The Status of Non-Binding Authority

Author : Marin K. Levy

Date : November 12, 2020

- Maggie Gardner, Dangerous Citations, 95 **N.Y.U. L. Rev.** (forthcoming 2020).
- Merritt E. McAlister, Missing Decisions, 169 **U. Pa. L. Rev.** (forthcoming 2021).

The field of judicial administration has started to produce an embarrassment of riches. Many of the legal academy's best young scholars are taking up critical issues related to how courts operate and how judges reach their decisions. Two forthcoming articles (and their authors), which take on the topic of non-binding authority, are perfect exemplars: Maggie Gardner's *Dangerous Citations* and Merritt E. McAlister's *Missing Decisions*.

As we know, courts cite to binding precedent in their opinions to support a particular point (e.g., *the law on X is Y in Z jurisdiction*). There are times, however, when courts cite to non-binding precedent, be it a published opinion from a court that cannot bind it or an unpublished opinion that binds no court. And we generally have assumptions about how this process works. First, that courts cite to non-binding authority sparingly and only when truly appropriate (e.g., for a persuasive point that is not well captured elsewhere). Second, that all decisions that a court might cite—including unpublished ones—can easily be accessed and assessed by the public. Gardner and McAlister challenge these assumptions in their respective articles.

Dangerous Citations examines the curious phenomenon of judges citing non-binding authority. In particular, the article looks to instances in which district judges cite work of other district judges, despite the fact that the opinions of their colleagues cannot bind them. While this practice can be harmless or even useful—as Gardner notes, it can promote consistency in the law, for example—it can also be quite harm*ful*.

Specifically, Gardner divides what she terms "dangerous citations" into two categories: those that are poorly conceived and those that are poorly implemented. Poorly conceived citations are ones in which the non-binding authority being leaned upon simply cannot be authoritative under the circumstances. A classic example is a cite to another case to establish facts (outside of the preclusion context)—courts seem to do this more when asked to fill in factors of a cumbersome multi-factor test. Poorly implemented citations, by contrast, rely upon authority that is not quite apt. For example, a court looks to a sibling court for guidance on a subject and imports a test that does not fit the context at hand.

What are the problems with poorly conceived and poorly implemented citations? First and foremost, they run against our understanding of how authority is meant to operate—it undermines the rule of law if courts cite cases for propositions that they cannot support. And second, such actions can inadvertently introduce errors into decisions, thereby shifting the path of the law in detrimental ways. For example, if a court "borrows" a test from one context and (mis)uses it in another, the law will be the worse for it. These are important concerns to be documenting and assessing, and some may carry into the use of citations to binding authority more generally. They certainly give us pause as we pick up and read the next opinion . . .

Missing Decisions takes on a separate problem of non-binding authority—whether such opinions are available to pick up and read in the first place. One of the great debates within judicial administration over the last several decades was about the propriety of unpublished opinions (opinions that are not published in the Federal Reporter). A truce of sorts made such opinions citable, although non-binding, beginning in 2007. And most thought the issue was largely resolved with the advent of the major legal databases such as WestLaw, Lexis, and Bloomberg Law. That is, the designation "unpublished" became less problematic given that the opinion it referred to was easy enough to locate. McAlister calls

into question that “given.”

Missing Decisions painstakingly documents how 27% of merits terminations in the twelve-month period ending September 30, 2017 are missing from the major commercial legal databases. To be sure, most of these are likely quite short and light on reason-giving. Still, this discovery is significant to scholars, practitioners, court administrators, and even judges.

How did so many decisions go missing? Not all decisions are released onto court websites—the websites that then populate the big commercial legal databases. This does not mean these decisions are nowhere to be found; they exist on the federal courts docketing database, PACER. But PACER lacks keyword-search functionality, rendering it of little use—in effect, one would have to know that a particular opinion exists to find it. The gap *Missing Decisions* identifies, therefore, is a substantial one.

The result, McAlister argues, is that we have been operating under a “false sense of transparency.” And what is the problem with that problem? First, our ability to be an effective check on the judiciary is impeded if a sizeable percentage of its decisions is out of sight (even accepting that many of these decisions may be perfunctory). And second, McAlister suggests that many of the missing decisions come from cases involving pro se litigants, criminal appellants, and non-citizens—our most vulnerable litigants. Depriving future litigants of the chance to review similar cases and outcomes may harm their own litigation chances. Moreover—tying back to a concern that *Dangerous Citations*raises—the path of the law could be shifted, even if just modestly, in a detrimental way.

What the two articles have in common, beyond adding to our understanding of how judges and courts operate, is that they identify concerning problems and then provide meaningful solutions. For *Dangerous Citations*, the solutions are a few-fold. First, appellate courts should create less complex legal tests for lower courts—quelling the demand for shortcuts by which judges inappropriately rely on colleague courts. Second, Gardner hopes to change opinion-writing norms, so that judges internalize quality citations over quantity. Awareness of the problem is necessary to accomplish that goal—and *Dangerous Citations* paves the way. For *Missing Decisions*, the solution is at the courts’ fingertips. McAlister proposes that the Judicial Conference issue guidance requiring courts to make all decisions (that are unsealed and that are stripped of personally-sensitive information) freely available on court websites. This step is critical in and of itself and will lead to broader collection of decisions by the WestLaws and Lexises of the world.

Ultimately, Gardner’s and McAlister’s works shed necessary light on how we maintain and rely upon non-binding decisions. Their articles challenge our notions of the status quo and should lead to real-world fixes, leaving all of us—including the courts—the better for it.

Marin K. Levy, *The Status of Non-Binding Authority*, JOTWELL (November 11, 2020) (reviewing Maggie Gardner, *Dangerous Citations*, **Maggie Gardner,** Dangerous Citations**, 95 N.Y.U. L. Rev.** (forthcoming 2020).; Merritt E. McAlister, *Missing Decisions*, **Merritt E. McAlister,** Missing Decisions**, 169 U. Pa. L. Rev.** (forthcoming 2021).), http://courtslaw.jotwell.com/the-status-of-non-binding-authority.