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COMMENTARY

A Critique of the Unpublished Per Curiam Opinion

By Samuel J. Samaro

Most lawyers who handle appeals are familiar with the experience of pouring one's heart out in a brief, carefully preparing for oral argument, sending a large, but completely justifiable bill to the client, and then losing the case in an unpublished per curiam that reads like the whole thing was trivial.

Of course, sometimes it was trivial. Lawyers become very invested in cases and it is not unusual for even very good ones to have expectations, on occasion, that are unrealistic given any fair assessment of the merits. This is especially likely to happen when counsel on appeal is also the lawyer who lost the case before the trial court. Even when the work was truly excellent it is hard not to feel somehow responsible for a losing effort, and whatever else that does to the lawyer's psyche, the trauma does not exactly support objectivity.

But there are other times when the opinion simply fails to honor the strength of the appeal or the importance of the question; times when it cannot be denied that the case received short shrift from the reviewing court. Invariably, those opinions will be neither published nor signed. They are meant for the parties only. They are meant to close out the case and die.


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The practice of issuing abbreviated, unpublished opinions has troubled thoughtful judges for a long time. One of them was Richard Arnold, until his death in 2004 a judge on the Eighth Circuit Court of Appeals and one of the most distinguished jurists of his generation. But for a chronic health problem that plagued him for much of his adult life, there is little question that he would have been nominated to Supreme Court and would have served there with great distinction. In a short article he published in 1999 titled "Unpublished Opinions: a Comment," Judge Arnold lamented the increasing prevalence of unpublished opinions and warned that the practice created opportunities for unfairness that could not be ignored.

One such opportunity was the possibility that an appellate panel wishing to avoid a messy legal problem could avoid confronting its complexities by issuing an abbreviated, unpublished opinion, thereby "sweeping the whole thing under the rug." By "sweeping it under the rug," he meant that the court could both achieve a result that might be hard to justify by any reasonable application of the law and, by making the appeal seem insubstantial, insulate that result from further appellate review.

A notorious example, not cited by Judge Arnold but likely on his mind, occurred in the Second Circuit several years before he published his article in a case called *Ricci v. DeStefano*. After extensive briefing and a one-hour argument, a three-judge panel of the court issued a one paragraph "summary order" affirming the lower court's order "substantially for the reasons stated in the thorough, thoughtful and well-reasoned opinion of the court below." Judge Jose Cabranes of that court was incensed. In a long dissent from the refusal of the full court to rehear the case en banc, Judge Cabranes expressed many of the concerns later raised by Judge Arnold:

> It is arguable that when an appeal raising novel questions of constitutional and and statutory law is resolved by an opinion that tersely adopts the reasoningof a lower court—and does so without further legal analysis or even a full statement of the questions raised on appeal—those questions are insulated from further judicial review. It is arguable also that the decision of this court to deny *en banc* review of this appeal supports that view. What is not arguable, however, is the fact that this court has failed to grapple with the questions of exceptional

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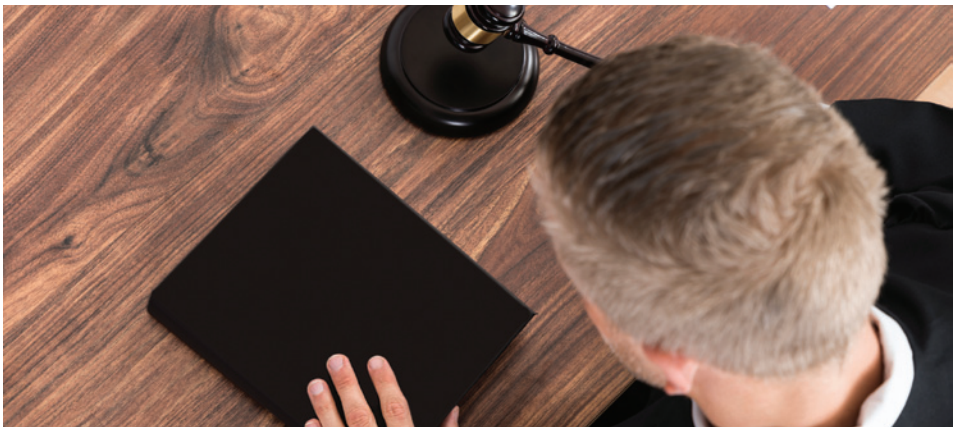
> importance raised in this appeal. If the *Ricci* plaintiffs are to obtain such an opinion from a reviewing court, they must now look to the Supreme Court. Their claims are worthy of that review.

The Supreme Court did agree to hear the case—and reversed. What people remember most about *Ricci*, however, is that one of the judges who sat on the three-judge panel was Sonya Sotomayor. During her Supreme Court confirmation hearings, critics raked her over the coals for *Ricci*, not so much because she got the decision wrong, but because she participated in such a flimsy dodge of an important Constitutional issue. Anyone who has ever had an appeal decided in a one or two paragraph "summary order," very common in the Second Circuit, was pleased to see the practice criticized, even if they wished Judge (now Justice) Sotomayor well in her confirmation hearings.

A common justification for unpublished decisions is that they cause no lasting harm because they are not precedential. Judge Arnold was unimpressed with that argument. He questioned the proposition that the judiciary had the *right* to deem a decision non-precedential. Most every case is different, and in Judge Arnold's view, unless you can say that the case from yesterday is exactly the same as the one you decide today, you are pointing out differences with precedential significance. Beyond that, the common law, as it was explained to us in law school, is the synthesis of the entire body of work. If you are picking what is and is not precedential, are you performing a judicial function? Judge Arnold was not sure:

> [W]hen a government official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no other reason than a change of mind, can the power that is being exercised properly be called "judicial"? Is it not more like legislative power …?



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Judge Arnold recognized that the true culprit was the enormous volume of cases, not any desire to legislate from the bench or dodge difficult cases. Given the ever-expanding appellate docket, there are simply not enough judicial resources to turn every decision into a publishable manuscript. He lamented:

> In 1970 there were 97 circuit court judgeships. There are now 167, and little prospect of any new ones being created in the near future. So something had to be done, and sometimes one gets the feeling that those in charge thought that they should do something, even if it was wrong.

The volume problem, of course, has become exponentially worse since Judge Arnold was writing. Here in New Jersey, the Appellate Division, composed of 32 judges, decides approximately 6,500 appeals a year, which roughly translates to an astounding 130 decided cases per week. A review of the judiciary's website suggests that something on the order of 2 to 5 of those cases per week will result in published decisions. The vast majority of the others are unpublished and unsigned.

There is no chance that all 6,500 merit publishable-quality decisions. There is also no chance that only several hundred a year do. That means that a lot of important guidance is lost every year and that parties are receiving less appellate process than they deserve. It is hard to imagine how you could possibly expect more work out of the 32 overworked judges we have. It takes about two years, start to finish, to get a decision these days, and it would take significantly longer if the judges had more writing to do. But to receive an unpublished, per curiam opinion in a significant case that "adopts the reasoning of the thoughtful decision below," or deems emphasized arguments to be "without sufficient merit to warrant further discussion," is to understand what Judge Arnold meant when he said that the process feels designed by someone who had to "do something, even if it was wrong." As the docket continues to grow, and as the other branches of government continue to underfund the courts, it would behoove us to think of some solution to the problem that is not wrong.■