

# On Appeal

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## Confessions of an Oral Argument Junkie

By Monica T. Monday / Gentry Locke Attorneys

I admit it. I am an appellate argument junkie. This has been a longstanding problem, but when the Supreme Court of Virginia began releasing audio recordings of its oral arguments in early 2014, my habit took on new dimensions. I can now listen to hours of appellate argument without leaving the house, car, or office. This has brought new purpose to my long daily commute (I hope the legislature will not make this illegal), and I'm totally hooked.

But what's the big deal, concerned friends ask – audio recordings of Fourth Circuit arguments have been available for some time now. It's true, so what is the big deal? Supreme Court recordings provide a look at the Court as a whole and how the justices interact with each other. Except for the rare occasion when it sits en banc, the Fourth Circuit hears most arguments in panels of three, limiting a study of that Court as a whole.

Whatever the reason for my obsessive interest in these audio recordings, they have reinforced some suspicions I have had about the Supreme Court, and appellate arguments in general. And, they have provided some new insight as well.

First, the justices are talking to each other when they ask their questions. This is something that is hard to follow during the heat of oral argument. However, listening to the argument after the fact, it is clear that many questions are really not for me, but are directed toward another justice, or the entire Court. The justices are actually discussing the case with each other and trying to convince their colleagues on the bench of their position.

So does this mean that my answers don't matter? Am I just a pawn on the Court's chess board? Not at all. My answers to those questions can influence that private, judicial discussion – and the

ultimate outcome of the case – by showing why my position is right.

Second, some questions are not at all what I thought they were at the time. During argument, it can be difficult to really listen to the Court's questions when you are focused on delivering the argument you have prepared. Things become clearer with the luxury of hearing the argument again without the stress of being in the middle of it. In particular, I have noticed that some questions were not exactly what I thought they were at the time; rather, the Court was asking something different.

Good listening at oral argument is hard. It requires us to focus on the Court first, and our prepared argument second. Because the Court is the decision-maker, though, we must understand its concerns and questions so we can respond meaningfully. If we haven't answered the Court's ques-

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# Message from the Chair

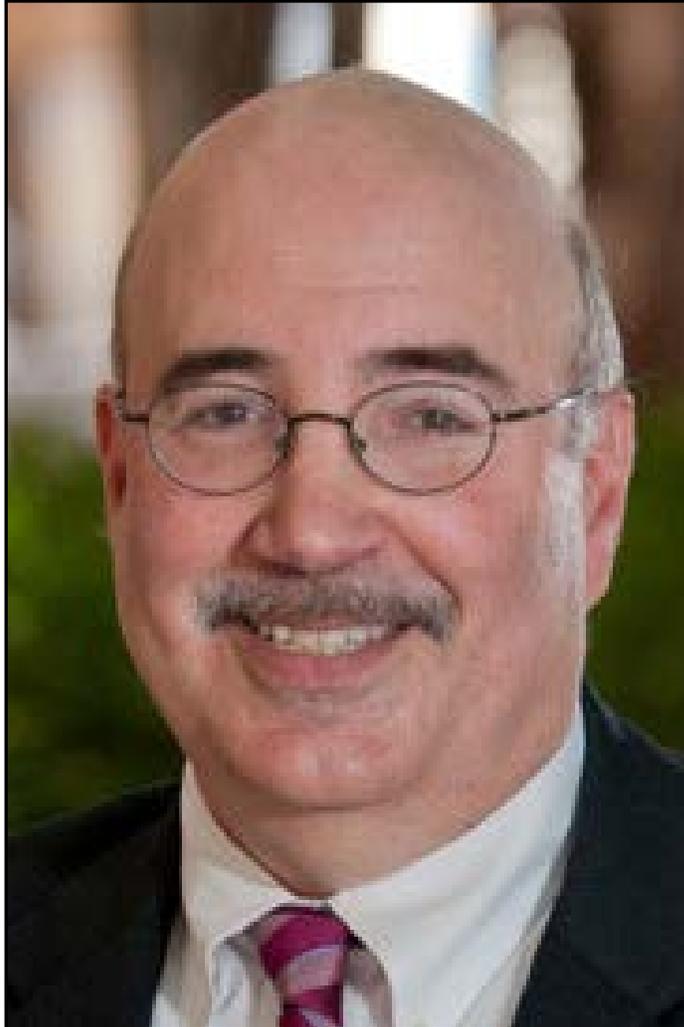
The Appellate Practice Section of the VBA is holding its Appellate Summit on September 30, 2015, in Richmond at the offices of Troutman Sanders. This event is always a source of useful tips and up-to-the-minute appellate information. It is also a great way for appellate advocates from all around the Commonwealth to visit and share ideas on our favorite area of practice.

We are quite fortunate that numerous appellate judges have agreed to participate in our program in September. This year's topics include "A Discussion with the Chiefs," with Chief Justice Lemons and Chief Judge Huff, about trends in Virginia's appellate courts. Experienced practitioners will instruct on "Seeking and Defending Certiorari in Washington" and clerks from state and federal courts will discuss effective appellate motions practice. Informative panels comprising appellate judges and attorneys will discuss briefing and oral

argument. There will also be presentations on appellate statistics, ethics, and a discussion on the impact of technology and "screens" on appellate practice. Recently-retired appellate jurists will also provide

candid insights in a segment called "Tell Us What You Really Think." The Appellate Summit will feature 6.5 hours of CLE credit, including 1.0 hour of ethics. The program is reasonably priced (and it includes a boxed lunch and a discount for Appellate Section members).

This fall our Section is also planning several regional gatherings among appellate attorneys to help foster collegiality and to allow younger appellate attorneys to meet more experienced practitioners. We hope our Section's events will be both enlightening and enjoyable for our members. Please feel free to contact me – or any council member – if you have ideas for future events, or if you seek deeper involvement in our Section.



**Frank K. Friedman**  
Appellate Practice Section Chair

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# A Few Thoughts on Unpublished Opinions

By Joseph R. Pope<sup>1</sup> / Williams Mullen

Today, the great majority of opinions issued by the federal circuit courts are non-precedential (or “unpublished”). According to data from 2014, approximately 88 percent of all circuit court opinions issued were unpublished.<sup>2</sup> Over the years, academics, practitioners, and judges have spilled much ink on the subject of unpublished opinions.<sup>3</sup> Many works on the subject labeled the judicial practice of deciding the precedential value of appellate opinions a “scandal of private judging,”<sup>4</sup> that has created “a double-track system [that] allows for deviousness and abuse.”<sup>5</sup> In fact, a panel of the Eighth Circuit once deemed the practice a violation of Article III and *per se* unconstitutional.<sup>6</sup>

The controversy somewhat subsided following the adoption of Rule 32.1(a), which prevents circuit courts from “prohibit[ing] or restrict[ing] the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like and issued on or after January 1, 2007.”<sup>7</sup> However, the debate was reignited this year by a dissent from denial of certiorari authored by Justice Thomas (and joined by Justice Scalia) in *Plumley v. Austin*,<sup>8</sup> a case on certiorari from the Fourth Circuit.

## Plumley v. Austin and Justice Thomas’ Dissent

Plumley presented the Court an opportunity to revisit its decision in *North Carolina v. Pearce*,<sup>9</sup> where the Court recognized a presumption of judicial vindictiveness in cases where a judge sentences a defendant more severely following a remand. Austin, the defendant in *Plumley*, walked away from an inmate road crew while serving a sentence for breaking and entering. He was recaptured and the state court tacked on an additional sentence for the attempted escape.<sup>10</sup> Austin filed a motion with the trial court to have the sentence corrected. Before the trial court could rule, the defendant petitioned the West Virginia Supreme Court for a writ of mandamus to the trial court to rule on the motion. Four days after receiving the petition, the trial court imposed a sentence greater than the earlier sentence for the escape.<sup>11</sup> Austin filed a challenge to the state court’s ruling based on the reasoning of *Pearce*. Yet, the West Virginia Supreme Court denied the appeal on grounds that the presumption of judicial vindictiveness did not apply, and on habeas review, the United States District Court agreed. But in a 39-page, 2-1 unpublished decision, the Fourth Circuit reversed on grounds that although a higher court had not reversed the trial judge, a presump-

tion of vindictiveness nevertheless applied. The State of West Virginia petitioned the Supreme Court for certiorari. The Supreme Court denied the petition over an impassioned dissent from Justice Thomas (in which Justice Scalia joined).

Justice Thomas noted that the Fourth Circuit’s ruling was incompatible with Supreme Court precedent that had seemingly limited the *Pearce* presumption to cases where an appellate court had reversed the trial court.<sup>12</sup> He also commented that the Fourth Circuit’s ruling deepened an existing disagreement between the circuit courts over the scope of the *Pearce* presumption of vindictiveness.<sup>13</sup>

But the centerpiece of Justice Thomas’ dissent was his criticism of the Fourth Circuit’s decision to label its opinion unpublished and non-precedential. Justice Thomas wrote:

True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 433, n. 6 (C.A.4 2012). But that in itself is yet another disturbing aspect of the Fourth Circuit’s decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin’s claim of judicial vindictiveness. It analyzed the claim

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in a 39-page opinion written over a dissent. By any standard — and certainly by the Fourth Circuit's own — this decision should have been published. The Fourth Circuit's Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it “establishe[d] ... a rule of law within th[at] Circuit,” “involve[d] a legal issue of continuing public interest,” and “create[d] a conflict with a decision in another circuit.” Rules 36(a)(i), (ii), (v) (2015). It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.

In a *New York Times* article, Adam Liptak, wrote that the last sentence of Thomas' dissent “suggested that the appeals court had acted strategically to avoid review of its ruling.”<sup>15</sup>

### Why Unpublished Opinions?

Appellate judges have long argued that the practice of writing non-precedential, unpublished opinions is a sensible reaction to the problem of overcrowded dockets. In a 2004 letter to then-Judge Samuel Alito, Judge Kozinski (now Chief Judge of the Ninth Circuit) wrote, “We simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent. In other words, we can make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost, but we don't have the time to consider how the language of the disposition might be construed (or misconstrued) when applied to future cases.” He also revealed the dirty little secret that many unpublished opinions are “drafted entirely by law clerks and staff attorneys.”<sup>16</sup>

### Problems Caused by Unpublished Dispositions

While designating certain opinions “unpublished” has its advantages in terms of resource allocation, the practice is not without adverse consequences. For example, the practice leaves trial courts and practitioners

without clear guidance on the state of the law. Ours is a common law system that is dependent on the case method. This remains true even in an age where statutes and regulations have assumed a more significant place among the corpus of rules and standards that we call positive law. The meaning of these regulations and statutes depends on how courts interpret, construe, and apply them to varying fact patterns. As Karl Llewellyn said, “We have discovered that rules alone, mere forms of words, are worthless. We have learned that the concrete instance, the heaping of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all.”<sup>17</sup> The problem created by unpublished opinions is that the body of precedent fails to acknowledge the collective experience of courts applying certain legal principles and texts to concrete facts. Trial courts and practitioners are therefore left without clear guidance from courts of appeals on how certain disputes should be resolved.

Some jurists have also expressed concerns that creating a category of non-precedential opinions is an invitation to poor or even strategic, result-based reasoning. Justice Stevens wrote “that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.”<sup>18</sup> And according to Judge Wald of the D.C. Circuit: “I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.”<sup>19</sup>

These and other concerns call into question the practice of designating certain opinions non-precedential, but it is very difficult to conceptualize a system in which all cases are given the same degree of consideration. The courts of appeals are already overburdened. But judges and practitioners alike should consider some reforms to the current system that will ensure a greater number of opinions are deemed precedent. For instance, internal circuit rules requiring publication of cases in which there is a dissent or a concurrence would go a long way to ensure that cases involving close legal issues are deemed precedent. This and other

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suggestions are worth considering in the coming years to ameliorate some of the negative impacts of designating certain opinions unpublished and nonprecedential.

### Endnotes

1. Joseph Pope is an associate with Williams Mullen. His practice focuses on appeals and critical motions and issues. Before entering private practice he clerked for the Honorable Gerald B. Tjoflat of the Eleventh Circuit Court of Appeals.

2. See Judicial Business 2014, available at <http://www.uscourts.gov/statistics-reports/judicial-business-2014>.

3. See, e.g., David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 Marq. L. Rev. 685 (2009).

4. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435, 1435 (2004).

5. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

6. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (declaring Eighth Circuit local rule on unpublished decisions unconstitutional on separation-of-powers grounds), *vacated en banc*. 235 F.3d 1054 (8th Cir. 2000).

7. Fed. R. App. P. 32.1.

8. 135 S. Ct. 828 (2015).

9. 395 U.S. 711 (1969).

10. *Plumley*, 135 S. Ct. at 828–29.

11. *Id.* at 829.

12. *Id.* at 830 (citing *Texas v. McCullough*, 475 U.S. 134, 138–139 (1986)).

13. *Id.*

14. *Id.* at \*831.

15. Adam Liptak, "Courts Write Decisions that Elude the Long View," *New York Times*, available at <http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html>.

16. *Letter from Alex Kozinski, U.S. Circuit Judge, 9th Cir., to Samuel A. Alito, Jr., U.S. Circuit Judge, 3rd Cir.* 5 (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf>.

17. Karl Llewellyn, *The Bramble Bush* 66-69 (1930).

18. Jeffrey Cole & Elaine E. Bucko, "A Life Well Lived: An Interview with Justice John Paul Stevens," 32 No. 3 Litigation 8, 67 (2006).

19. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

## Oral Argument Junkie

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tions, then we have not done our jobs as oral advocates. So, be flexible during oral argument. Weave the important points of the argument into your answers, but make sure you are addressing the issues the Court wants to discuss.

Third, the Court genuinely wants to understand your argument and the ramifications of its decision. This is why the justices ask hypothetical questions – to test the boundaries and effect of its ruling in future cases involving different facts. And this is why it may press the advocate to define the scope of the ruling he seeks and to explain the effect of that ruling. Concisely explaining the scope and limiting principles of your position will greatly assist the Court in understanding the effect of adopting your position, and becoming comfortable with it. Embrace the opportunity to help the Court do its job well.

Finally, audio recordings only tell you half the story. Listening to an audio recording of an argument I heard – or delivered – is a different experience than being there live. The visual, relational, and intangible aspects of the live argument cannot be captured on an audio tape. Thus, many essential ingredients to an effective oral argument, such as genuineness, credibility, eagerness, passion, engagement, and rapport with the Court are not fully experienced on an audio recording.

Therefore, being there in person is the only way to fully appreciate the argument – although that won't stop me from listening. And, you should not agree to argue your case by phone – that separation prevents full engagement with the Court.

You can access the audio recordings from the Court's merits arguments since January 7, 2014, at [http://courts.state.va.us/courts/scv/oral\\_arguments/home.html](http://courts.state.va.us/courts/scv/oral_arguments/home.html).