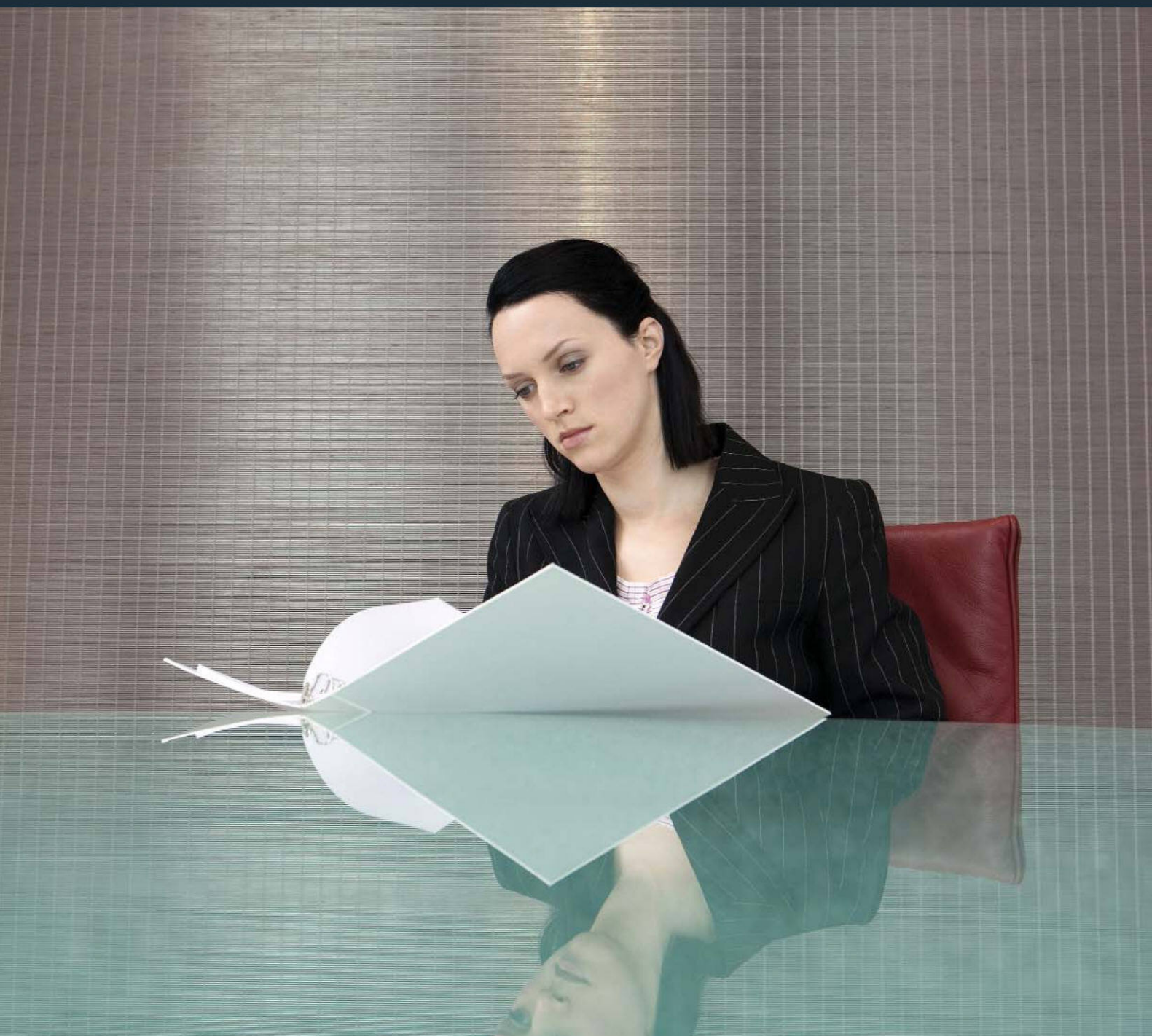
Private Justice or Public Right?

A call to reconsider the Pennsylvania Superior Court's policy against reliance on unpublished decisions

By Mary Jane Bowes and Megan Bode



Two lawyers sit in an office. One is distraught: He's handling a difficult appeal to the Pennsylvania Superior Court, and extensive research has revealed that there is no supporting case law on point. He complains to a colleague that there are several cases he could attempt to analogize but nothing that will win over the judges. She asks about the facts of the case and the issues in dispute, hoping to help her co-worker devise a winning legal strategy. As he launches into a description of his client's plight, her eyes slowly widen. She excitedly explains that when she appealed a similar case, the Superior Court had decided in her client's favor. "I'm sure I have a copy of the opinion in my files," she says, leaving the room.

Ten minutes later, she returns with a stapled document and wordlessly hands it to her partner. He reads the all-too-familiar facts, the eerily identical issues and the judges' well-reasoned explanation for their decision — this case uses precisely the language he needs. Jumping up to thank his colleague, he notices for the first time her grim expression. "What's wrong?" he asks. "This will save my case."

"Read it again," she says. Confused, he does and looks up once more, shaking his head in bewilderment. She crosses the room and extends her index finger, placing it directly above the caption. He sees the following words in all capital letters, almost mocking him: NON-PRECEDENTIAL DECISION.

Sadly for our friend, the document he holds cannot be relied upon or even mentioned. The Pennsylvania Superior Court's Internal Operating Procedure 65.37 contains a strict non-citation rule, meaning that attorneys and judges alike are barred from relying on unpublished decisions, unless such a memorandum is relevant under the doctrine of law of the case, res judicata or collateral estoppel. No matter how perfect or important a memorandum decision may seem, it cannot be cited to or by the Superior Court.

Our Superior Court is one of the busiest intermediate appellate courts in the nation, filing 5,324 opinions in 2007, 4,912 of which were unpublished. Attorneys and clerks constantly request copies of these unpublished decisions to discover how a particular judge might view an issue, to conduct further research on a topic or to see the reasoning employed by colleagues arguing a similar case. The offices of the court reporter, the prothonotary and Westlaw jointly receive 75 to 80 calls each month requesting unpublished memoranda.

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Yet in spite of this demand and regardless of the fact that 92 percent of the judicial work product of the Superior Court takes the form of memorandum decisions, the rule prohibiting citation to unpublished memoranda remains in place.

The Superior Court's policy is contrary to a recent national trend allowing persuasive citation to unpublished decisions. The issue of whether to allow citation to unpublished memoranda came under countrywide scrutiny in 2001, when the U.S. Department of Justice requested that the Federal Rules of Appellate Procedures (Fed.R.App.P.) be changed to permit citation of unpublished decisions. Prior to the amendment of Fed.R.App.P. 32.1 in 2006, each federal court of appeals had different local rules regarding citation to unpublished memoranda. The new version of the rule grants attorneys permission to cite any unpublished decision issued by any court of appeals after Jan. 1, 2007. Judges faced with such a citation have the discretion to ignore the unpublished decision, to treat it as persuasive or to adopt it as precedential.

During and after the process of amending the Federal Rules of Appellate Procedure, the trend favoring permissive citation of unpublished memoranda quickly emerged. The American Bar Association issued a resolution proclaiming that non-citation rules were "contrary to the best interests of the public and the legal profession." Further, many state appellate courts began to alter their rules regarding the citation of unpublished decisions. Judge Alex Kozinski, a proponent of strict citation rules, testified in 2002 before the Advisory Committee on the Federal Rules of Appellate Procedure regarding a study conducted by University of Arkansas law librarians Melissa Serfass and Jessie Cranford. "Federal and State Court Rules Governing Publication and Citation of Opinions," 3 *Journal of Appellate Practice and Process* 251 (Spring 2001). Based on their survey, he noted that 38 states had some form of a strict non-citation, non-publication rule. In 2008, that number is approximately 23.

Interestingly, nearly all of the states that amended their rules decided to permit persuasive citation; in only four states do unpublished decisions constitute precedential law. Under persuasive citation rules, state appellate court judges have the discretion to ignore, discuss or follow a reference to an unpublished opinion.

Pennsylvania is not one of the many states that amended appellate procedure to allow for the citation of unpublished memoranda. In light of the trend set by the federal and many state appellate courts, it seems prudent to ask: Why not?

As can be seen below, there are many reasons why the Superior Court of Pennsylvania *should* consider making a change.

Publicize the Work Product of the Court

The Superior Court is quite busy, as reported by Ernie Gennaccaro, chief staff attorney for Pennsylvania's central legal staff. "Each judge writes 240 decisions per year," he explains. Yet most of these writings, after being circulated to the trial court judges and the parties, are seldom seen again. Certainly, an attorney could request a copy; however, he or she could never cite its contents in forming a legal argument.

Why allow the diligent work of the judiciary to languish in file cabinets, largely unseen and wholly unused? If persuasive citation were allowed, attorneys would be able to look carefully at judges' writings in factually similar, unpublished cases and remind the court how it had previously decided an analogous issue. The scholarly work of the judiciary as reflected in the unpublished decisions could assist later litigants, attorneys and judges in resolving disputes.

No Downside If Court Can Disregard Citation

Persuasive citation means that judges would not necessarily be bound by previous unpublished decisions. If a memorandum is helpful, a judge will certainly consider how the writing might be applicable to the case at bar. On the other hand, if an unpublished decision is not on point, a judge can ignore the citation and rely instead on published law or more specific unpublished memoranda.

Judges do not typically address every published case cited in a brief. Under the current system, judges discern which case law is most helpful and which is irrelevant. If persuasive citation to memoranda were allowed, judges would not suddenly lose their sense of prudence. Similarly, they would not discuss every citation. Rather, Pennsylvania judges — like those on the federal courts of appeals — could decide whether to address or ignore the cited case.

When judges have the discretion to ignore, consider or follow the persuasive citation of a memorandum, any concern that the judicial workload might increase or that permissive citations would indirectly create precedential law is unfounded.

Enhance Public Confidence in the Court System

Persuasive citation to unpublished memoranda would promote transparency in the decision-making process of the Superior Court, which helps ensure public confidence in the important work of the judiciary. Picture once more the lawyers in our introductory scenario. Now imagine a third person in the room — the client. How might an attorney explain to this person why a case supporting his position cannot be used in a legal argument? The client might conclude that the court's non-citation rule has deprived him of justice; he may

wonder why certain opinions are treated differently and not exposed to the searching legal scrutiny attendant to attorneys' research.

Members of the bar recognize that the goal of the non-citation rule is not to prevent some decisions from being seen. Most attorneys likely also understand that any member of the public can obtain a copy of an unpublished memorandum from the prothonotary's office. However, without this knowledge, the general public may mistakenly believe that certain decisions are decided differently and therefore are not a reliable source of precedent. Permitting persuasive citation to these unpublished memoranda would prevent public misconception about the consistency of judicial dispositions.

Why not allow a litigant to remind the court of its own decision on a similar issue? It could help the bench to make an informed decision. Why not help the client feel that justice was served, that at least the best possible argument was presented to the bench? The answer is simple: In the interests of justice and public confidence in our judicial system, full disclosure should prevail.

Attorneys' Fees Remain Unchanged

In *Schaaf v. Kaufman*, 850 A.2d 655 (Pa.Super. 2004), Judge Richard B. Klein claimed that "only those with funds to pay for the access would be able to survey the unpublished decisions" if memoranda became precedential. Essentially, the learned judge argued that under a permissive citation system, attorneys would need to conduct more extensive research in order to find the most effective case for their clients. His argument does make logical sense. An increase in research time translates to a hike in attorneys' fees, creating an imbalance in the justice system between the rich and the poor.

Research does not support this fear. Patrick Schiltz, a reporter for the Advisory Committee on the Federal Rules of Appellate Procedure, commented that there is no evidence of higher attorneys' fees in the states that already allow persuasive citation to unpublished decisions. Patrick J. Schiltz, "The Citation of Unpublished Opinions in the Federal Courts of Appeals," 74 *Fordham L. R.* 23 (2005). Attorneys have always used discretion in their research, following their best leads rather than pursuing every possible avenue. Members of the bar are experienced in determining quickly whether a decision is relevant, and they will not waste time on futile research efforts.

Conclusion

Memorandum decisions constitute the vast bulk of the judicial output of the Superior Court of Pennsylvania. This court, for most citizens, is the court of last resort. The methods and results of its decisions affect the lives of every person in Pennsylvania. Why not give attorneys every possible tool, including the thoughts and processes of most of the judicial reasoning in Pennsylvania, as they seek zealously to represent their clients? Moreover, between January and June 2008, nearly one-half of the Superior Court cases accepted for consideration by the Pennsylvania Supreme Court were memorandum decisions. Permissive use of these intermediate decisions would assist the bar in its understanding and awareness of issues that may come before the high court. Considering the tremendous advantages that exist for the bench and bar to be able to cite persuasively the non-precedential decisions of the Superior Court of Pennsylvania, it is time to reconsider the impact of the non-citation rule and permit the bright light of persuasive citation to become the standard for this important court.

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