

## MEMORANDUM

TO: WSBA Court Rules and Procedures Committee

FROM: Roger Wynne, Convenor, Task Force on the Citation of Unpublished Opinions

SUBJECT: Proposed amendment to **RAP 10.4(h)** to allow citation to unpublished opinions;  
Task Force’s findings and recommendations

DATE: December 15, 2003

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## **I. Introduction**

In an October 30, 2003, memorandum, Justice Charles Johnson requested the WSBA's comments on a proposal to amend RAP 10.4(h) as follows:

A party may not cite as an authority an unpublished opinion of the Court of Appeals. {+A party may cite an unpublished opinion for guidance, and must include a copy of the unpublished opinion as an appendix to any brief served upon other parties.+} Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

The Court Rules and Procedures Committee appointed a Task Force to consider the question. Members of the task force are Jerry Boyd, William Crittenden, David Estudillo, William Knudsen, Hon. Christine Quinn-Brintnall, and Diego Vargas. I serve as the convenor of this esteemed group. The members who participated in the e-mail and formal discussions that developed the recommendations in this memo were, in addition to myself, Judge Quinn-Brintnall and Messrs. Boyd, Crittenden, Estudillo, and Knudsen.

This memo is my attempt to capture what we collectively learned and discussed.

## **II. Recommendation to the Committee.**

Given the relatively short timeframe in which to prepare comments, the Task Force recommends that the Committee **not** attempt to resolve every issue raised by the proposal. Instead, the Task Force recommends that the Committee recommend that the Board of Governors present the Court comments on three primary questions:

1. As a threshold matter of timing, should the Supreme Court act on this proposal before: (a) RCW 2.06.040 is amended; or (b) the federal courts resolve a similar proposal for federal circuit courts of appeal?
2. As a matter of policy, is this proposal the right course of action?
3. If the Supreme Court pursues this proposal, what other issues should the Court consider?

For comments on each of these questions, the Task Force recommends following the format used below—a presentation of arguments for and against a particular outcome and, where possible, a report on whether consensus was reached on the issue and, if not, the extent to which opinions were split.

The Task Force also recommends that the Board of Governors transmit to the Supreme Court the resources for further research contained in the Appendix.

### III. Threshold timing issues.

#### A. Should the Supreme Court act on this proposal before RCW 2.06.040 is amended?

The federal practice of issuing unpublished opinions stems from a 1964 U.S. Judicial Conference recommendation. Although the current practice in Washington also arose in the 1960s, it stems from the statute that created the Courts of Appeal:

In the determination of causes all decisions of the court shall be given in writing and the grounds of the decisions shall be stated. All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published.

RCW 2.06.040.

Arguments **in favor** of the Supreme Court acting to allowing citation to unpublished opinions before RCW 2.06.040 is amended include:

- Wash. Const. Art. IV, §§ 30(1) and (5) provide:
  - (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute....
  - (5) Administration and Procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

Subsection (5) exclusively authorizes the Supreme Court to provide for the administration and procedures of the Courts of Appeal. Arguably, the citation of unpublished opinions is within this exclusive prerogative. By contrast, Subsection (1) seems to limit the Legislature's role to establishing the jurisdiction of the Courts of Appeal.

- Wash. Const. Art. IV, § 21 states: "The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person." This could be read to imply that opinions of the Courts of Appeal should also be published.
- RCW 2.04.200 provides: "When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." Washington courts have frequently relied on this statute to follow court rules that conflict with statutes that appear to dictate

court procedure. Through this statute, the Legislature has already consented to the Supreme Court developing its own rules that might conflict with existing statutes.

Arguments **against** of the Supreme Court acting to allowing citation to unpublished opinions before RCW 2.06.040 is amended include:

- RAP 10.4's prohibition against citing unpublished decisions derives from this statute.
- "Guidance" is just another form of precedent. See, e.g., Black's Law Dictionary at 612 (5th Ed. Abridged 1983) ("precedent" includes: "A course of conduct once followed which may serve as a guide for future conduct."). If a panel determines that an opinion lacks "precedential value" under this statute, it should have no value as "guidance."
- The *status quo* has been in existence for more than 30 years, so there should be no rush.
- Especially considering the bold change that would be ushered in by the proposal, it would be best to work deliberately and cooperatively with the Legislature.
- Wash. Const. Art. IV, § 30 (5) and RCW 2.04.200 (discussed above) should be used to allow only procedural court rules to nullify statutes. The proposal to allow citation to unpublished opinions as guidance should not be deemed procedural.
- Wash. Const. Art. IV, § 21 (discussed above) deals only with opinions of the Supreme Court. Extending it to include opinions of the Courts of Appeal would make as much sense as extending it to include Superior Courts.
- As a matter of comity between the judicial and legislative branches—even if not necessarily as a matter of separation of powers—the Supreme Court should seek amendment of the statute before adopting a contrary rule.

**Recommendation:** Task Force members agreed that the Supreme Court should pursue this or a similar proposal only in cooperation with the Legislature as part of an amendment to RCW 2.06.040.

**B. Should the Washington Supreme Court act on this proposal before the federal courts resolve a proposal that would allow the citation of unpublished opinions in all federal circuit courts of appeal?**

On August 15, 2003, the U.S. Judicial Conference's Advisory Committee on Appellate Rules published for comment the following proposed addition of Appellate Rule 32.1:

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for FEDERAL RULES OF APPELLATE PROCEDURE publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

This amendment would force a change in the minority of circuits (including the 9th Circuit) where courts currently prohibit citation to unpublished opinions.

After the comment period closes on February 16, 2004, the Advisory Committee will forward a proposal to a standing committee of the Judicial Conference. If the full Judicial Conference and the U.S. Supreme Court approve the amendment, it will take effect unless Congress changes or rejects it. This process could still take more than a year to complete.

Arguments **in favor** of proceeding without waiting for resolution of the proposed federal rule include:

- Washington need not follow federal rules precisely and should do what it deems most appropriate.
- Despite the absence of a federal rule, other states already have rules that allow for the citation of unpublished opinions.

Arguments **against** proceeding without waiting for resolution of the proposed federal rule include:

- The 9th Circuit, although in the minority, currently bars citation to unpublished opinions. Even if the federal courts ultimately decide to allow citation to unpublished opinions, it would be best to hold off on any change in

Washington's rule until that outcome is clear. This would avoid the risk placing Washington lawyers in the situation of having to follow different rules in state and federal courts in Washington.

- Washington will benefit from the arguments made for and against the proposed federal rule.

**Recommendation:** The Task Force agreed that this timing issue is less important than the question of waiting to amend RCW 2.06.040. Even though the Task Force agreed that valuable lessons might be learned from the federal process, no Task Force member voiced a strong opinion against Washington acting independently of the federal courts.

#### **IV. As a matter of policy, is the proposal the right course of action?**

Task Force members informally polled other WSBA members about the proposal. It is fair to say that this is a very contentious issue. The Supreme Court should expect a strong reaction from both sides of this debate if the Court formally proposes an amendment like this.

Many of the arguments outlined here were culled from attorneys and judges who responded to inquiries about the merits of the proposal. Please note that citations to and summaries of case law are reproduced here as they were presented by those who responded to inquires. No effort has been made to verify the citations or the summaries.

**As a threshold matter**, some Task Force members were concerned that the central policy issue raised by the proposal may not be framed properly. By its nature, posing the question as whether counsel should be "allowed to cite unpublished opinions" might evoke a reaction to a potential gag order—of course, attorneys do not want to be told that they may not utter certain words. The concerned Task Force members felt that, instead, the focus of the debate should remain on whether Courts of Appeal should continue to have the authority to identify only certain rulings as having precedential value. The Task Force agreed with a suggestion that the Courts of Appeal should adopt a practice of citing not simply RCW 2.06.040 when deeming an opinion "unpublished," but should also state that the opinion "lacks precedential value."

Arguments **in favor** of the proposal to amend RAP 10.4(h) as a matter of policy include:

- Allowing citation to all opinions comports with a common law system, in which the prior opinions of all appellate courts are useful.
- Under this proposal, courts remain free to accord as much weight as they deem appropriate to an unpublished opinion. This is just like the manner in which trial judges treat evidence—they may simply ignore that which they do not deem significant.

- It is important to keep this in perspective. Unpublished decisions are only a small part of the universe of materials already consulted and cited when preparing an appellate brief.
- It is difficult to justify a rule that allows citation to practically every other word in existence—whether that word appears in a law review article, a newspaper, or the Bible—but not to words in unpublished opinions. Judges will be able to separate wheat from chaff.
- There are frequently times when the only on-point opinion is unpublished. Attorneys know that the judges and their clerks have likely come across the same opinion. Attorneys should be able to explain their view of that opinion to the court.
- An unpublished opinion that is factually identical to the case at bar can be useful where no published opinion is factually on point.
- Citations to unpublished opinions can be useful to demonstrate that a well-settled principle is still good law.
- This will not cause a flood of citations to unpublished decisions. Attorneys will not serve their cause by attempting to persuade a court to follow conflicting, unpublished opinion over published, binding opinions or by citing unpublished decisions for a proposition stated adequately by a published one.
- If unpublished opinions, essentially by definition, add nothing new, there can be no harm in citing them.
- Unpublished opinions are accessible to all attorneys with access to computerized research. To meet basic standards of practice, all attorneys should ensure that they have such access. Judges and clerks also have this access.
- The choice should be up to the practitioner to at least inform the court of the existence of an unpublished opinion. Attorneys should not continue to face sanctions for doing this.
- This amendment would force courts to accept responsibility for the decisions they make. If an opinion is good enough for the parties to the case, it should be good enough for other parties.
- This amendment will improve the quality of decisions. It will expand the sources of insight and information that can be brought to the attention of judges and will make the process more transparent. A second-class body of “shadow” law should not exist. Under the proposed rule, judges will know that the decision—even if memorialized in an unpublished decision—will receive

discussion and commentary when used in later proceedings. This will sharpen the level of focus and, consequently, judicial decision making may be improved.

- Some unpublished decisions are written very well and inform the debate regarding the legal principles involved. This, in turn, helps direct and focus attorneys' and judges' attention on those principles.
- Judges and clerks are not infallible when deciding which opinions should be published. Note, for example, the rate at which Courts of Appeal publish opinions only after a party moves for publication.
- The majority of federal circuits already allow citations to unpublished opinions, apparently without ill effect. They have not been overwhelmed with such citations.
- Other states—reportedly including at least Texas, Ohio, and Delaware—allow citations to unpublished opinions, likewise apparently without ill effect.

Arguments **against** the proposal as a matter of policy include:

- Unpublished opinions are unpublished for a reason. RAP 12.3(d) provides: ‘In determining whether the opinion will be published in the Washington Appellate Reports, the panel will use at least the following criteria: (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance; or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.’ See also State v. Fitzpatrick, 5 Wn. App. 661, 491 P.2d 262 (1971). When the court decides not to publish an opinion, it has by that act told the world that it does not think the opinion is useful as precedent.
- The quality of unpublished opinions is generally lower than that of published opinions. The quality of briefing on both sides of a case is often exceptionally poor, facing judges with the choice of either essentially researching, arguing, and deciding the case on their own, or making the best judgment they can without the confidence that the issues have been presented well. It may be that there was a strong reason to decide a particular case a certain way, but the legal principle used to reach that outcome may not have been applied as carefully. The court may not have thought through the issues—or at least through the explanation of the resolution of those issues—as carefully as with published opinions. We should expect such results from overburdened courts. Judges tend to rely on their clerks more heavily for statements of fact, and attorneys are notorious for slanting facts, so the presentation of facts (which seems to be the primary focus of those who want to cite unpublished opinions) is often the weaker part of opinions, especially those the judges know are non-precedential.

Especially for unpublished opinions issued under the current rule, courts have not had an incentive to polish unpublished opinions to withstand the test of future citation as authority.

- The Courts of Appeal do not have the option—invoked in the vast majority of cases by the Supreme Court—of simply declining to review cases that are presented poorly, based on unfortunate facts, or unlikely to result in any new law. The option of deeming certain opinions non-precedential is the only recourse left to the Courts of Appeals. (It is interesting to note that the Courts of Appeal decide to publish their opinions essentially as frequently as the Supreme Court decides to accept review—in roughly 15% of cases.) By allowing citation to non-precedential opinions, even if for “guidance,” this valuable tool will effectively be denied the Courts of Appeal.
- Arguing that judges will be able sort out what unpublished opinions are worthy of some precedential value overlooks that judges have already decided that such opinions, by definition, lack precedential value. The only real motivation for citing an unpublished opinion is to force or tempt judges into acting consistently with something that has already been deemed void of precedential value.
- If an attorney feels that a decision should have been published, that party has the option of moving the court to publish it. Although the rules are not clear on this point, it at least seems plausible for an attorney in a different case, years after an unpublished decision was rendered in the earlier case, to move to have that decision published. (If the Supreme Court wants to encourage this option, it may want to amend the rules to make the option more explicit.)
- Respecting a panel’s determination that an opinion lacks precedential value increases the quality of published opinions by allowing judges to take greater care with cases that involve new or important questions of law.
- The volume of unpublished decisions is enormous. Based on the Court web site and just taking the decisions issued Nov. 10 – 24, 2003, 85% were unpublished (103 out of 121). Published case law is confusing and voluminous enough to keep up with, particularly for those attorneys who are not specialists.
- More law is not necessarily better law. Long string cites are generally not effective or particularly useful. Inviting citations to unpublished decisions will merely force opponents and judges to wade through both wheat and chaff.
- Because of the enormity of unpublished case law, those opinions will generally be relevant only because of a particular factual situation. This will reward those with the capacity and resources to search for the details of facts rather than principles of law. It would be a burden for our appellate courts to have to deal

with the morass of minute factual distinctions found in the uncategorized assortment of unpublished opinions.

- By allowing citation to unpublished opinions, the Court would be inappropriately placing attorneys in danger of malpractice claims. Despite the barriers to researching the full universe of unpublished decisions, some disgruntled client will eventually hit upon the fact that their attorney failed to cite, or even to thoroughly search for, an opinion that the client will assert would have “guided” the court their way.
- Currently, most unpublished Washington opinions are **not** available on-line. Garnering a precise answer from Westlaw and Lexis was not possible under these circumstances, but it appears that full coverage of unpublished Washington appellate opinions did not begin prior to 1996 at the earliest. Only litigants with untold hours (and unlimited resources) to go to the appellate courts and randomly review uncategorized unpublished opinions would be able to cite to opinions not found on line. Furthermore, a practitioner specializing in a particular area of law could conceivably collect older unpublished decisions, placing himself or herself in position of advantage.
- Although West is currently making an effort to publish “unpublished” federal decisions (creating a bit of an oxymoron) through *West's Appendix*, there is no plan to do so with Washington opinions.
- Even for opinions available on-line, researching such decisions will be difficult. “Shepardizing” or “Key Citing” unpublished opinions may not be possible, even on line, so attorneys and courts may not be able to determine if a later decision reached a contrary result. Unpublished decisions will not have headnotes, which are very useful for research. Unpublished opinions are generally not covered in treatises. In short, the only way to research most unpublished Washington opinions will be by conducting boolean-based searches on-line. This will favor those who can afford Lexis or Westlaw and the time to use it.
- This proposal would limit access to justice. Only those who can afford an on-line service will be able to research this body of case law. *Pro se* litigants are generally limited to published opinions. Although on-line research may offer the promise of more efficient use of time, this proposal will have the ironic result of increasing costs by requiring advocates to find, discuss, and distinguish a significantly expanded universe of potentially relevant precedent.
- This proposal could slow the administration of justice. It could force the Courts of Appeal to spend more time on opinions that would be more effectively spent on opinions that will serve as binding precedent. Panels may not be able to issue unanimous opinions as often because one judge, fearing use of an unpublished opinion later, will feel compelled to author a separate opinion.

Counsel may move more frequently for reconsideration or even review by the Supreme Court to fix minor flaws that now may simply be left to linger in an unpublished opinion. This could increase the Supreme Court's case load.

- Instead of (or perhaps in addition to) slowing the administration of justice, this proposal might tempt the Courts of Appeal to issue summary dispositions (notwithstanding the command of RCW 2.06.040 that "the grounds of the decisions shall be stated"). Although this may be an accepted practice in some states (including, reportedly, Oregon), this would disserve the parties to that dispute and would leave the Supreme Court less able to assess petitions for review.
- This amendment may be unnecessary, because counsel may cite unpublished opinions in oral argument and in other situations. For example, an attorney may call a trial court's attention to an unpublished opinion as "guidance" during oral argument. See State v. Golden, 112 Wn. App. 68, 80-81 (Div. III 2002). The Supreme Court has cited unpublished opinions to show that no split of authority exists between jurisdictions. State v. Barnes, 146 Wn.2d 74, 80 n.34 (2000). It has also cited an unpublished opinion for factual background in the same or a related case. Broad v. Mannesmann Anlagenbau, A.G., 141 Wn.2d 670, 683 (2000). Accord State v. Nolan, 98 Wn. App. 75, 78 n.1 (Div. I 1999) ("[A]n unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties").
- This amendment is unnecessary because there is nothing that stops counsel from researching unpublished opinions and simply lifting the winning arguments from the most favorable decisions. For those attorneys who spot a contrary, unpublished opinion and are concerned that a judge or clerk has also spotted it, those attorneys may simply set up and knock down a "strawman" argument lifted from that opinion. This allows an unpublished opinion, stated through counsel, to "guide" future courts without forcing those courts to resolve the question of precedential value.

**Recommendation:** Based only on informal and unscientific polling, Task Force members found that roughly 2 out of 3 attorneys and judges contacted opposed the proposal as a matter of policy. This ratio was fairly consistent among attorneys and among judges, polled as separate groups.

Opinion among the Task Force members who participated in our discussion reflected this rough proportion: four out of the five believed that the proposal was not the right course of action as a matter of policy.

The diversity of opinion on this issue underscores the Task Force's recommendation that the Supreme Court solicit a wide range of opinions on the policy of

allowing citation of unpublished opinions as part of any formal proposal to amend RAP 10.4(h).

**V. If the Supreme Court pursues this proposal, what other issues should the Court consider?**

The Task Force identified a number of issues that should be addressed if the Supreme Court were to pursue a proposal to allow the citation of unpublished opinions. There was no attempt to reach consensus or take a vote on how a particular issue should be resolved.

Many of the comments received by Task Force members dealt with the specific language of the proposal. The Task Force recommends that the Court solicit a wide range of suggestions on how best to phrase any amendment to RAP 10.4(h).

What follows is a list of some of the issues identified by the Task Force, relying heavily on input from other WSBA members. Please note that, as elsewhere in this memo, no attempt has been made to verify the accuracy of the citations or case summaries presented in this section of the memo.

**A. Should “guidance” be defined or should another term be used?**

- A significant number of attorneys expressed concern with the term “guidance.” Many felt it was a distinction without a difference, because courts will be reluctant to act inconsistently with their prior decisions once those decisions are pointed out to them by the parties.
- Even though “guidance” seems to prevent an opinion from serving as *binding* precedent, does it prevent the opinion from serving as *persuasive* precedent? Is some lesser status intended? Would “non-precedential” be a useful term?
- Note that the proposed federal rule intentionally says nothing about the weight or effect that a court must give to a cited, unpublished opinion.

**B. Is the term “opinions” appropriate?**

- Note that RAP 12.3(a)-(c) already provides several definitions of a variety of forms of decisions, including “decision terminating review,” “interlocutory decision,” and “ruling.” It does not define “opinion.”
- Are there any Court of Appeals decisions that would not be considered “opinions” that should be covered by this amendment? Conversely, are there decisions that might be considered “opinions” that should not be covered by this amendment?

**C. Should any change apply only prospectively?**

- Should opinions written with the expectation that they would not be cited serve even as guidance?
- But if such opinions are not binding, should that matter?

**D. If an amendment has retroactive effect, should it cover decisions issued before the period comprehensively covered by the on-line services?**

- To avoid the possibility of counsel citing decisions that are not readily available on-line (and thereby gaining an advantage over an opponent who is not as able to research old hard copies as readily), should a retroactive amendment extend back only to the periods comprehensively covered by the on-line services?
- Would attaching a copy of a decision cure any such problem?

**E. If an amendment is not fully retroactive, should there be an express exemption to allow the citation of older, unpublished decisions that establish the law of the case at bar?**

- Note that, currently, an unpublished opinion may be cited for factual background in the same or a related case. Broad v. Mannesmann Anlagenbau, A.G., 141 Wn.2d 670, 683 (2000). Accord State v. Nolan, 98 Wn. App. 75, 78 n.1 (1999) (“[A]n unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties”).
- Also note that the federal circuit for the District of Columbia allows citation to unpublished opinions for purposes of establishing *res judicata*, law of the case, or preclusive effect. See D.C. Cir. R. 28(c)(I)(B).

**F. Is attaching paper copies a good idea?**

- If an unpublished opinion is available on line, is it a good use of natural resources and file space to attach hard copies to briefs?
- Note that the proposed federal rule would require attaching a copy only if the opinion were not available in a publicly accessible electronic database.

**G. If copies are to be provided, should the rule be clarified about who is to receive those copies?**

- As proposed, the amendment would provide that a party “must include a copy of the unpublished opinion as an appendix to any brief **served upon**

**other parties.”** Should that also provide “...and filed with the Court” to avoid any doubt that that Court should receive a copy as well?

**H. Should an amendment expressly address opinions from other jurisdictions?**

- As written, the current rule could be read to include all decisions—published or unpublished—from other jurisdictions. Because none of them is “published in the Washington Appellate Reports,” all would be considered “unpublished opinions.”
- Courts have apparently not read this to prevent citation of **published**, non-Washington opinions. However, courts have not treated **unpublished**, non-Washington opinions consistently. For example, one court held that citation to an unpublished opinion from another state is not appropriate, *see, e.g., Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002), but another court invoked an unpublished federal district court opinion for its persuasive reasoning. *E.g., Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 678, 15 P.3d 115 (2000).

**I. Should unpublished opinions be identified in a brief by something other than the absence of a reporter cite?**

- Although the absence of a reporter cite may be sufficient to identify the opinion as unpublished in the first instance, would that be sufficient if later citations in the same brief were simply to the name of the case?
- Note that the federal rule would not prohibit local circuits from requiring unique fonts or formats for identifying unpublished opinions.

**J. Would Superior Court rules also have to be amended?**

- Note that there is apparently a split, at least between Divisions I and II, on the issue of whether counsel may cite unpublished opinions at the trial court level. Division I apparently allows it, but Division II does not.
- Would the Supreme Court intend to allow counsel to cite unpublished opinions in Superior Courts as in Courts of Appeal? If so, should the rules of Superior Court be amended to reflect any amendment to RAP 10.4(h)? Would an amendment to the General Rules be sensible?

**VI. Appendix**

The following resources are included as an aid to further research. Where available, hyperlinks are provided to allow access from this document (in its electronic format) to resources available on the Internet.

**A. Text of 3 Orland and Tegland, WASH. PRACTICE RAP 10.4 at 290 (1998) and at 71-75 (Supp. 2003)**

at 290 (1988):

Subdivision (h) states that a party may not cite as authority an unpublished opinion of the Court of Appeals. This provision was added in 1985 and was designed to codify statements in cases such as State v. Fitzpatrick, 5 Wn. App. 661, 491 P.2d 262 (1971).

Interestingly, the rule does not address the question of whether it is proper to cite unpublished cases from other jurisdictions—cases such as federal decisions that are not included in the National Reporter System. For that matter, the rule does not define “published.” Is a decision “published” if it is not included in the National Reporter System but is reported on the Internet or in a professional newsletter?

These questions rarely arose before computerized services such as WESTLAW ® were available. Now, however, one can obtain a wealth of case law that is available only from the computerized service, either because it is too new to be in the National Reporter System, or because it is a trial court decision that never will be in the National Reporter System. Certainly nothing in RAP 10.4 prevents citations to such authority, and as computerized legal research has become more popular, the practice of relying upon such authority has become correspondingly more popular.

This is not to say, however, that all such authority will be regarded as persuasive by a Washington court. It is admittedly exciting to find a case directly on point and only one week old, even if it is from an obscure trial court 3,000 miles away. And it is tempting to cite such a case as authoritative. Under some circumstances, a citation to the case may be justified, particularly if it seems to be the only case even remotely on point. Counsel, however, should not lose sight of the time-honored practice of relying upon Washington case law, even when it is not directly on point. Many, if not most, judges still consider it to be more persuasive.

at 71-75 (Supp. 2003):

**Author’s Comments**

....

As mentioned in the main volume, RAP 10.4(h) states that a party may not cite as authority an unpublished opinion by the Court of Appeals. By implication, unpublished opinions have no precedential value, other than

to establish facts via the doctrine of res judicata or collateral estoppel. See, e.g., In re Davis, 95 Wn. App. 917, 977 P.2d 630 (1999).

In RAP 10.4(h), which already prohibited the use of unpublished opinions as authority, a new sentence was added in 1998 as follows: “Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.”

According to the drafters’ comments, the purpose of the amendment is to make it clear that an opinion that is published by an unofficial publisher—on the Internet or otherwise—is not considered a published opinion for purposes of the Rules of Appellate Procedure unless it is also [\*72] published in the official Washington Appellate Reports. A more detailed history of the 1998 amendments is set forth under heading 10, below.

Division 3 has held that unpublished opinions from any jurisdiction, including jurisdictions outside Washington, should not be cited in appellate briefs. Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002).

The Eighth Circuit initially held a similar federal rule to be unconstitutional. In Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), the court held that unpublished opinions by the federal appellate courts must be given precedential value. Otherwise, the court said, the appellate courts—by deciding which opinions to publish—would have complete discretion to determine which opinions would bind the courts in future cases and which would not. This result, the court held, violates the constitutional provisions defining the authority of the federal courts. The court made it clear that it was not saying all opinions should be published—only that unpublished opinions must be treated as precedent on issues of law. The opinion, however, was later vacated on rehearing. 235 F.3d 1054 (8th Cir. 2000).

## 10. History of RAP 10.4

1998 Amendments. As mentioned above, several changes were made in RAP 10.4 in 1998. The changes themselves are summarized under the appropriate headings directly above.

The amendments to RAP 10.4 were proposed by the Court Rules and Procedures Committee of the Washington State Bar Association. When the proposed amendments were first published for public comment, they were accompanied by the following drafters’ comment:

(1) Background: The amendments were developed by the judges and clerks of the Court of Appeals, and revised by the Court Rules and Procedures Committee. The purpose statement is based on that submitted by the judges and clerks. [The draft rule incorporates, in “redlined” format, changes that were published by the Supreme Court in March, but which were not submitted to the Committee for review.]

(2) Purpose: This rule governs the preparation and filing of briefs....

[...\*73]

Section (h) states a party may not cite as an authority an unpublished opinion of the Court of Appeals but does not define an unpublished opinion. Because both published and unpublished opinions are now available on-line through a variety of sources, including the Internet, it is necessary to define an unpublished opinion. The proposed amendment makes it clear that an unpublished opinion of the Court of Appeals is one not published in the Washington Appellate Reports. The exception refers to a proposed amendment to rule 12.3(f), which would allow the use of unpublished opinions to establish the law of the case or for purposes of res judicata or collateral estoppel. (See also the proposed amendment to rule 12.3(d), which sets forth criteria to be used in determining whether an opinion should be published.)

(3) Washington State Bar Association Action: The Board of Governors recommends the amendments.

(4) Supporting Materials: None.

(5) Spokesperson: Joel Delman, Chair, WSBA Court Rules and Procedures Committee.

(6) Hearing: Not recommended....

### **Law Reviews And Other Commentary**

Barnett, Stephen R., From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. App. Prac. & Process 1-26 (2002).

Kibbey, Thomas F., Standardizing the Rules Restricting Publication and Citation in the Federal Courts of Appeals, 63 Ohio St. L.J. 833-870 (2002).

Schiavoni, Johanna S., Who's Afraid of Precedent? The Debate Over the Precedential Value of Unpublished Opinions, 49 UCLA L. Rev. 1859-1893 (2002).

Tobias, Carl, Anastasoff, Unpublished Opinions, and Federal Appellate Justice..., 25 Harv. J.L. & Pub. Pol'y 1171-1184 (2002).

Snowden, Suzanne O., "That's My Holding and I'm Not Sticking to It!" Court Rules That Deprive Unpublished Opinions of Precedential Authority Distort the Common Law, 79 Wash. U. L.Q. 1253-1276 (2001).

Mason, Sebrina A., Citing Unpublished Opinions: The Eighth Circuit Holds It Violates the Constitution to Ignore the Precedential Value of Unpublished Opinions..., 26 S. Ill. U. L.J. 119-148 (2001).

Fredley, Steven A., Nonprecedential Precedent, Judicial Power, and Due Process: A Case For Maintaining the Status Quo...[\*74], 10 Geo. Mason L. Rev. 127-157 (2001).

Miller, William J., Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond..., 50 Drake L. Rev. 181-206 (2001).

Strongman, Jon A., Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional, 50 U. Kan. L. Rev. 195-223 (2001).

Mandell, Joshua R., Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions..., 34 Loy. L.A. L. Rev. 1255-1295 (2001).

Endter, Brian, Death, Taxes, and Unpublished Opinions: In the Wake of Anastasoff v. United States and Its Holding That Eighth Circuit Rule 28(A)(i) Unconstitutionally Expands the Judicial Power, 33 Ariz. St. L.J. 613-635 (2001).

Berg, Eron, Unpublished Decisions: Routine Cases or Shadow Precedents?, Wash. St. Bar News, Dec. 2000, 28-35.

Cohen, Gary J., The Dilemma: Lawyers Face the Issue of Whether or Not to Cite Unpublished Decisions, Washington Journal, 2/12/01, p. 6.

## Washington Decisions

....

Citations to out-of-state unpublished opinions are inappropriate. Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002).[\*75]

Sanctions against counsel for mortgagee were warranted in consumer protection action brought by mortgagors, where counsel cited and discussed at length an unpublished opinion in their appellate brief, which was in violation of appellate rule governing the preparation and filing of briefs. Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. 542, 13 P.3d 240 (2000).

Unpublished opinion upholding termination of parental rights to the oldest of five children of parents of child who was subject of instant termination of parental rights proceeding was properly attached to state's opening brief in termination proceeding, where fact that parental rights to those children were terminated was in record before trial court, and where state did not reference unpublished opinion for purpose of submitting additional evidence not in record before trial court, but to advise reviewing court of current status of that appeal. In re Dependency of A.S., 101 Wn. App. 60, 6 P.3d 11 (2000).

Unpublished Court of Appeals decision may not be cited as precedential authority on a point of law, but may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. State v. Nolan, 98 Wn. App. 75, 988 P.2d 473 (1999), affirmed 141 Wn.2d 620, 8 P.3d 300 (2000); State v. Acrey, 97 Wn. App. 784, 988 P.2d 17 (1999); In re Davis, 95 Wn. App. 917, 977 P.2d 630 (1999), affirmed 142 Wn.2d 165, 12 P.3d 603 (2000).

Unpublished opinions have no precedential value and may not be cited as authority. State v. Bays, 90 Wn. App. 731, 954 P.2d 301 (1998); In re Marriage of Schweitzer, 132 Wn.2d 318, 937 P.2d 1062 (1997).

### **B. Washington and 9th Circuit case law**

*The following citations and the summaries of them are reproduced here as they were presented by WSBA members who responded to inquires about the proposed rule amendment. No effort has been made to verify the citations or the summaries.*

- Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (rejecting the holding in Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), that banning citations to unpublished decisions is unconstitutional).

- State v. Fitzpatrick, 5 Wn. App. 661, 668, 491 P.2d 262 (1971):

“In enacting [RCW 2.06.040] the legislature recognized that opinions which do not have sufficient precedential value to affect the common law of our state should not be published. To continue the publication of cases which merely restate well established principles of the law fills up our book shelves, complicates legal research and will inevitably adversely affect the computerization of the case law of our state.

“We therefore hold that unpublished opinions of the Court of Appeals will not be considered in the Court of Appeals and should not be considered in the trial courts. They do not become a part of the common law of the State of Washington. If the trial courts were to consider them it would not only be wasteful of their time but would permit any group of lawyers to collect such opinions and create an unfair advantage by citing cases not available to their opponents.”

- State v. Nolan, 98 Wn. App. 75, 78 n.1 (1999) (“[A]n unpublished opinion may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties”).
- Broad v. Mannesmann Anlagenbau, A.G., 141 Wn.2d 670, 683 (2000) (citing an unpublished opinion for factual background in the same or a related case).
- State v. Barnes, 146 Wn.2d 74, 80 n.34 (2000) (citing unpublished opinions to show that no split of authority exists between jurisdictions).
- Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. 542, 548-49 (2000) (imposing \$500 sanction on counsel for citing an unpublished opinion).
- State v. Golden, 112 Wn. App. 68, 80-81 (2002) (an attorney may call a trial court’s attention to an unpublished opinion as “guidance” during oral argument; the rule only prohibits citing unpublished opinions as authority in a brief).
- Mann v. Hobbick, \_\_\_\_ WL \_\_\_\_, 112 Wn. App. 1032 (2002) (unpublished; sanctioning attorneys for violating RAP 10.4(h)).
- Kenneth Brooks Trust v. Pacific Media, 111 Wn. App. 393 (2002) (sanctioning attorneys for violating RAP 10.4(h)).

### C. Scholarly treatments and opinions

- Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. Appellate Practice & Process 1 (2002): <http://www.ualr.edu/~appj/barnett.html>
- American College of Trial Lawyers, OPINIONS HIDDEN, CITATIONS FORBIDDEN: A REPORT AND RECOMMENDATIONS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON THE PUBLICATION AND CITATION OF NONBINDING FEDERAL CIRCUIT COURT OPINIONS (March 2002): <http://www.actl.com/PDFs/Opinions.pdf>
- Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Div., REPORT TO THE HOUSE OF DELEGATES, Res. No. 01A115 (Aug. 1, 2001).
- Sheree L. K. Nitta, *The Price of Precedent: Anastasoff v. United States*, 23 U. Haw. L. Rev. 795, 805 (2001).
- Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 Journal of Appellate Practice and Process 219 (1999): <http://www.ualr.edu/~appj/ARNOLD.HTML>
- Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 184 (1999).
- Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Judge Martin*, 60 Ohio St. L.J. 2025, 2041 (1999).
- Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. Rev. 235, 242 (1998)
- American Judicature Society, HI Chapter (a useful collection of links to other sources): <http://www.nonpublication.com/EVENTS.HTML>

**D. U.S. Judicial Conference materials (reverse chronological order)**

- Committee on Rules of Practice and Procedure, Aug. 2003 notice of proposed rule, with comment period: <http://www.uscourts.gov/rules/memo0803.pdf>
- Advisory Committee on Appellate Rules; Minutes and Reports

May 2003 Report: <http://www.uscourts.gov/rules/app0803.pdf>

[This submits the text of the proposed rule for publication along with the Committee Comment. The relevant text is at pp. 27– 36 of the original attachment (pp. 30 – 39 of the .pdf file).]

May 2003 Minutes: <http://www.uscourts.gov/rules/Minutes/app0503.pdf>

[Relevant text at pp. 11-17.]

Nov. 2002 Minutes: <http://www.uscourts.gov/rules/Minutes/app1102.pdf>

[Relevant text at pp. 22-39.]

May 2002 Report: <http://www.uscourts.gov/rules/Reports/AP5-2002.pdf>

[Relevant text at pp. 3-4.]

April 2002 Minutes: <http://www.uscourts.gov/rules/Minutes/app0402.pdf>

[Relevant text at pp. 23-27.]

**E. House Judiciary Committee hearing materials (6/27/02)**

- Full transcript of the hearing on this topic:  
[http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0.HTM)
- Statement of Samuel A. Alito, Jr., judge of the United States Court of Appeals for the Third Circuit, appearing on behalf of the Judicial Conference of the United States: <http://www.house.gov/judiciary/alito062702.htm>

**F. Notice of proposed rule change in the 1st Circuit (9/27/02)**

<http://www.ca1.uscourts.gov/rules/rule32.pdf> (Note that this proposal reportedly generated very little comment and was adopted.)