Unpublished Opinions in Federal Litigation

Key considerations for citing to unpublished opinions in federal litigation and guidance on asking a court to publish an opinion.

SCOTT E. GANT
PARTNER
BOIES, SCHILLER & FLEXNER LLP

Scott is a partner in the firm's Washington, DC office. His main practice areas include complex commercial litigation, class actions (for plaintiffs and defendants), antitrust, intellectual property and constitutional law at the trial and appellate levels. Scott has written numerous opinion pieces and scholarly articles, including an article on unpublished opinions in the *Boston College Law Review*.

The majority of opinions issued by federal circuit courts are designated by those courts as non-precedential (unpublished). A recent US Supreme Court dissent highlights some of the controversy with circuit courts issuing unpublished opinions, as the practice allows a circuit court to intentionally avoid creating binding case law (see *Plumley v. Austin, 135 S. Ct. 828, 831 (2015) (Thomas, J. and Scalia, J., dissenting)*).

With limited exceptions, unpublished opinions lack precedential value. Thus, other courts (and even subsequent panels of the issuing court) generally are not bound to follow the rulings in these decisions. However, because unpublished opinions often resolve contested legal issues that may be relevant to a client's case, counsel frequently seek to rely on these decisions to advance their client's position in federal court. Before citing to unpublished appellate opinions in court filings or oral argument, practitioners should familiarize themselves with the relevant court rules on unpublished opinions and avoid making misrepresentations to the court regarding an opinion's precedential value. Moreover, if a client has obtained a ruling in an unpublished opinion which may be valuable in future matters, counsel also should consider asking the issuing appellate court to convert the unpublished opinion into a published one.

ACCESSIBILITY VERSUS PRECEDENTIAL EFFECT

Attorneys today often confuse the concept of unpublished opinions with the accessibility of these written opinions. In the context of federal appellate opinions, the term "unpublished" is synonymous with "non-precedential" (see *Federal Rule of Appellate Procedure (FRAP) 32.1*; *2006 Advisory Committee Notes to FRAP 32.1*). Before the advent of the internet and electronic legal databases, unpublished opinions were not readily available to counsel, given that they were not physically published in case law reporters. However, federal appellate opinions are now accessible online, even if deemed unpublished by the issuing circuit court. For example, attorneys may access these opinions through:

- The issuing circuit court's website (typically free and unrestricted access).
- Public Access to Court Electronic Records (PACER), the public access service that allows users who have a login and password to obtain the docket sheets and court filings for US federal cases, or the court's Case Management/Electronic Case Filing (CM/ECF) system.
- An electronic legal database, such as WestlawNext.

Confusion also arises between the binding effect of federal appellate and district court decisions. Practitioners should remember that, unlike appellate opinions, district court opinions are not precedential (see *Nat'l Union Fire Ins. Co. v. Allfirst Bank, 282 F. Supp. 2d 339, 351 (D. Md. 2003)* ("Of course, no decision of a district court judge is technically binding on another district court judge, even within the same district.")). In that sense, all district court opinions are "unpublished," even though they are readily available online.

Some district court cases also are unreported, which is a separate concept that has become largely irrelevant given the accessibility of most district court opinions online (see *Calhoun v. Colvin, 959 F. Supp. 2d 1069, 1077 n.6 (N.D. Ill. 2013)* ("[W]hether or not a district court case is reported has no impact on its ultimate authority or lack of authority. No district court decision is 'binding' on another district court, and its 'persuasiveness' ... is determined by the substance of the case, not by its place in the Federal Supplement.")). As with federal appellate opinions, most attorneys today typically access district court opinions through PACER, CM/ECF or an electronic legal database.

CITING TO UNPUBLISHED OPINIONS

Under FRAP 32.1(a), attorneys practicing in any court may freely cite to a federal judicial opinion or other written disposition that has been designated by the issuing court as "unpublished," "not for publication," "non-precedential," "not precedent" or the like if the opinion was issued on or after January 1, 2007. Before this rule was enacted, circuit court rules restricted or even prohibited the citation of unpublished opinions in court filings (see *2006 Advisory Committee Notes to FRAP 32.1(a)*).

However, because FRAP 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007, courts are still permitted to prohibit or restrict the citation of unpublished opinions issued before that date. Attorneys who wish to cite to an unpublished opinion issued before that date should consult both the rules of the circuit court that issued the opinion and the rules of the circuit court in which the attorney is litigating, because the relevant rules vary among the courts. (See *2006 Advisory Committee Notes to FRAP 32.1(a)* ("The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits.").) For example:

- Some circuit courts do not restrict the citation of unpublished opinions issued by their court before January 1, 2007, so long as counsel indicates in the brief or filing that the decision is unpublished (see, for example, *1st Cir. R. 32.1.0(a)*).
- Some circuit courts still prohibit counsel from citing to any unpublished opinions issued by their court before January 1, 2007, with limited exceptions, such as to establish *res judicata* or collateral estoppel (see, for example, *2d Cir. R. 32.1.1(b)(2)(A)*; *7th Cir. R. 32.1(d)*; *9th Cir. R. 36-3(c)*).
- Even in courts where counsel may cite to unpublished opinions issued by that court before January 1, 2007, citing to unpublished opinions issued by another circuit court may still be prohibited, requiring counsel to also consult the rules of the issuing court (see, for example, *1st Cir. R. 32.1.0(b)*).

Although it is now a rare occurrence, if an unpublished opinion is not available in a publicly accessible electronic database, counsel must file and serve a copy of the opinion with the court filing in which it is cited, regardless of when the opinion was issued (*FRAP 32.1(b)*; *2006 Advisory Committee Notes to FRAP 32.1(b)*). Some circuit courts also require counsel to provide pro se parties with a copy of all cited unpublished opinions (see, for example, *2d Cir. R. 32.1.1(d)*). Attorneys practicing in federal district court also should consult the district court's local rules, which may impose similar requirements for citing to unpublished decisions (see, for example, *S.D.N.Y. and E.D.N.Y. L. Civ. R. 7.2*).

MOVING TO CONVERT AN UNPUBLISHED OPINION

Significantly, FRAP 32.1 applies only to the citation of unpublished opinions. For example, it does not impose any restrictions on a circuit court's ability to issue unpublished opinions, the procedure for a circuit court to determine whether an opinion should be binding case law or the effect a court must give to an unpublished opinion it or another court has issued (see *2006 Advisory Committee Notes to FRAP 32.1*). Indeed, federal appellate courts continue to issue unpublished opinions as a matter of course.

Although the majority of federal appellate opinions are unpublished, counsel should keep in mind that both parties and non-parties may be permitted to file a motion with the issuing circuit court to convert an unpublished decision into binding precedent (see, for example, *5th Cir. R. 47.5.2*; *7th Cir. R. 32.1(c)* (allowing "any person" to make the motion); *9th Cir. R. 36-4*; *11th Cir. R. 36-3*; *SEC v. Monterosso, 756 F.3d 1326, 1329 (11th Cir. 2014)* (granting the SEC's motion to publish a previously unpublished opinion)). These motions are most often filed by a prevailing party hoping to expand the application of its victory outside the context of a specific case, such as when a defendant successfully obtains a denial of a motion for class certification in a class action lawsuit. Counsel also may consider filing a motion to publish an unpublished opinion on behalf of a non-party client whose interests are affected by, and who may benefit from, the rulings in a decision.

For this type of motion, counsel should:

- Review the applicable standards under which the relevant circuit court issues binding precedent. The criteria for publication among the circuits vary (see, for example, *4th Cir. R. 36(a)*; *5th Cir. R. 47.5*; *9th Cir. R. 36-2*).
- Describe in the motion why the circuit's applicable standard has been met or why publication is appropriate.
- Include any additional reasons why the circuit court should treat the opinion as precedential.
- Follow the circuit court's procedures for filing this specific type of request (see, for example, *9th Cir. R. 36-4* (allowing request for publication by letter to the court); *11th Cir. R. 36-3, IOP 6* (requiring that motions for publication comply with FRAP 27)).

Where a published decision is unfavorable to a client, counsel also may consider asking a circuit court to convert the decision into an unpublished opinion, although these motions are rarely filed.