases; and/or (2) shorter opinions that exclude all of the facts and make useless the citation to any unpublished case. Looking back at the federal system that my colleagues praise, it is hard to disregard the wide use of summary opinions. These opinions are short and succinct, and usually do not contain extensive reasoning or facts.⁹ If such a system were implemented at the court of appeals, it truly would cast a veil of secrecy over the decision-making process.

A Step Further

I believe in the soundness of the Colorado Court of Appeals' policy. I understand its underlying aims and grasp the consequences of reversing it. I appreciate clear principles of law grounded in a complete background of a case.

With the goal of keeping the law clear, I would urge the court to take its policy a step further and move to a system that promotes partial publication. In such a system, only the parts of a published opinion that comply with C.A.R. 35(f) would become available to the public at large, and only those parts would be appropriate for citation under the court's policy.

Notes

1. The Colorado Court of Appeals' policy on unpublished opinions is available on the court's website at www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm.

2. *Erie Railroad Co. v. Tompkins* 304 U.S. 64, 78 (1938) (holding there is no federal general common law confining the federal courts to act only as interpreters of law originating elsewhere).

3. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (giving federal courts the authority to fashion common law rules with respect to issues of federal power). See also *International News Service v. Associated Press*, 248 U.S. 215 (1918) (creating a federal common law cause of action for misappropriation of "hot news" that lacks any statutory grounding; that is one of the handful of federal common law actions that survives today).

4. *Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

5. Holmes, Jr., *The Common Law*, Lecture I, sec. 2 ("In Massachusetts today . . . there are some (rules) which can only be understood by reference to the infancy of procedure among the German tribes.").

6. See, e.g., *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982) (*en banc* in relevant part) (explaining order of precedent binding on the U.S. Court of Appeals for the Federal Circuit).

7. See *Muscarello v. United States*, 24 U.S. 125, 129 (1998), citing the *King James Bible*, *Robinson Crusoe*, and *Moby Dick* in a single paragraph in attempting to define the term "carries a firearm."

8. See DuVivier, "Are Some Words Better Left Unpublished? Precedent and the Role of Unpublished Decisions," 3 *J. App. Prac. & Process* 397, 412 (Spring 2001) (discussing a remark by the Colorado Court of Appeals Reporter of Decisions that even unpublished opinions are carefully reasoned).

9. See *King v. Champion*, 55 F.3d 522, 526 (10th Cir. 1995) (holding there is nothing inherently objectionable in the use of summary opinions in unpublished cases). See also *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (holding there is no constitutional requirement that an appellate court accompany a decision with a written opinion). ■