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Dicta ain't necessarily so

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Most lawyers know that a "holding" is a statement in an opinion that is necessary to the outcome of a case, whereas "dicta" is everything else – i.e., general observations that need not be followed. But this elementary understanding ain't necessarily so, depending on your jurisdiction. Exceptional lawyers know to ask "is you is or is you ain't my [holding]." For example, state courts in Arizona, Illinois, Maryland, and Minnesota follow a different rule. And so does another court closer to home.

We all recognize that the Ninth Circuit Court of Appeals is exceptional in many ways: It's the biggest in terms of geography, number of sitting judges, and the size of its en banc court (11 judges!). It's also the "biggest" in terms of how broadly it defines a "holding."

As detailed in a law review article by Professor Charles Tyler, the Ninth Circuit has adopted an exceptional approach that expands the ordinary rule. That article offers an interesting look behind the scenes at how the Ninth Circuit came to adopt this exceptional position. See Charles W. Tyler, The Adjudicative Model of Precedent, 87 U. Chi. L. Rev. 1551 (2020).

Professor Tyler begins by laying out the regular rule of a precedential holding, which he calls the "Necessity Model" of precedent. He then discusses the rarer and broader view of precedent in the Ninth Circuit and a few other jurisdictions, which he labels the "Adjudicative Model." This Adjudicative Model treats a ruling as authoritative and binding if it expressly resolves an issue that was part of the case – even if not "necessary" to the disposition of that case.

Historically, the Ninth Circuit followed the traditional Necessity Model, but that approach began to change in 2001 with an en banc opinion written by Judge Kozinski and joined by Judges Trott, T.G. Nelson, and Silverman. See United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) (en banc).

Johnson involved a search for contraband in a shed on a defendant's property. Id. at 900. A majority en banc opinion reversed the district court's denial of the defendant's suppression motion, and remanded a determination

on whether the warrantless search occurred within the home's curtilage. Id. at 898. In a separate majority opinion, however, six judges held that the Court reviews de novo whether a search takes place within the curtilage. Id. at 913-14. This, in effect, announced a standard of review for an issue the panel never reached. See Tyler, supra, at 1568.

Judge Tashima wrote separately to "correct the mistaken assertion" that this second majority opinion "represents a 'holding' of the Court." Johnson, 256 F.3d at 919 (Tashima, J., concurring). Specifically, Judge Tashima explained that the "musings about the standard of appellate review of curtilage determinations are dicta because the Court has not reviewed any curtilage determination." Id. And "[w]hile some may find [the] musings to be interesting, they are of no moment because they have no effect on our disposition of the case." Id.

Judge Kozinski responded to Judge Tashima in a subpart of his opinion that was joined by three members of the second majority (Judges Gould and Paez abstained). See id. at 914-16. Judge Kozinski criticized the Ninth Circuit's inconsistency in applying precedent, which, he argued, created uncertainty for litigants because "lawyers advising their clients would have to guess whether a later panel will recognize a ruling that is directly on point as also having been necessary." See id.

To solve this problem, Judge Kozinski proposed what Professor Tyler calls the Adjudicative Model: "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." Id. at 914; see Tyler, supra, at 1569. This marked the beginning of a four-year debate on what constituted precedent in the Ninth Circuit. See Tyler, supra, at 1569-70.

Professor Tyler details a "noteworthy flashpoint" during this period, when Judge Reinhardt dissented from a denial of rehearing en banc and "excoriated" a three-judge panel for offering what he considered an "advisory opinion" relating to Arizona's death penalty statute. See Spears v. Stewart, 283 F.3d 992, 999 (9th Cir. 2002) (Reinhardt, J., dissental).

Judge Reinhardt's "dissental" – see A. Kozinski & J. Burnham, I Say Dissental, You Say Concurral, 121 Yale L.J. Online 601 (2012) – drew sharp criticism from five judges. They cautioned that Judge Reinhardt purported to advise the

public and other courts of the Circuit to ignore portions of an opinion that commanded a majority of the panel, which was “a dangerous practice that will cause no end of confusion and disarray in our circuit caselaw.” See Spears, 283 F.3d at 1005 (Kozinski, J., statement concerning the denial of rehearing en banc).

The Adjudicative Model eventually won out and became Ninth Circuit law in a 2005 en banc per curiam opinion. See Barapind v. Enomoto, 400 F.3d 744, 751 (9th Cir. 2005) (en banc); Tyler, supra, at 1570-74. The district court in Barapind, on habeas review of an extradition court’s ruling, held that it was not bound by a portion of a published Ninth Circuit case because the discussion in that case was not necessary to the ultimate disposition. On appeal, however, the Ninth Circuit disagreed, and the en banc panel criticized the lower court for “operat[ing] under a mistaken understanding of what constitutes circuit law.” Barapind, 400 F.3d at 751.

The Court explained that the discussion at issue was “law of the circuit” because it addressed the issue and was decided in an opinion joined by a majority of the panel. Id. at 750-51. And this was so “regardless of whether it was in some technical sense ‘necessary’ to [the] disposition of the case.” Id. at 751. Buried in footnote 8, the en banc opinion explains that an en banc Court can provide a “supervisory function” “by instructing three-judge panels and district courts about how to determine what law is binding on them. It thus constitutes authoritative circuit law.” Id. at 751 n.8. Thus, notwithstanding Judge Rymer’s partial dissent suggesting “the discussion about dicta is dicta,” the Adjudicative Model is the law in the Ninth Circuit. See id. at 758; Tyler, supra, at 1571.

Professor Tyler anonymously interviewed numerous Ninth Circuit judges who participated in the seminal cases and still grapple with the Adjudicative Model today. Several of those judges stated that they voted to rehear Barapind en banc specifically to clarify the Circuit’s framework for determining the holdings of earlier cases. See Tyler, supra, at 1571 (citing anonymous interviews).

Some judges, still to this day, think Barapind was “ridiculous[ly]” wrong. Id. at 1572 (citing anonymous interviews). Another judge said she believes the Adjudicative Model is unconstitutional, but nonetheless acknowledged that the Barapind framework is the law of the Ninth Circuit in the sense that her colleagues treat it that way. Id. at 1574. Even so, Professor Tyler found that

most judges believe the Adjudicative Model is the proper way to determine the holding of a Ninth Circuit case, and some interviewees even mentioned Johnson or Barapind by name, calling those cases "binding," "established now for … years," "settled" law, the "consensus approach," and "the rule of decision." See id. at 1572-74.

Professor Tyler's interviews reveal the importance of this exception, which suggests holding-versus-dicta arguments may be best left out of your next Ninth Circuit brief. In fact, several judges could remember cases where their view of an issue turned on the Circuit's broad definition of a holding, and some were even facing that issue in pending cases. See id. at 1574. One judge said she makes a point of educating each new batch of law clerks on the Barapind framework. Id. Another said her first law clerk, who previously clerked for another Ninth Circuit judge, taught her about the framework when she joined the Court. Id. Several said they mention the framework to visiting judges, who come from across the country and are unlikely to be familiar with it. Id.

Unlike the Ninth Circuit, however, California follows the general rule – albeit with Latin phrasing. In California, "[o]nly statements necessary to the decision are binding precedents." Gogri v. Jack in the Box Inc., 166 Cal. App. 4th 255, 272 (2008) (quoting W. Landscape Constr. v. Bank of Am., 58 Cal. App. 4th 57, 61 (1997)). California calls this the "ratio decidendi"—i.e., the principle or rule that constitutes the basis of the decision and creates binding precedent. United Steelworkers of Am. v. Bd. of Educ., 162 Cal. App. 3d 823, 834 (1984).

In California, stare decisis extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments included in an opinion (i.e. dicta). Gogri, 166 Cal. App. 4th at 272. And to determine the precedential value of a court's statement, "the language of that statement must be compared with the facts of the case and the issues raised." Id. (quoting W. Landscape Constr., 58 Cal. App. 4th at 61). And just to muddy the waters further, Courts of Appeal "generally consider California Supreme Court dicta to be persuasive," but may reject dictum that does not "reflect compelling logic." Id.

Professor Tyler suggests that California may be moving towards the Adjudicative Model, citing Leider v. Lewis, 2 Cal. 5th 1121, 1134 (2017) as evidence of this shift. The Supreme Court in Leider recognized that

“[s]tatements responsive to the issues raised on appeal and intended to guide the trial court on remand are not dicta.” Id. While this rule may sound a bit broader than a pure Necessity Model of precedent, it doesn’t seem to approach the broad view of precedent adopted by the Ninth Circuit.

And while it will be interesting for Exceptionally Appealing to monitor whether any new exceptions to the general rule develop in California, the Supreme Court seems to have reaffirmed California’s commitment to the holding/dicta dichotomy as recently as August 2020. See Ixchel Pharma v. Biogen, Inc., 9 Cal. 5th 1130, 1153 (2020) (“It is axiomatic that an unnecessarily broad holding is ‘informed and limited by the fact[s]’ of the case in which it is articulated.”).