Ignorance of the Sausage

Wednesday, September 23rd, 2009

As the First District Court of the State of California has noted in a case certified for partial publication — the irony of this will soon become apparent —

> It is commonly said that ignorance of the law is no excuse. (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1661 [82 Cal.Rptr.3d 100].)

It is also commonly said that sausage and legislation are two things you don't want to see being made.

Although I doubt he had the protection of your sensibilities in mind, the Roman Emperor Caligula developed a unique plan to hide the law from the people who were, nevertheless, held accountable for it:

> [G]reat grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it. (Seutonius, "Gaius Caesar Caligula" from *The Lives of the Twelve Caesars*, XLI, p. 280.)

California courts have found a better way.

In California, as everywhere else in the United States except (to my knowledge) Louisiana, courts are partly responsible for the creation of law. We call the particular type of law the courts create "case law" or, sometimes, "common law." The foundation of this "common law" system is a concept known as *stare decisis*, which means "the court will do whatever it wants; how dare you ask us why we do what we do!"

No, actually *stare decisis* is a portion of the Latin phrase "*Stare decisis et non quieta movere*," which means "Maintain what has been decided and do not alter that which has been established."

The idea behind *stare decisis* in the law is that — contrary to what Caligula thought — people should be able to know what the law is, since they will be held accountable for it. *Stare decisis* is the doctrine that underlies the common law inherited through the centuries in our system. When a decision is made by a court, the rule (the "holding") of a particular case becomes the definite understanding of the law going forward.

Stare decisis and the common law are a little more complicated than this, but for what I'm trying to explain here, this is a good enough explanation. *Stare decisis* is what brings predictability to the law and allows our society to, among other things, entertain the fiction that everyone should know the law — after all, it's *published* and once published it's not supposed to *change* (at least not overnight) — and thus everyone can properly be held accountable. Thus it provides the justification for the statement that "ignorance of the law is no excuse."

However, as I noted above, California courts —in fairness, they aren't the only courts to do this — have found a better way to torment the people than the approach favored by Caligula. And, in fact, this move is why now the new translation for *stare decisis* might rightly be "the court will do whatever it wants; how dare you ask us why

we do what we do!"

The new approach is this: The court has put the new case law right out there where everyone can see it, but they have created a "Rule of Court" that labels certain cases as "unpublished" and stated that no attorney or judge may cite an unpublished case as precedent. Some have gone farther than to argue no attorney may cite an unpublished case; some have suggested that any attorney who does should be held in contempt of court. (Milton J. Silverman, "The Unpublished Opinion in California" (1976) 51 California State Bar Journal 33, 33; *see Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155.)

But as Silverman notes,

> [T]his practice poses a continuing hazard to certain essential features of democracy. For the written rule of law has proved a formidable weapon in the arsenal of democracy. Where unwritten law has flourished, tyranny has prevailed. (Silverman, *supra*, 51 Cal.St.B.J. at 33.)

I ran smack into this problem recently when a judge noted — *and let me be clear that I will neither name the judge nor provide any other information about the case because a) I'm not looking for a fight, or any other trouble, and b) as I hope this article will show, I actually sympathize with the judge on this one* — that he was "not" relying on two unpublished cases, one of which was directly on point, when he gave a tentative ruling.

The problem is that there were *no* published cases anyone could cite that stated the rule the unpublished cases stated. And one of those unpublished cases was exactly like the case being considered by the judge. And the unpublished case was from the appellate court in our district. All of which made it very tempting for the judge, who was tentatively indicating he was going to make a decision that matched the unpublished case perfectly, to rely upon the unpublished case as precedent.

Again, I want to be crystal clear about something: I am *not* writing this article to "pick a fight" with that judge. I happen to think the judge *should* be able to cite the unpublished case as precedent. That there is a Rule of Court saying we cannot do this is, in my opinion, wrong. That's why I wrote this article.

I want to be clear that I'm not "calling out" this judge because I have recently learned that some judges do read my blog. At least when they are researching some topic on which I've written and Google coughs up one of my articles.

There is a problem with this (my viewpoint), though. The California rule about unpublished cases has been around a long time. Because of that, there are some significant problems that could develop if this rule were relaxed or changed.

See, there are a lot of unpublished opinions — such as the ones the judge is (not) relying on for his tentative ruling — which contradict *published* opinions. *Published* opinions *are* citable as precedent.

The reasons for this problem are myriad. Partly it's because "the unpublished opinion is, by definition, supposed to be shorter and less polished than a formally published opinion." (Joshua R. Mandell, "Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions" (2001) 34 Loyola of Los Angeles Law Review 1255, 1266.) Furthermore, "a system that allows selective publication of opinions allows courts to depart from prior decisions for no reason whatsoever." (Johanna S. Schiavoni, "Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions" (2002) 49 UCLA L. Rev. 1859, 1868.)

> If judges had the legislative power to 'depart from' established legal principles [*stare decisis*], 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions….' (Schiavoni, *supra*, 49 UCLA L. Rev. at 1869.)

And guess what? Or, should I say, "Surprise!" This actually happens.

> [Ninth Circuit Court Judge] Kozinski points out that trying to parse an unpublished opinion to determine the thinking of judges is futile because most likely, the judges have had little if anything to

> do with the opinion. Holding the judiciary responsible for writing an opinion that is reasoned according to law just because three judges signed it is, to him, unreasonable. Startled by the candor, the Federal Judicial Center (hereinafter the FJC) issued a press release *to disclose (belatedly) the judiciary's delegation of most decision-making to non-judicial staff.* (Kenneth J. Schmier and Michael K. Schmier, "Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?" (2005) 7 J.L. & Soc. Challenges 233, 245, emphasis added.)

In other words, sometimes "judges dictate right results to be supported by clerk-drawn opinions…resulting in legal analysis that often falls short of its conclusions." (Schmier and Schmier, *supra,* 7 J.L. & Soc. Challenges at 246.)

Finally, at least as far back as 1973, "[o]ne other source of concern" was noted:

> Certification for non-publication has of late become a technique whereby the Supreme Court can get rid of what it apparently deems to be erroneous or otherwise improvident decisions of the Court of Appeal. (Gideon Kanner, "The Unpublished Appellate Opinion: Friend or Foe?" (1973) 48 Cal.St.B.J. 386, 391.)

When the original California rule creating "unpublished opinions" and making them uncitable was created, the rationale was that cases were ballooning out of control. At the rate they were going, not even a superhuman attorney could expect to keep current on the law; there were just too many new cases.

But here's a dirty little secret: If "keeping current on the law" means "reading new opinions as they're published," *I do not know of a single attorney or judge who keeps current on the law*. That's just not how we "do law" today — if it ever was.

Sure, we try to "keep up with" the most important cases. But the reality is that no judge, no attorney, has the time to read every new opinion that is published, even though from 2000 to 2008 more than 81 percent of federal appellate opinions were unpublished (with the Fourth Circuit Court of Appeal leading the charge at 92 percent) and, in 2002, 93 percent of California opinions were unpublished. (Aaron S. Bayer, "Unpublished appellate opinions are still commonplace" (August 24, 2009) The National Law Journal 14; The Third Branch, "Congress/Courts Study Use of Unpublished Opinions (2002) available at http://www.uscourts.gov/ttb/july02ttb/unpublished.html.)

When lawyers write briefs, or judges write opinions, we utilize search engines to help us find cases relevant to the issues. Lawyers, we hope, — we really, really hope — are a little more inclined than judges to do things this way, but what we do is plug terms into search engines that we hope are going to help us find cases that support our point of view. If we actually *read* the cases, we're bound to find out "what the law is" even with this slanted approach.

(But here's another nasty secret: One of my favorite things to see in a prosecution brief is a quote that starts with, ends with, or contains an ellipsis ("…"). Why? Because I know that means they left something out. And although this is a perfectly acceptable way to save a reader's time by deleting *irrelevant* content, I learned a long time ago that prosecutors will use it to delete content that goes contrary to their position, because they expect that no one is going to go look for the source and discover the misleading nature of the quote. I can't tell you how enjoyable it is in my Reply Brief to re-quote the section, adding in the material elided by the prosecution.)

Whatever justification may have existed in the days preceding contemporary database and search engine technology is long gone.

> Requiring judges to provide principled reasons for their decisions separates the judicial function from the legislative. The fact that opinions are available for scrutiny by the public and by other members of the bar and the judiciary increases the accountability of the judges on a decisionmaking panel Additionally, by articulating their reasoning, judges inform the parties of the reasons for the result in the case. The practice increases the legitimacy of the entire judicial system in the eyes not only of the litigants, but also of the general public. In contrast, when cases are decided without oral argument or a published opinion (or without either, which commonly occurs) the "parties have little

> assurance that the judges have paid attention to their case." A system of universal publication and citation would ensure that judges provide reasons for their decisions and thus reassure litigants that their cases are adequately adjudicated. (Schiavoni, *supra,* 49 UCLA L. Rev. at 1882.)

Equally importantly, it would encourage consistency in decisionmaking. It would put some teeth back into *stare decisis*. It would eliminate situations like the one that brought this issue to my attention in the first place: there would be no "unpublished" opinions around to contradict published opinions. Contradictory opinions would have to be explained with explicit statements that prior law had been overruled and no opportunity to whipshaw back and forth depending upon the judicially-desired result.

Then the next time someone tried to feed me a bit of case law I don't like, at least I'd have some faith that it was properly made.

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One Response to "Ignorance of the Sausage"

1. *Kenneth Schmier* Says:
   September 29th, 2009 at 6:07 pm

   Excellent statement of many of our concerns and objectives.

   I also want to tell you that we have on appeal our suit in the District Court for Northern California challenging the California no-citation rule. We sought an injunction against the rule as a prior restraint of speech, in the circumstance where the speech was attribution of three relevant, consistent, appellate court decisions by an attorney in the manner of citation of relevant precedent, that, if citable, would compel exoneration of the client defendant. See http://www.nonpublication.com/svsc for pleadings.

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