

Beware of Nonbinding Precedent

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In law school, we're all taught the basics of binding versus nonbinding precedent. Case law from within the applicable jurisdiction is generally binding, while case law from other jurisdictions is merely persuasive. Less often discussed is the fact that this distinction can apply to precedent from within the same court system. Many practitioners, for example, will have encountered rules surrounding unpublished opinions in the federal circuit courts and circuit-specific variations regarding the precedential value of such opinions, including if and how they should be cited. Similar rules may apply at the state level, and appellate practitioners litigating in new jurisdictions should be careful to review these rules before citing intrastate authority as binding. Take Georgia, for instance. Prior to August 1, 2020, an opinion of the Georgia Court of Appeals (the state's intermediate appellate court) decided by a three-judge panel was binding only to the extent that all three judges concurred in the judgment and rationale. [1] Under this prior version of the rule, any portion of the opinion in which one or more of the judges concurred only in the judgment was considered "physical precedent," which is persuasive, but nonbinding. The rule required that physical precedent be marked as such in citations. The [physical precedent rule](#), Georgia Court of Appeals Rule 33.2, was recently amended to provide that a decision issued by the Court of Appeals after August 1, 2020, is binding if at least a majority of the participating judges concur in the judgment and rationale, eliminating the need for unanimity. However, the older, more limiting version of the rule still applies to opinions issued before the August 1, 2020, cutoff. [2] As a result, lawyers practicing in Georgia still have to track the lines of rationale in opinions issued before the cutoff to determine whether an opinion is binding on a particular issue. Crucially, this determination requires a careful review of the full opinion as it depends on a level of nuance that may not be captured by citator tools like KeyCite or Shepard's. The intricacies of Georgia's physical precedent rule serve as a reminder to practitioners who litigate across multiple jurisdictions: Be careful what you cite and how you cite it, even when working with authority from within the applicable jurisdiction.

[1] See Ga. R. App. Ct. 33.2(a)(2); *Fulton Cnty. Bd. of Tax Assessors v. Nat'l Biscuit Co.*, 676 S.E.2d 41, 43-44 (Ga. Ct. App. 2009). [2] See *N. Am. Senior Benefits, LLC v. Wimmer*, 889 S.E.2d 361, 364 (Ga. Ct. App. 2023).

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