Did the Sky Fall? A Retrospective on Allowing the Citation of Unpublished Opinions

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In 2016, the Washington Supreme Court amended General Rule 14.1 to allow the citation of unpublished opinions issued by the Court of Appeals. A number of appellate judges, as well as many practitioners, opposed the amendment and predicted dire consequences should it become reality, including that unpublished opinions would become "accidental precedent" for non-existent legal principles.1

But what has actually happened in the four years since GR 14.1 was amended? Did the sky fall? This article briefly outlines the history and origin of GR 14.1 before concluding that, in the author's opinion, the amendment to GR 14.1 has actually benefited Washington's legal system.

When the Legislature originally created the Court of Appeals in 1969, RCW 2.06.040 would have required that all of its opinions be published. The statute was amended two years later to allow the Court of Appeals to designate opinions as either published or unpublished. For many years unpublished opinions, unlike published opinions, were available only on the "spindle" at the Court of Appeals, and in the Court's files. They were not easily researched or available. Somewhat like "samizdat," they would circulate among interested practitioners, but citation to them was in some instances prohibited, as explained below, and always unusual.

But unpublished opinions are now widely available, including on free legal research databases and the Washington Courts' website, which has copies of all unpublished opinions issued after March 1, 2013. As unpublished decisions became more accessible, litigants, not surprisingly, began citing them. Although RAP 10.4(h) prohibited the citation of unpublished decisions from the Washington Court of Appeals in appellate briefs, it did not address citation of unpublished opinions from other jurisdictions or citation of unpublished opinions in trial courts.

GR 14.1, enacted in 2007, was intended to establish a "clear rule" governing the citation of unpublished opinions for "all Washington State court proceedings."2 GR 14.1 states that "[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court" and, when originally enacted, the rule prohibited the

citation of unpublished opinions.

The adoption of GR 14.1 generated heated discussions within the legal community. Prior to its adoption, the Washington State Bar Association created a task force to consider whether to allow the citation of unpublished opinions. The task force detailed the numerous arguments on both sides while stressing this was "a very contentious issue."3

Those in favor of citing unpublished opinions argued that "courts remain free to accord as much weight as they deem appropriate to an unpublished opinion."4 Those opposed argued that "[t]he quality of unpublished opinions is generally lower than that of published opinions" — very often because of poor briefing — and thus they were unlikely to "withstand the test of future citation as authority."5

Perhaps bowing to the inevitable, as unpublished opinions became more and more readily available, GR 14.1 was revisited and amended in 2016 to allow the citation of unpublished decisions: "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

The rule continues the "second-class" status of unpublished opinions, however, with the caveat that "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." GR 14.1(c). A parallel amendment to RAP 13.4(b)(2) changed that rule to provide that the Supreme Court would only review a decision from the Court of Appeals based on a "conflict with a published decision of the Court of Appeals."

The 2016 amendment was based on analysis from a workgroup commissioned by the Court of Appeals that "found ... significant support in the state's legal community for a rule change."6 The Drafters' Comment for the amendment explained that despite the prohibition on citing unpublished opinions, "trial court judges, and appellate judges read and make use of the reasoning in unpublished opinions," and that "[a]llowing these cases to be cited by the parties will bring greater transparency to the legal process."7 The Drafters' Comment further explained that they hoped GR 14.1(c) would "minimize the risk for unpublished opinions to attain precedential status."

Not everyone, however, supported the amendment, including six judges from the Court of Appeals. Those judges signed a letter opposing the amendment, arguing that "[g]reat care should be taken in drawing conclusions from unpublished decisions since the reason it was deemed non-precedential might not be apparent," and that in order to avoid creating "'accidental' precedent ... more time will be spent preparing and finalizing unpublished opinions."8 The judges also argued that "concern for the unintended consequences of an opinion" would lead to more separate opinions and harm "the collegiality of the court."9

Four years later we can now ask which of the predicted benefits and detriments of amending GR 14.1 have materialized. While by no means an exhaustive review, the author has waded through numerous cases citing unpublished opinions and believes that, on the whole, the citation of unpublished opinions has benefited the Washington legal system. Most prominently, as predicted by the amendment's proponents, courts can now openly explain to a party that they did not find an unpublished case persuasive, instead of "dancing" around the opinion.10

The amendment also benefits both courts and litigants by allowing them to discuss an unpublished case when — with the benefit of hindsight — it becomes clear that the case is the only one addressing a particular legal point. As much as practitioners might like them to be, appellate judges are not omniscient, and may not appreciate when they designate a decision unpublished that it addresses "an unsettled or new question of law or constitutional principle," a factor that generally weighs in favor of publication.11 As the Court of Appeals itself has recognized, there are times when an unpublished opinion is the only relevant case and thus courts should be able to consider it for whatever value it may have.12

Turning then to the predicted consequences, have courts created "accidental" precedent by relying on unpublished opinions? It appears not. Although, as noted above, the Court of Appeals has occasionally relied on unpublished cases as persuasive authority, those cases are few and far between. The author found only a handful of cases in which a court relied on an unpublished opinion as authority for its decision. The majority of citations to unpublished opinions were to explain why the court was not relying on it as authority. Courts thus appear to have taken seriously the admonition in GR 14.1(c) that they should not discuss unpublished opinions "unless necessary for a reasoned decision."

But has it taken longer for the Court of Appeals to issue its opinions? That is a trickier question, but here too it appears the amendment has not had a dramatic impact. The statistics published by the Court of Appeals show that in 2017, the first full year in which parties could cite unpublished opinions, for the 75th percentile of cases the time between a case being "ready" for oral argument and the Court of Appeals issuing an opinion decreased by 1.1 percent from 2016.13

What then of dissents and concurrences? Have judges lost their collegiality? Again, it appears not. A Westlaw search for concurring and dissenting opinions returned 69 separate opinions in 2016 and 74 separate opinions in 2017. Moreover, when judges do dissent from an unpublished decision now, they can cite GR 14.1 as a reminder to litigants and trial courts that the majority's opinion has "no precedential value" and is "not binding upon any court."14

Although the citation of unpublished opinions appears not to have radically upended the Washington legal system, practitioners should not take that as license to freely cite unpublished opinions. Even after the 2016 amendment, the better practice is to review published opinions cited within an unpublished opinion and rely upon those cases if possible. As the Court of Appeals itself has explained, unpublished opinions are not precedent "[n]o matter how well reasoned."15

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice. Ian Cairns is a principal in Smith Goodfriend and former chair of the King County Bar Association's Appellate Section. He can be reached at ian@washingtonappeals.com.

1 See Letter from Judge Kevin Korsmo, et al., to Chief Justice Barbara Madsen (April 4, 2016), available at https://www.courts.wa.gov/court_Rules/proposed/2015Jun/GR14.1/Judge%20Kevin%20M.%20Korsmo,%20et%20al.pdf.

2 See Drafters' Comment to GR 14.1, reproduced in 2 Wash. Prac., Rules Practice GR 14.1 (8th ed. March 2020 Update).

3 WSBA Court Rules and Procedures Committee, December 2003 Memorandum Regarding Proposed Amendment to RAP 10.4(h) at 5 ("2003 Memorandum"), available at http://www.nonpublication.com/washprop.pdf.

4 Id. at 5.

5 Id. at 7–8.

6 See Drafters' Comment, 2016 Amendment to GR 14.1, reproduced in 2 Wash. Prac., Rules Practice GR 14.1 (8th ed. March 2020 Update).

7 Id.

8 See note 1.

9 Id.

10 See, e.g., Slater v. Northgate Mall P'ship, 7 Wn. App. 2d 1022, 2019 WL 296121, at *2, rev. denied, 193 Wn.2d 1018 (2019); Matter of Gronquist, 192 Wn.2d 309, 325–26, 429 P.3d 804 (2018); Byrd v. Pierce Cty., 5 Wn. App. 2d 249, 263 n.3, 425 P.3d 948 (2018).

11 See RAP 12.3(d).

12 See, e.g., Cave Properties v. City of Bainbridge Island, 199 Wn. App. 651, 665 n.2, 401 P.3d 327 (2017); Guardado v. Guardado, 200 Wn. App. 237, 244, 402 P.3d 357 (2017).

13 The Court of Appeals annually reports the amount of time it takes the 75th percentile of its cases to move through the various stages of an appeal. These statistics, as well as a variety of other statistics concerning the caseload and work of all Washington courts are available at https://www.courts.wa.gov/caseload/.

14 See, e.g., Ruiz v. Cervantes, 200 Wn. App. 1012, 2017 WL 3267480, at *8 (2017) (Siddoway, J. (dissenting)).

15 State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012), as amended (May 31, 2012).