

The Scrivener: Modern Legal Writing



Not Selected for Official Publication

by K.K. DuVivier

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Hundreds of thousands of "unpublished opinions" are now available on electronic databases. Although these opinions have not been designated as officially published precedent, they still may have a significant impact on the outcome of your client's case. The dilemma is whether you can or should cite these unpublished cases in your brief.

In the Federal Courts

If you are filing your brief in a federal court, you will have to check the local rules: federal courts do not treat unpublished opinions uniformly. As of 1996, the U.S. Court of Appeals for the Tenth Circuit permits the citation of unpublished opinions if they have "persuasive value" and "would assist the court in its disposition."¹

The Tenth Circuit did not come easily to this position. In 1986, the court adopted the previous version of Rule 36.3 that prohibited citation to unpublished opinions. Three judges dissented to the adoption of that rule.²

Many courts that have adopted a no-cite rule argue that unpublished opinions should not be cited because all litigants do not have equal access to the opinions. Those with access would have an unfair advantage. The judges dissenting to Rule 36.3 responded that systems could be established to make these decisions more accessible. In instances where the decisions were not accessible, the court could "implement some reasonable measures to adjust for such an imbalance."³

A second argument is that courts designate for publication any cases that would serve as significant precedent, and consequently, the unpublished opinions are insignificant. The dissenting judges responded that the unpublished opinions are significant because attorneys would have no incentive to cite

them if the published decisions provided sufficient guidance. The unpublished opinions, however, can fill in the gaps when published decisions fail.⁴

In 1996, a majority of the Tenth Circuit judges changed their view on unpublished opinions, and Rule 36.3 was amended to provide that unpublished opinions may be cited. Remember, however, that unpublished opinions are not favored and should be used only when the issue is not addressed in an officially published case.

In the Colorado Courts

If your brief is for the Colorado Court of Appeals or the Colorado Supreme Court, do not be tempted to cite to that unpublished case. In 1994, the Colorado Court of Appeals adopted a policy stating that, with just a few exceptions,⁵ "[c]itation of unpublished opinions is forbidden. . . ."⁶

The Court of Appeals prepares written decisions for all cases not settled or dismissed for lack of jurisdiction. Historically, only one-quarter of those opinions are published, which means approximately 75 percent remain unpublished.⁷ Unlike the federal decisions, these unpublished opinions are not readily available on electronic databases such as Westlaw or LEXIS. Thus, the argument that some litigants might have unfair access to these opinions is more compelling in the Colorado courts.

All Colorado Supreme Court opinions are published, so you will not have to ponder whether to cite an unpublished opinion of that court.⁸ However, if you are tempted to cite an unpublished opinion from the Colorado Court of Appeals as persuasive authority, you should be aware that the Colorado Supreme Court disfavors such citations for many of the same reasons articulated by the Court of Appeals.⁹

In conclusion, our legal system is based on precedent. Therefore, any prior opinion should be relevant to the determination of a subsequent case. In some courts, citing an unpublished opinion will be considered resourceful; in others, citing that

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

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opinion will be breaking the rules.¹⁰ Whether you cite the unpublished opinion itself or simply adopt its reasoning in a court that prohibits its citation, remember the words of the judges who dissented to the original Tenth Circuit no-citation rule: "[A]ll rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation."¹¹

NOTES

1. "Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. Citation of unpublished orders and judgments is not favored. Nevertheless, an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition. A copy of the decision must be attached to the brief or other document in which it is cited, or if cited in oral argument, provided to the court and all other parties." Tenth Cir. Rule 36.3.

2. Re Rules of the U.S. Court of Appeals for the Tenth Circuit, adopted Nov. 18, 1986, 955 F.2d 36 (10th Cir. 1992).

3. *Id.* at 37

4. *Id.* at 38.

5. "[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." "Policy of the Colorado Court of Appeals Concerning Citation of Unpublished Opinions," 23 *The Colorado Lawyer* 1548 (July 1994). Furthermore, the policy does not apply to opinions that were designated as "Not Selected for Official Publication," yet still were published by West Publishing in the Pacific Second Reporter (between January 1, 1970, and November 1, 1975). *Id.*

6. *Id.*

7. Casebolt, "Procedures and Policies of the Colorado Court of Appeals," 24 *The Colorado Lawyer* 2105, 2109 (Sept. 1995).

8. Oral communication with Mac Danford, Clerk of the Colorado Court of Appeals, on April 28, 1997.

9. *Id.*

10. Zodrow, "Citing Unpublished Opinions: Being Resourceful or Breaking the Rules?," *For the Defense* 33 (Jan. 1996).

11. *Supra*, note 2 at 37.

Pro Bono Colorado

September 26, 1997
Univ. of Denver College of Law
Denver, Colorado



Keynote Address:

Justice Rebecca Love Kourlis,
 Colorado Supreme Court

Agenda Topics:

- ✦ Litigation on a Shoestring
- ✦ Family Law
- ✦ Transactional/Government Lawyers
- ✦ Recruitment, Retention and Burnout Prevention
- ✦ Domestic Violence
- ✦ Funding Issues/LSC & COLTAF
- ✦ Public Benefits
- ✦ Housing
- ✦ Health
- ✦ Fair Debt Collection

Immigration Agenda Topics:

- ✦ Overview of Removal Proceedings
- ✦ Procedures for Practice Before the Immigration Court and Board of Immigration Appeals
- ✦ Immigration Consequences of Criminal Pleas
- ✦ Ethical Issues Associated with Representation of "Aliens"
- ✦ Bond Redetermination and Voluntary Departure
- ✦ Cancellation of Removal for Long-Term Permanent Residents and Non-Residents
- ✦ Adjustment of Status and Waivers of "Removability"
- ✦ Asylum

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