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Nov. 2, 2021

Memo-dispo No-no

Apart from the substantive law, there's a valuable lesson in a recent 9th Circuit ruling about citing unpublished decisions.

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EXCEPTIONALLY APPEALING

Unless you have an intense interest in how parking tickets are handled in Portland, Oregon, you probably missed *Grimm v. City of Portland*, 971 F.3d 1060 (9th Cir. 2020).

Actually, it turns out that Portland's mobilephone parking app, called Parking Kitty, raised some pretty interesting constitutional issues. Hence a serious 9th U.S. Circuit Court of Appeals opinion -- and one that never mentions the cutesy name nor makes any stab at feline humor, unlike the Parking Kitty website itself, which promises Purrfect Parking solutions that are the cat's meow. But apart from the substantive law, there's a valuable lesson in the case about citing unpublished decisions.

As an important constitutional ruling, *Grimm* took the form of a published opinion. But most 9th Circuit decisions are not published. Instead, they are resolved by unpublished memorandum dispositions, affectionately abbreviated to memodispos or the even shorter memdispos. (Memdispos outnumber published opinions by over 15 to one.) 9th Circuit General Order 4.3.a explains: "Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a concise explanation of this Court's decision. Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result." *See also* General Order 6.5.b.1 (noting that dispositions in cases resolved without oral argument, i.e., by the Circuit's screening panel, "ordinarily will be by unpublished memorandum"). Indeed, a memdispo can be as short as a single sentence with a citation and the outcome (affirmed or reversed). Most, however, typically do a bit more than that, often spanning a few pages.

Before 2007, memdispos could not be cited under the rules because they are unpublished decisions. And before the Federal Appendix started (in 2001) -- you know, the oxymoronic case reporter that publishes unpublished decisions -- memdispos could only be found on electronic research services. In 2006, the Federal Rules of Appellate Procedure were amended (after much hullabaloo) to allow citation to unpublished opinions issued on or after Jan. 1, 2007. Fed. Rule App. Proc. 32.1.

OK, you probably knew all that already, but this background was necessary to get to the grim tale about to unfold. In *Grimm*, the district court granted the city's summary judgment motion relying "exclusively" on a memdispo. 971 F.3d at 1062. The 9th Circuit found that this was "misguided." *Id.* at 1066.

Non-binding memdispos are "not precedent" (except when relevant under the doctrine of law of the case or claim or issue preclusion). *Id.* at 1067. Thus, the court instructed that the memdispo "should not have been relied upon by the district court as the dispositive basis for its ruling." *Id.*

When Circuit Rule 36-3(a) says that memdispos are "not precedent," that means that they are not meant to be treated as if they were precedential. As "shorthand" decisions designed solely for the parties, and merely applying established law to particular facts, their reasoning is rarely developed enough to acknowledge and account for competing considerations, reconcile precedents, or describe limitations to their legal

holdings. *Id.* Because of their "limited function," they lack the "nuance and breadth of precedential opinions," and so are of "little use to district courts or litigants in predicting how [the 9th Circuit] -- which, again, is in no way bound by such dispositions -- will view any novel legal issues in the case on appeal." *Id.*

Therefore, although memdispos can be cited -- because the federal rules require allowing citation (*see* 9th Cir. Rule 36-3(b)) -- and they may "prove useful" as examples of applying settled law, they are "not appropriately used" (as done in *Grimm*) "as the pivotal basis for a legal ruling by a district court." *Id.* Doing so annoys 9th Circuit judges because reliance on a nonprecedential disposition robs the appellate court of "a legal analysis to review." *See id.*

So the 9th Circuit in *Grimm* criticized the district court for relying on a memdispo (which the court, in a footnote, said was distinguishable anyway) and for ignoring two published cases that were more on point. Oddly enough, *Grimm* is not the only grim example: In *Watersheds Project v. Grimm*, 921 F.3d 1141, 1147 (9th Cir. 2019), the court disapproved of a district court relying on an unpublished memorandum, too. (And no, it's not the same Mr. Grimm: One is Andrew, the other Todd.)

Grimm v. Portland cites *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001), which thoroughly compares published versus unpublished dispositions and affirms the constitutionality of 9th Circuit Rule 36-3(c). Occasionally a 9th Circuit panel may find a memdispo "instructive" (e.g., *DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 764 n.7 (9th Cir. 2018)). But more often, references to memdispos will note that they are neither controlling nor persuasive authority. *Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001). For example, in *Aliyev v. Barr*, 971 F.3d 1085, 1087 n.2 (9th Cir. 2020), the panel explained that memdispos are "are not precedential" and pointed out that "because the recitation of the facts is brief or non-existent, we cannot determine whether those decisions involved the precise circumstances here." *Id.* (citing *Hart*, 266 F.3d at 1177-78). The panel also noted that "none of the dispositions offered any analysis beyond recitation of the regulatory text ... [so] our decision today likely is fully consistent with our earlier dispositions; to the extent that our decision conflicts with our earlier dispositions, we are unpersuaded by their terse analyses." *Id.* at 1087 n.2.

In *Giha v. Garland*, 12 F.4th 922, 932 n.6 (9th Cir. 2021), the court recently criticized a petitioner for relying "on a cherry-picked selection of unpublished decisions that he claims support his position, while overlooking other unpublished decisions that squarely reject his view." The panel concluded that "[i]n any event, all of these unpublished decisions, including those cited by [petitioner], are nonprecedential." *Id.*

Where does this leave us? Well, first, never violate the rule against citing to pre-2007 memdispos. *See In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1001 n.10 (9th Cir. 2016) (party should not have cited or relied upon a 1996 memdispo); *Garity v. APWU Nat'l Lab. Org.*, 828 F.3d 848, 857 n.7 (9th Cir. 2016) ("citation to pre-2007 unpublished

authority violates our rules"). That rule arguably applies to judges, too. *See* *Kaur v. Wilkinson*, 986 F.3d 1216, 1233 (9th Cir. 2021) (Miller, J., dissenting) (criticizing panel majority for relying on a pre-2007 memdispo: "[i]t is contrary to fundamental principles of due process to base our decisions on authorities that we have designated as nonprecedential and forbidden the parties to address").

Second, if you feel compelled to cite a post-2007 memdispo, recognize its limitations. Even if it seems like spot-on authority, *Grimm* teaches that it is not enough to merely cite it as if it were actually binding precedent. Citation to, and even discussion of, the memdispo alone will not suffice as a basis for a decision. Instead, go further and make all other arguments, especially factual arguments, to support the desired outcome. And importantly, appreciate why some judges will entirely ignore memdispos, and assume that could happen in your situation. (Note that some judges are not above criticizing their colleagues for such citations. *See, e.g.*, *United States v. Bare*, 806 F.3d 1011, 1021 (9th Cir. 2015) (Kozinski, C.J., dissenting) ("The majority also cites two unpublished cases to support its decision. But our rules clearly state that unpublished dispositions aren't authority. And for good reason: They generally aren't worded carefully enough to govern future cases, nor are they exposed to the type of en banc scrutiny to which published opinions are subjected." [citations omitted]).)

If a district court hands you a win that looks like the one in *Grimm* -- i.e., premised solely on a memdispo -- encourage the judge to bolster the ruling with more analysis. Or, if you're on the other side of such a ruling, cite *Grimm* and the other cases noted here. ν

Exceptional research assistance by Manatt associate Benjamin E. Strauss.