

“The decision to print an opinion in a West reporter is based in part on the issuing jurisdiction’s decision to ‘publish’ the opinion and in part on West’s selection criteria.”

UNPUBLISHED VS. UNREPORTED: WHAT’S THE DIFFERENCE?

BY ELLEN PLATT

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Introduction

Do you wonder what the difference is between an “unpublished” and an “unreported” decision? Are you curious about how courts determine which opinions will be “published”? Have you ever wondered how the editors at West Publishing Company decide which court opinions will be “reported” in the regional or federal reporter sets? Or which court opinions will receive headnotes in print and online? Read on for the basics of court publication rules and the editorial policies followed by West¹ and LEXIS-NEXIS.²

Basic Court Publication Practices

Some years ago, in response to increased caseloads and the resultant proliferation of opinions in both state and federal courts, many jurisdictions began limiting the number of opinions published by their courts. By 1994, all federal circuit courts and the majority of state courts had adopted some sort of policy to limit publication of opinions.³

One example is the U.S. Seventh Circuit rule, which states that the court may dispose of an appeal by either an opinion or an order: opinions are published, orders are not.⁴ Published opinions are printed and distributed as slip opinions and are available for unlimited citation as precedent. Unpublished orders may not be cited or used as precedent except to support a claim of *res judicata*, collateral estoppel, or law of the case.

¹ Information from West Publishing Company supplied by Edward Wagner, West Senior Associate Editor.

² Information from LEXIS-NEXIS supplied by John Hourigan, LEXIS-NEXIS Public Relations Manager.

³ Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Ref. 119, 125 (1994).

⁴ U.S. Ct. App. 7th Cir. R. 53.

Criteria used in the Seventh Circuit in deciding to publish an opinion instead of issue an order include whether the decision

- establishes a new, or changes an existing, rule of law;
- involves an issue of continuing public interest;
- criticizes or questions existing law;
- constitutes a significant and non-duplicative contribution to legal literature by historical review of law; describing a legislative history; or resolving or creating a conflict in the law;
- reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
- is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.⁵

The Seventh Circuit procedures are typical of those of many state and federal courts in making a publication determination. They are also important to the treatment of the decision by West Publishing Company and LEXIS-NEXIS.

West Publishing Company Policies

The decision to print an opinion in a West reporter is based in part on the issuing jurisdiction’s decision to “publish” the opinion and in part on West’s selection criteria.

State Court Opinions

Print publication of state court appellate opinions is fairly straightforward. Unless an opinion is “unpublished” in accordance with the jurisdiction’s criteria, the decision will appear in the appropriate regional reporter, it will be assigned headnotes by West’s editors, and the headnotes will appear in West’s digest system. Unpublished decisions are only available in WESTLAW databases, and thus are technically “unreported” because they don’t appear in a reporter. Unpublished decisions are not assigned headnotes, and they do not appear in digest case name tables.

⁵ *Id.* Generally, final decisions as to publication are made by a panel of judges or a committee at both state and federal level. For an example of one state’s process, see Burton A. Scott, *Publication of Appeals’ Court Opinions*, Wis. B. Bull., July 1988, at 15. For a summary of state court publication practices, see Jane Williams, *Survey of State Court Opinion Writing and Publication Practice*, 83 Law Libr. J. 21 (1991).

Federal Court Opinions

As with state court opinions, only federal court opinions that are printed in a reporter series will be assigned headnotes. West's editors determine inclusion of federal court cases, as follows:

Federal District Court cases are reported in the *Federal Supplement*[®] using the following general criteria:

- the case is considered “of interest” to the general membership of the bar; and
- reporting of the case advances understanding of that area of the law, as opposed to a more “routine” opinion dealing with well-settled or established principles of law; and
- the decision was reached within two years of its filing date. (This criterion may be disregarded if the case is appealed and subsequently affirmed.)

West's editors typically exclude short memorandum decisions, orders, and other routine housekeeping items from both print sources and WESTLAW. In addition, there are some other considerations for inclusion of district court opinions in print and online sources:

- Some federal districts, such as the Northern District of Illinois and the Southern District of New York, are called “sweep districts,” which means all substantive opinions will appear on WESTLAW. Editors may also select some of these opinions for publication in the *Federal Supplement*.
- West will generally publish opinions at the request of federal district judges. Some submit nothing, others send everything. Seventy to eighty percent of the more than 20,000 federal decisions processed by West each year come from federal district court judges. Opinions are also sent to West by attorneys and court clerks. If, after review, West's editors decide the opinion should be reported, West requests a copy from the court for inclusion in the *Federal Supplement* and on WESTLAW. Opinions not deemed significant enough for print will only appear on WESTLAW.⁶

⁶ The district court databases on WESTLAW are divided into two parts, one for reported decisions and one for unreported decisions. They may be searched individually or collectively.

- West's editors also monitor looseleaf services closely. If they determine an opinion found in a looseleaf service to be of significant interest, they request a copy from the court for inclusion in the *Federal Supplement* and on WESTLAW.
- Some federal district court opinions are reported in West's specialty reporters. There is no overlap in publication with the *Federal Supplement*. The *Federal Rules Decisions*[®] contains opinions of district judges and magistrate judges that construe federal rules, primarily the rules of civil and criminal procedure. The *Bankruptcy Reporter*[®] includes opinions of United States bankruptcy judges, and opinions of federal district court judges dealing with bankruptcy matters.⁷ The *Federal Claims Reporter*[™] has all opinions from the United States Court of Claims selected for publication by that court.⁸

All **Federal Courts of Appeals** opinions released for publication, other than memorandum decisions and court orders, will appear in the *Federal Reporter* and on WESTLAW. Unpublished decisions appear in full text only on WESTLAW; their names appear in the “Table of Decisions Without Published Opinions” of the *Federal Reporter*.

All **United States Supreme Court** opinions are reported in the *Supreme Court Reporter* and appear on WESTLAW.

LEXIS-NEXIS Policies

LEXIS-NEXIS includes all opinions released for publication by state and federal courts in the appropriate state and federal libraries and files. In addition, other decisions considered “substantive” (that is, dispositive of a substantive issue in an adversarial case) are also added to the service. Unpublished opinions are made available whenever possible, but always with the instructions from the court in mind. Should the court withdraw, amend, or correct a decision, LEXIS-NEXIS will make the corresponding change to its files. ❖

⁷ The *Bankruptcy Reporter* also includes a special section with bankruptcy cases decided by the U.S. Supreme Court and the several courts of appeals, reprinted from the *Supreme Court Reporter*[®] and the *Federal Reporter*, respectively.

⁸ The *Federal Claims Reporter* also includes reports of cases appealed from the Court of Claims, reprinted from the *Federal Reporter* and the *Supreme Court Reporter*.