

Anastasoff v. U.S.

The Continuing Controversy over the Precedential Effect of Unpublished Opinions

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Most practitioners are familiar with the local rules of the circuit courts of appeal that allow courts to determine which opinions are suitable for publication and prohibit citation to unpublished opinions as precedent. This system has been the subject of an ongoing debate, which recently escalated when a panel of the Eighth Circuit held that its local rule, which prohibited the use of unpublished opinions as precedent, was unconstitutional. See *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

Although *vacated*, *Anastasoff* breathed new life into a continuing controversy over the precedential effect of unpublished opinions, receiving national attention from the judiciary, legal commentators and practitioners. The debate will most likely continue until the Supreme Court addresses the issue. Until then, practitioners should be aware that although some courts may now be open to accepting unpublished opinions as precedent, they could also encounter resistance, or face the possibility of sanctions, if they challenge the constitutionality of these rules.

Non-precedential, Unpublished Opinions and No-citation Rules

The current system, which limits the publication of opinions and their precedential value, originates from the 1964 U.S. Judicial Conference. In response to the increased volume of cases and limited judicial resources, the conference recommended that courts of appeal and district courts limit the publication of opinions to those with

precedential value. *Judicial Conference of the United States*, Report 11 (1964). Despite this recommendation, limited publication standards were not generally accepted until almost a decade later, when a Federal Judicial Center commission issued a report on the standards for non-publication. *Judicial Conference of the United States*, Report 12 (1973). Today, all eleven circuit courts of appeal limit the publication of opinions and their precedential value. See Serfass, Melissa M. and Cranford, Jessie L., "Federal and State Court Rules Governing Publication and Citation of Opinions," 3 J. App. Prac. & Process, 251, 253-255 (Spring 2001).

Although each circuit has its own criteria, generally an opinion will be published if it (1) establishes a new rule of law, (2) relates to a legal issue of continuing legal interest, (3) creates a conflict with a decision of another circuit, (4) affects an existing rule, (5) applies an existing rule to a significantly different set of facts or (6) is a significant contribution to legal literature. See 4th Cir. R. 36(a); 5th Cir. R. 47.5.1; 6th Cir. R. 206(a); 8th Cir. R. App. I (4).

In addition to the criteria for publication, local rules of the circuit courts of appeal discourage, and sometimes even prohibit, citations to unpublished opinions. There are, however, exceptions that allow citations to establish the law of the case, *res judicata* or collateral estoppel. See 3d Cir. I.O.P. 5.8; 9th Cir. R. 36-3; 5th Cir. R. 47.5.3 and 47.5.4 (the Fifth Circuit rules divide unpublished opinions into two groups, allowing all unpublished opinions issued before Jan. 1, 1996, to be cited as precedent). Many of the Bankruptcy Appellate Panels have adopted similar rules. See 10th Cir. B.A.P. R. 8010-2; 9th Cir. B.A.P. R. 8013-1; 6th Cir. B.A.P. R. 8010-1.

A few of the circuits adopted a more expansive view, allowing the citation to unpublished opinions if counsel believes the opinion has precedential or persuasive value and there is no published opinion that would serve as well as the unpublished opinion. See 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(i).

The publication and non-precedential rules have had ardent critics and supporters since their inception. See Dragich, Martha J., "Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?," 44 Am. U. L. Rev. 757 (1995); Arnold, Richard S., "Unpublished Opinions, A Comment," 1 J. App. Prac. & Process 219 (Summer 1999); Kozinski, Alex, and Reinhardt, Stephen, "Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions," 20 Cal. Law. 43 (June 2000). The

Anastasoff opinion intensified the ongoing controversy, galvanizing the system's critics and supporters.

Anastasoff v. United States

Faye Anastasoff sought a refund for federal income tax and had three years to file a refund claim. See *Anastasoff*, 223 F.3d at 899. Although her claim was timely mailed, it was received one day late and the Internal Revenue Service (IRS) rejected her claim. *Id.* In response, Anastasoff argued that her claim was timely filed under the "mailbox rule" of the Internal Revenue Code. *Id.* *Anastasoff's* proposed interpretation had previously been rejected by the Eighth Circuit in a *per curiam*, unpublished opinion. On appeal, Anastasoff argued that the three-judge panel was not bound by the decision because it was not precedent under Eighth Circuit Rule 28A(i). The court disagreed, holding the portion of 28A(i) that declares unpublished opinions non-precedential and unconstitutional. *Id.*

Writing for the Eighth Circuit panel, Judge Richard S. Arnold explained the limits on the court's judicial power:

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time the nation was founded. The framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.

Id. at 899-900 (citations omitted).

The court emphasized that they were not addressing whether all opinions should be published, but whether "they ought to have precedential effect, whether published or not." *Id.* at 904.

Anticipating the criticism that would follow, the court stressed that the practicalities that favor the current system, the volume of appeals and overworked judges, cannot justify the courts ignoring the precedential effect of their opinions. The

rules are an unconstitutional expansion of the court's power because "rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they will not." *Id.* at 904.

The precedential effect of the *Anastasoff* opinion was itself short-lived. The Eighth Circuit granted *Anastasoff*'s petition for rehearing *en banc*, but found that the case was moot because the IRS abandoned its prior interpretation of the statute and agreed to give *Anastasoff* her full refund. As a result, the Eighth Circuit vacated the prior judgement. See *Anastasoff v. United States*, 235 F.3d 1054, 1055-56 (8th Cir. 2000). In doing so, the court stated that the issue of whether 28A(i) is unconstitutional remains an open question in the Eighth Circuit. *Id.* at 1056.

Reaction and Continuing Controversy

Although the *Anastasoff* opinion was vacated, district courts have cited the opinion to support their citation to unpublished opinions. See *McGuinness v. Pepe*, 150 F.Supp.2d 227 (D. Mass 2001), and to request review of the issue within their own circuits; see *Encore Video Inc. v. City of San Antonio*, 2000 WL 33348240 (W.D. Tex. Oct. 2, 2000) (stating that the unpublished-opinion issue is worth the consideration of the Fifth Circuit because of the similarities between the Fifth Circuit and Third Circuit Rules, a possible trend, and the fact that the court's decision could have been aided by unpublished opinions).

In addition, three Fifth Circuit judges recently dissented from a decision denying a petition for rehearing *en banc* because the case provided the court with an opportunity to "revisit the questionable practice of denying precedential status to unpublished opinions." See *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. June 26, 2001) (Smith, J., dissenting from denial of reh'g. *en banc*).

The *Williams* dissent aptly demonstrates the concerns raised by critics of non-precedential opinions. In a previous unpublished case, a Fifth Circuit panel affirmed a district court's determination that Dallas Area Rapid Transit (DART) was a political subdivision of the state of Texas and was therefore immune from suit. *Id.* at 260. Although the dissent agreed that the panel reached the correct result under Fifth Circuit law in holding that DART was not immune from suit, it was troubled that if the prior opinion had been published, it would have been binding on the *Williams* panel. The dissent also recognized that the court's decision placed DART's counsel in a

predicament, because he could have reasonably advised his client that it was immune from suit based on the prior ruling of another panel. *Id.*

A Ninth Circuit panel, however, recently rejected the argument that non-precedential opinions are unconstitutional. See *Hart v. Massanari*, 2001 WL 1111647 (9th Cir. Sept. 24, 2001). Authored by Judge Kozinski, the opinion did not surprise those that had read Judge Kozinski's article on the subject. See Kozinski, Alex and Reinhardt, Stephen, "Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions," 20 Cal. Law. 43 (June 2000) (distinguishing between unpublished opinions written for error correction and published opinions written to develop the circuit's law).

In *Hart*, the Ninth Circuit ordered counsel for the appellant to show cause why he should not be disciplined for citing an unpublished opinion in his opening brief, in violation of the Ninth Circuit's rule. Relying upon *Anastasoff*, the appellant argued that the rule might be unconstitutional. See *Hart*, 2001 WL at *1. Recognizing that the *Anastasoff* opinion could "seduce" members of the Ninth Circuit bar into violating its rules, the court wrote a compelling and lengthy opinion that

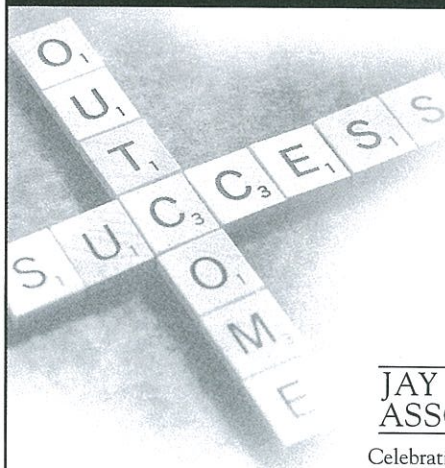
rejected the reasoning and practical implications of *Anastasoff*. *Id.* at *1. Fortunately for the appellant's counsel, the court determined that he had a good-faith basis to test the constitutionality of the rule and did not impose sanctions. *Id.* at *15; but, see *Dwyer v. J.I. Kislak Mortgage Corp.*, 12 P.3d 240, 244 (recognizing the existence of the *Anastasoff* opinion, but imposing sanctions on counsel for citing unpublished, non-precedential opinions in violation of that court's rule).

Conclusion

The continuing controversy over the precedential value of unpublished opinions will likely continue until the Supreme Court addresses the issue. Whether one agrees or disagrees with *Anastasoff*, the opinion has served a crucial purpose, focusing counsel and the judiciary on the need to reassess the validity of an experiment that began more than 20 years ago. The evaluation of this experiment must define and recognize the need for precedent while balancing the needs of an already overburdened judiciary. In the interim, practitioners should be aware that a good-faith basis might exist to argue that a favorable, unpublished opinion is precedent, but that some courts will be more receptive than others. ■

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