

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
CRIMINAL JUSTICE SECTION
TORT AND INSURANCE PRACTICE SECTION
SENIOR LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED THAT the American Bar Association opposes the practice of various
2 federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions
3 as contrary to the best interests of the public and the legal profession.
4

5 FURTHER RESOLVED THAT the American Bar Association urges the federal courts of
6 appeals uniformly to:

- 7
- 8 1) Take all necessary steps to make their unpublished decisions available through
9 print or electronic publications, publicly accessible media sites, CD-ROMs,
10 and/or Internet Websites; and
 - 11
 - 12 2) Permit citation to relevant unpublished opinions.
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2 **REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON**
3 **UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS**
4

5 As the number of cases heard and decided by federal appellate courts increased,
6 without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules
7 concerning the publication and non-publication of their decisions, and set parameters concerning
8 the use and effect of and citation to unpublished decisions. Generally speaking, the approach
9 favored by the federal courts of appeals has been to give the courts discretion in deciding which
10 cases to publish in official case reporters, and which cases not to publish. The appellate courts
11 also have discretion to determine whether, to what extent, and for what purposes their
12 unpublished decisions may be cited. A slim majority of federal appellate courts has adopted a
13 companion principle, which is that decisions not designated for publication not only do not
14 constitute binding precedent, but cannot even be cited for their possible persuasive value.
15

16 This Report provides an overview and summary of federal courts of appeals rules
17 concerning litigants' ability (or inability) to cite unpublished opinions and the effect, if any, to be
18 given by the courts to such unpublished decisions. The Report examines the historic rationale for
19 such rules and addresses the continued vitality of these rationale. The Report concludes that the
20 justifications for rules prohibiting citation to unpublished federal appellate decisions no longer
21 carry substantial weight, and that the ABA should support a recommendation that all federal
22 appellate courts (1) take all necessary steps to make their unpublished decisions available
23 through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or
24 Internet websites; and (2) permit citation to relevant unpublished opinions.¹
25

26 1. Overview of Federal Appellate Court Rules Concerning Citations to
27 Unpublished Decisions or Orders
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29 All of the federal courts of appeals have rules governing citation to unpublished
30 decisions or orders. These rules fall into two general categories.
31

32 The first category consists of rules that prohibit the citation to unpublished
33 decisions except for purposes of establishing the doctrines of the law of the case, *res judicata* or
34 collateral estoppel. The Federal, District of Columbia, First, Second, Seventh, Eighth and Ninth
35 Circuits, as well as the Federal Court of Claims, have such rules.²

¹ The Report and Recommendation do not address the threshold issue of publication of appellate decisions or the criteria employed by courts in making decisions concerning publication.

² See Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1st Cir. R. 36(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); 9th Cir. R. 36-3; Fed. Ct. Cl. R. 52.1. *But see* discussion *infra* at 3.A. concerning the Eighth Circuit's recent decision concerning the constitutionality of its rule.

1
2 The Court of Appeals for the District of Columbia goes further in prohibiting
3 citation not only to the court’s own unpublished decisions, but to unpublished decisions from
4 other courts as well, unless the particular court considers its unpublished decisions to be
5 precedential.³

6
7 The second category consists of rules that disfavor the citation to unpublished
8 decisions, but allow citation if counsel believes that the decision has precedential value in
9 relation to a material issue in a case and if there is no published opinion that would serve as well.
10 The rules require that counsel must provide a copy of the unpublished opinion to the court. The
11 Fourth, Fifth, Sixth, Tenth and Eleventh Circuits take this approach.⁴

12
13 Finally, the Third Circuit simply states that it will itself not cite to any of its
14 unpublished opinions because they are not precedent.⁵ However, the Third Circuit does not place
15 any restrictions on the ability of parties to cite to unpublished decisions.⁶

16
17 In addition to the federal court rules, the American Bar Association’s Standing
18 Committee on Ethics states that it is:

19
20 ethically improper for a lawyer to cite to a court an unpublished
21 opinion . . . where the forum court has a specific rule prohibiting
22 any reference in briefs to an opinion . . . marked . . . ‘not for
23 publication.’⁷

24
25 2. Origins of and Rationale for Rules Restricting Effect of and Citation to
26 Unpublished Decisions or Orders
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³ See D.C. Cir. R. 28(c).

⁴ See 4th Cir. R. 36(c); 5th Cir. R. 47.5; 6th Cir. R. 24(c); 10th Cir. R. 36.3; 11th Cir. R. 36-2; see also Report of the Committee on Federal Courts on the Second Circuit’s Rule Regarding Citation of Summary Orders (July 17, 1998), discussed *infra* at 3.C, in which the Committee on Federal Courts recommends that the Second Circuit adopt a rule governing citation to unpublished summary orders similar to the rules in the Fourth, Sixth and Tenth Circuits.

⁵ 3d Cir. IOP 5.8.

⁶ See 3d Cir. R. 28.3 (“Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.”).

⁷ ABA Formal Op. 94-386R.

1 The origin of rules restricting citation to unpublished decisions is linked to the
2 determination that certain opinions should not be published.⁸ Up to and through the 1960's and
3 1970's, the vast majority of decisions from federal courts, even one-word Memorandum
4 Decisions, routinely were published.⁹ However, that same period experienced a significant
5 increase in the number of opinions being handed down by the federal courts.¹⁰ In 1964 the
6 Judicial Conference of the United States expressed concern over the number of published
7 opinions that might impose unreasonable costs and practical difficulties in maintaining access to
8 the published reports.¹¹ Thus, the Judicial Conference recommended that the federal courts of
9 appeals publish “only those opinions which are of general precedential value.”¹² In 1971 the
10 Federal Judicial Center issued a report which further highlighted the problems faced by the
11 federal courts due to the increasing caseload.¹³ In 1972, the Judicial Conference directed the
12 federal circuits to develop plans to limit the publication of opinions, which eventually resulted in
13 the current rules in the federal courts.¹⁴

14
15 The concern over the number of opinions generally is expressed in two ways.
16 First, as the amount of decisions increases, so too does the cost of publishing, disseminating and
17 researching them.¹⁵ There was a fear that the increased costs will be passed on to the consumer
18 of legal services, resulting in inequities as only those who can afford to pay these high costs will
19 obtain the best legal advice.¹⁶

⁸ For an in-depth discussion of the history and rationale for unpublished opinions, see Donna Stienstra, Federal Judicial Center, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* (1985); William L. Reynolds and William M. Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 *Colum. L. Rev.* 1167 (1978) (“Reynolds and Richman I”); William L. Reynolds and William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 *U.Chi. L. Rev.* 573 (1981) (“Reynolds and Richman II”).

⁹ Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the federal courts of appeals*, 85 *Calif. L. Rev.* 541, 546 (1997); Donald R. Songer, *Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 *Judicature* 307, 308 (1990) (“It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.”).

¹⁰ Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 *Ohio St. L.J.* 177, 181-85 (1999).

¹¹ Report of the Proceedings of the Judicial Conference of the United States 11 (1964).

¹² *Id.*

¹³ William L. Reynolds and William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 *Duke L.J.* 806, 808 (1979).

¹⁴ Report of the Proceedings of the Judicial Conference of the United States 33 (1972).

¹⁵ Shuldberg, *supra* note 9, at 547-48.

¹⁶ Reynolds and Richman I, *supra* note 8, at 1188-89.

1
2 As the number of federal cases grew, federal judges and their clerks indicated that
3 they were unable to keep up with and resolve their caseloads in a timely manner. Thus, a second
4 concern was that the efficiency of the federal court system would be compromised by the need to
5 publish every single decision, no matter how unimportant.¹⁷ By selectively publishing opinions,
6 judges could spend less time writing opinions and more time resolving a larger number of
7 cases.¹⁸ Moreover, in the interests of judicial efficiency, courts should spend more time on
8 published opinions that substantially advance the state of the law, and not publish opinions that
9 only resolve a dispute between litigants.¹⁹

10
11 Having made the determination not to publish certain decisions, it quickly was
12 decided that citation to these decisions should be restricted. It was argued that unfettered citation
13 to unpublished decisions would substantially undermine the purposes of selective publication –
14 reduction of costs and increased judicial efficiency.²⁰ If litigants could cite to unpublished
15 decisions, the parties and the court still would have to spend time researching these cases.²¹
16 Alternate collections of these decisions would develop and practitioners and law libraries would
17 have to invest funds to keep abreast of these collections. Judicial efficiency also would suffer,
18 the argument went, because judges would feel compelled to spend more time writing opinions
19 that they know were going to be cited anyway.²²

20
21 In addition, there was a concern that allowing citation to unpublished decisions
22 was unfair because certain litigants would have more access to the body of unpublished opinions
23 than others.²³ For example, attorneys with greater time and resources would more easily be able
24 to bear the costs of researching and maintaining collections of the decisions, and frequent
25 litigants, such as the government, would have access to a greater number of unpublished opinions

¹⁷ Shuldberg, *supra* note 9, at 548; Martin, *supra* note 10, at 190; Joiner, *Limiting Publication of Judicial Opinions*, 56 *Judicature* 195, 196 (1972).

¹⁸ Martin, *supra* note 10, at 190; George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 *Mercer L. Rev.* 477, 479 (1986).

¹⁹ Richard A. Posner, *The Federal Courts: Crisis and Reform*, 124 (1985); *Comm. on the Use of Appellate Court Energies*, Advisory Council for Appellate Justice, FJC Research Series No. 73-2, *Standards for Publication of Judicial Opinions* 5 (1973).

²⁰ Reynolds and Richman I, *supra* note 8, at 1186-87.

²¹ Shuldberg, *supra* note 9, at 550; Martin, *supra* note 10, at 190.

²² Shuldberg, *supra* note 9, at 550.

²³ *Id.*

1 issued in the numerous cases in which they are involved.²⁴ The argument was that citation to
2 unpublished decisions should be restricted so that these attorneys and litigants did not have an
3 unfair advantage over smaller or less well-funded parties.

4
5 3. Bases for Recommending Changes to Rules Restricting Effect of
6 and Citation to Unpublished Decisions

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8 Many of the stated justifications for rules limiting or prohibiting citation of
9 unpublished decisions deserve renewed scrutiny today, especially in view of technological
10 developments that have made the availability and accessibility of unpublished decisions more
11 widespread and easier than in the past.²⁵ In addition, a recent decision of the Eight Circuit Court
12 of Appeals addressing the issue of the Constitutionality of rules barring citation to unpublished
13 decisions bears mention, although the focus of this Report and the bases for the proposed
14 Recommendation involve practical concerns and general issues of the operation of appellate
15 courts and their decision-making rather than the Constitutional grounds raised by the Eighth
16 Circuit.

17
18 Constitutional Analysis of *Anastasoff v. U.S.*

19
20 A panel of the Eighth Circuit Court of Appeals recently added a new wrinkle to
21 the debate over unpublished opinions in the case *Anastasoff v. United States*.²⁶ On August 22,
22 2000, Judge Richard S. Arnold, writing for the court, held that the Eighth Circuit's rule
23 restricting citation to unpublished opinions violated Article III of the Constitution. In affirming
24 the district court's denial of Ms. Anastasoff's claim for a tax refund, the panel relied on an
25 unpublished Eighth Circuit case, *Christie v. United States*. *Christie* was directly on point and
26 squarely addressed the issue before the court.

27
28 Ms. Anastasoff argued that the panel was not bound by the decision in *Christie*
29 because, per the Eighth Circuit's own rule, it was unpublished.²⁷ Rather than follow the rule,
30 Judge Arnold noted that the Framers of the Constitution considered the federal courts to have

²⁴ Standards for Publication, supra note 19, at 18; Stienstra, supra note 8, at 3 (noting that the U.S. Attorney is a frequent litigant who might benefit if citation to unpublished opinions is allowed); Reynolds and Richman I, supra note 8, at 1179; Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 958-59 (1989).

²⁵ See, e.g., Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235 (1998); Shuldberg, supra note 12.

²⁶ 223 F.3d 989 (8th Cir. 2000).

²⁷ See 8th Cir. R. 28A(i).

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1 certain powers, which the Framers delegated to the courts and limited by virtue of Article III.
2 Inherent in every judicial decision is a declaration and interpretation of a general principle or rule
3 of law. Therefore, the Framers considered that every judicial decision is authoritative to the
4 extent necessary for the decision and must be applied in subsequent cases to similarly situated
5 parties. Because all judicial decisions result in the creation of precedent, and Article III
6 implicitly formalizes the doctrine of precedent, the federal courts do not have the power to decide
7 which of their opinions create precedent. Thus, the rules purporting to restrict the creation of
8 precedent are unconstitutional.
9

10 Judge Arnold was careful to point out that the panel’s decision in *Anastasoff* does
11 not impact the federal courts’ ability to designate certain opinions as not for publication. Judge
12 Arnold’s point was that, regardless of the fact that nonpublication of decisions may have
13 practical value in terms of saving space and time, the federal courts do not have the discretion to
14 limit the doctrine of precedent implicit in Article III.
15

16 Ms. Anastasoff filed a petition for rehearing *en banc* before the Eighth Circuit.²⁸
17 Before the *en banc* panel could issue a decision, the United States mooted the case by paying
18 Anastasoff the entire amount of her claimed refund. Consequently, on December 18, 2000, the
19 *en banc* panel vacated Judge Arnold’s opinion and remanded to the District Court with directions
20 to vacate its judgment as moot.²⁹
21

22 **Practical Litigation Concerns**

23
24 Several practical litigation considerations can be advanced to support a departure
25 from rules limiting or forbidding citation to unpublished decisions.
26

27 First, and perhaps foremost, is the issue of the quality and extent of the record
28 upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a
29 party from creating a complete record of the authorities and prior appellate rulings bearing on a
30 matter.³⁰
31

32 Second, by restricting the effect and use of such decisions, rules against citation of
33 unpublished decisions also impact the appellate court’s ability to provide a complete and
34 instructive record of the court’s analysis and rationale for its decision, likewise impacting future
35 proceedings. This impact can be felt both in terms of a court’s inability to support its decision by

²⁸ See Steve France, Analysis & Perspective, 69 U.S. Law Week 2227 (BNA, Oct. 24, 2000).

²⁹ United States v. Anastasoff, 235 F.3d 1054 (8th Cir. 2000).

³⁰ Carpenter, supra note 25, at 247-48.

1 reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such
2 decisions in distinguishing the outcome of another case.³¹

3
4 Third, rules against citing unpublished decisions may create anomalous situations
5 in which the prior (but unpublished) decisions of a particular court of appeals are given less
6 weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both
7 litigants and appellate courts likely would agree that the expectations of the parties and the
8 federal appellate system would be better served where a court's own body of prior decision-
9 making is given proper credence and effect vis-a-vis the decisions of a sister court.³²

10
11 Fourth, the lack of uniformity among the rules and approaches of the various
12 federal appeals courts also is problematic. The same unpublished opinion may be citable for its
13 persuasive value in one circuit court, but not citable in another. This difference in approach is
14 particularly vexing because it could result in situations where an unpublished opinion could be
15 cited to sister courts, but not to the court authoring the opinion.

16 **Fairness/Access Issues**

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19 The fairness and access concerns that historically have been raised to justify rules
20 against citation to unpublished decisions appear to be obviated, if not eliminated, by the advances
21 and expansions in electronic publication and other mass dissemination of unpublished decisions.

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24 The unpublished decisions of most federal appellate courts, at least those rendered
25 in the last ten years, are effectively "published" and accessible either via (1) electronic legal
26 research services such as LEXIS and WESTLAW, (2) internet websites operated by the appellate
27 courts themselves, or (3) a combination of both. Additionally, numerous specialized case
28 reporters have sprung up in recent years, reporting on and reprinting published and unpublished
29 cases alike on particular areas of law and practice. Given the widespread use of and general
30 access to these electronic and specialty reporting media, concerns about litigants' inability to
31 identify and collect relevant unpublished decisions should be minimized. Moreover, the extent
32 to which unpublished decisions are made available through such media, as well as the
33 accessibility of such media, are likely to increase and improve in the years ahead.³³

34
35 Recently, the Committee on Federal Courts issued a report in which a majority of
36 the members of the Committee recommended that the Second Circuit adopt a rule allowing

³¹ Shulldberg, *supra* note 9, at 561-62; Robel, *supra* note 32, at 960.

³² Carpenter, *supra* note 25, at 258.

³³ Shulldberg, *supra* note 9, at 559-60.

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1 citation to unpublished summary orders in cases where counsel believes that the summary orders
2 have substantial persuasive value beyond any published decision.³⁴ The Committee found that
3 the two rationales commonly advanced to prohibit citation to unpublished decisions – unfair
4 access to unpublished opinions and judicial efficiency – were not persuasive to support a total
5 ban on citation.³⁵ With respect to the first rationale, the Committee noted that the Second
6 Circuit’s unpublished summary orders are widely available on LEXIS, WESTLAW or the court’s
7 website, to which many lawyers now have access. Summary orders are no more difficult to find
8 than many other types of authority which parties can cite, such as slip opinions, state court
9 reporters, BNA reports, and the like.³⁶

10
11 Further, there are strong countervailing “fairness” arguments that militate in favor
12 of allowing citation to unpublished opinions. First, significant concerns about fairness are raised
13 when a litigant is prohibited from calling to a court’s attention a prior ruling of that court that
14 may be relevant to the case at hand. Second, fairness issues also are presented when courts may
15 have adopted guiding approaches and principles to particular legal issues that are embodied
16 solely in unpublished opinions that, if not citable, are less likely to be known by litigants. Third,
17 the “unequal access” concern voiced by advocates of no-citation rules for unpublished opinions
18 is not eliminated by such rules, only disguised. Litigants better able to access unpublished
19 opinions will be able to do so whether such opinions are citable or not. No-citation rules serve
20 only to mask a litigant’s reliance on the analysis or reasoning of such unpublished opinions,
21 while still leaving the other party uninformed about the existence of the unpublished decision and
22 other related unpublished opinions.

23 24 **Quality of Decision-Making and Judicial Accountability**

25
26 Another consideration is the effect of rules barring citation to unpublished
27 decisions on quality of judicial decision-making and accountability. Even the best-intentioned
28 court may be inclined to give less fulsome consideration to a case, at least at the opinion-writing
29 stage, if the court knows that its decision can or will be designated as “not for publication” and
30 therefore will not be citable.

31
32 Moreover, the quality of appellate decision-making may be adversely impacted by
33 virtue of the fact that courts are depriving themselves of a universe of prior analysis, reasoning

³⁴ Report of the Committee on Federal Courts on the Second Circuit’s Rule Regarding Citation of Summary Orders (July 17, 1998) (“Committee on Federal Courts Report”).

³⁵ *Id.* A minority of the Committee members dissented from the Committee’s recommendation on the grounds of unequal access and concern that judges would abandon summary orders if they knew that parties could cite to them.

³⁶ *Id.*

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2 and decision-making embodied in unpublished opinions. Regardless of the *precedential* effect of
3 unpublished decisions, there appears to be no principled basis for refusing to consider
4 unpublished opinions for their possible persuasive or instructive value.

5 **Use of Public Forum for Private Dispute Resolution**

6
7 As public institutions, appellate courts serve important public interests. One of
8 those interests is to develop a body of law that resolves legal issues and guides future litigants,
9 actual and potential. Rules that permit the issuance of “not for publication” decisions that cannot
10 be used even for their persuasive value foster the notion of courts as private dispute resolution
11 bodies, addressing cases for the sole benefit of the involved parties but not for the benefit of the
12 public or legal community at large.

13
14 Moreover, the supposed efficiencies and cost savings of rules limiting the use and
15 effect of unpublished opinions actually may have the opposite effect. By depriving litigants and
16 courts of the use of such decisions as precedent or for persuasion, disputes or issues that may
17 easily have been disposed of by reference to such decisions instead may linger or advance. In
18 addition, the potential deterrent value of a prior adverse appellate decision is, for practical
19 purposes, eliminated when the decision cannot be cited because it was not published.³⁷

20 Finally, although concerns have been expressed about institutional litigants having
21 better access to or familiarity with unpublished opinions favorable to their cause, there is a
22 countervailing problem involving such litigants and unpublished opinions. Specifically, there is
23 a risk that specifically, institutional litigants will be successful in “burying” adverse decisions by
24 urging that they be designated as “not for publication.” Simply stated, institutional litigants have
25 a greater inherent incentive to manipulate the publication decision if that decision will render an
26 unfavorable opinion uncitable by future adversaries.

27 28 4. Technology Considerations and Impacts on Citation to Unpublished Decisions

29

³⁷ See Committee on Federal Courts Report, in which the Committee noted that:

The pervasive use of summary orders has created a vast body of unpublished decisions which are often pertinent to issues arising before the Court, but which cannot be brought to the Court’s attention under the current rule. . . . The inability under the current rule to bring a highly pertinent summary order to the attention of the Court leads to unnecessary briefing and argument by the parties and wastes judicial time and effort. It is also odd to have a body of decisional law that cannot be cited yet may be recalled by judges who participated in creating it or may be found by law clerks doing research. Perhaps most significantly, the current rule risks the possibility that two identical cases could be decided inconsistently, in violation of the Courts’ most basic obligation to treat like cases the same.

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1 Due to advances in technology from the time the rules restricting citation were
2 formulated, it is no longer as difficult to track down and utilize unpublished case law. Now, the
3 unpublished opinions of most of the federal circuits are available electronically in one form or
4 another. Most of the circuits have submitted the full text of their unpublished opinions to either
5 LEXIS or WESTLAW since the late 1980's or early 1990's.³⁸ In addition, the First, Second,
6 Eighth and Tenth Circuits put their unpublished opinions and orders on-line on the courts'
7 websites. Further, many specialized reporters gather unpublished opinions that are of interest to
8 their particular area of law, and these reporters often are available on-line or can be purchased on
9 CD-ROMs.

10
11 With the increasing use of electronic means of collecting, storing and researching
12 legal opinions, the fears of prohibitive costs and unequal access should be minimized. Computers
13 and CD-ROMs take up much less space than printed case reporters, with considerable savings in
14 the cost of storage space and purchasing expensive books.³⁹ Although computer research is not
15 without pitfalls, overall it allows a researcher to work more quickly and efficiently, particularly
16 as new generations of attorneys now are wholly computer-literate.⁴⁰

17
18 However, as noted above, not all federal circuits make their unpublished opinions
19 available in electronic form. This inconsistency could result in significant gaps in legal research
20 and cause researchers to overlook opinions that directly impact their issue. Because the use of
21 decisions in electronic format is so widespread, it is recommended that all the federal circuits
22 take all necessary steps to make their unpublished decisions available through print or electronic
23 publications, publicly accessible media sites, CD-ROMs, and/or Internet websites.

24
25 Ronald Jay Cohen, Chair, Section of Litigation

26
27 August 2001
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³⁸ Exceptions are the Third Circuit, the Fifth Circuit and the Eleventh Circuit, which do not make their unpublished opinions available electronically.

³⁹ Shuldberg, *supra* note 9, at 558.

⁴⁰ *Id.* at 559.

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GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Litigation
Submitted By: Ronald J. Cohen, Chair, Section of Litigation

1. Summary of Recommendation(s).

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association adopt policy urging federal courts of appeals to make their unpublished decisions more widely available through various print or electronic means, and to permit citation to relevant unpublished opinions.

2. Approval by Submitting Entity.

The report with recommendation on unpublished opinions was unanimously approved by the Council of the Section of Litigation on January 4, 2001.

1
2 3. Has this or a similar recommendation been submitted to the House or Board previously?

3
4 No.

5
6 4. What existing Association policies are relevant to this recommendation and how would
7 they be affected by its adoption?

8
9 The “Standards Relating to Appellate Courts,” approved by the House of
10 Delegates in February 1977 and amended by the House of Delegates in August 1994
11 state:

12
13 Opinions of an appellate court should be a matter of public record

14
15 “Publication of Opinions,” § 3.37(a). This policy would be reinforced by the
16 recommendation
17 with specific reference to unpublished opinions.

18
19 The “Standards Relating to Appellate Courts” also state:

20
21 Rules of court should provide that an opinion which is not formally
22 published may not be cited, but may be used to establish *res*
23 *judicata*[,] collateral estoppel, law of the case, or other similar
24 purposes.

25
26 “Citation of Opinions Not Formally Published,” § 3.37(c). The accompanying
27 commentary
28 further states that:

29
30 Allowing citation of unpublished opinions creates pressures to make
31 such opinions generally available, resulting in a secondary system of
32 unofficial publication which to some extent frustrates the purpose of
33 the nonpublication rule.

34
35 Thus, adoption of the Recommendation will require reconsideration of this existing
36 policy.

37
38
39 5. What urgency exists with requires action at this meeting of the House?

40
41 Access to, and fair use of, unpublished opinions is an important matter in the overall
42 administration of justice in the federal courts, and thus requires prompt attention.

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44 6. Status of Legislation. (If applicable.)

45
46 Not applicable.

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7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

On April 6, 2001 the Report and Recommendation to the House of Delegates on the Use and Effect of Unpublished Opinions in the Federal Courts of Appeals was circulated for public comment to the State Delegates, House of Delegates; all ABA Standing Committees; and all ABA Sections and other entities.

In May 2001, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division agreed to co-sponsor the Report and Recommendation on the Use and Effect of Unpublished Opinions.

10. Contact Person. (Prior to the meeting.)

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**EXECUTIVE SUMMARY OF THE
REPORT AND RECOMMENDATION**

A. Summary of the Recommendation

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association should support a recommendation that all federal appellate courts should (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and (2) permit citation to relevant unpublished opinions.

B. Summary of the Issue

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of citation to unpublished decisions. A slim majority of federal appellate courts has adopted the rule that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value. The issue is whether the traditional justifications for this rule are still valid or whether sound litigation reasons exist for allowing citation to unpublished opinions.

1 The Report makes the above recommendations because the traditional
2 justifications for the current rules prohibiting citation to unpublished federal appellate court
3 opinions – the increased cost and time to obtain, store and research a growing body of case law,
4 the need for judicial efficiency, and the perceived unfairness to some litigants over access to
5 unpublished opinions – no longer carry substantial weight. Several practical litigation
6 considerations exist to support a departure from the current rules.

7
8 First, and perhaps foremost, is the issue of the quality and extent of
9 the record upon which to base a further appeal. Rules barring
10 citation to unpublished decisions prevent a party from creating a
11 complete record of the authorities and prior appellate rulings
12 bearing on a matter.

13
14 Second, by restricting the effect and use of such decisions, rules
15 against citation of unpublished decisions also impact the appellate
16 court’s ability to provide a complete and instructive record of the
17 court’s analysis and rationale for its decision, likewise impacting
18 future proceedings. This impact can be felt both in terms of a
19 court’s inability to support its decision by reference to prior (but
20 unpublished) decisions, and in its inability to cite or rely upon such
21 decisions in distinguishing the outcome of another case.

22
23 Third, rules against citing unpublished decisions may create
24 anomalous situations in which the prior (but unpublished)
25 decisions of a particular court of appeals are given less weight (or
26 perhaps no weight at all) than (published) decisions of other
27 appellate courts. Both litigants and appellate courts likely would
28 agree that the expectations of the parties and the federal appellate
29 system would be better served where a court’s own body of prior
30 decision-making is given proper credence and effect vis-a-vis the
31 decisions of a sister court.

32
33 Fourth, the lack of uniformity among the rules and approaches of
34 the various federal appeals courts also is problematic. The same
35 unpublished opinion may be citable for its persuasive value in one
36 circuit court, but not citable in another. This difference in
37 approach is particularly vexing because it could result in situations
38 where an unpublished opinion could be cited to sister courts, but
39 not to the court authoring the opinion.

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41 The fairness and access concerns that historically have been raised to justify rules
42 against citation to unpublished decisions have been diminished by the advances and expansions

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1 in electronic publication and other mass dissemination of unpublished decisions. The
2 unpublished opinions of most of the federal circuits are available electronically, either on LEXIS,
3 WESTLAW, CD-ROM, court websites, or in specialized reporters. Overall, access to these
4 unofficial reporting media has increased, while the cost of collecting, storing and researching has
5 decreased.

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7 **C. Impact of the Policy Recommendation**
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9 Allowing citation to unpublished opinions will help to ensure that judges will give
10 full consideration to their decisions in all cases, by encouraging more complete analysis in
11 unpublished opinions as well as allowing parties to make the courts aware of the complete body
12 of case law that may affect their particular case. In contrast, depriving litigants and courts of the
13 use of such decisions as precedent or for persuasion may cause disputes or issues that may easily
14 have been disposed of by reference to such decisions instead to linger or advance. In addition,
15 the potential deterrent value of a prior adverse appellate decision is, for practical purposes,
16 eliminated when the decision cannot be cited because it was not published. Finally, citation to
17 unpublished opinions will deter institutional litigants from attempting to influence the
18 publication decision to eliminate the effect of unfavorable opinions against them. Thus, citation
19 to unpublished opinions will benefit judges and litigants alike.
20

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22 **D. Opposing Views**
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24 There are two traditional justifications for preventing citation to unpublished
25 opinions. First, it is argued that unfettered citation to unpublished opinions would substantially
26 undermine the purposes of selective publication – reduction of costs and increased judicial
27 efficiency. Second, there is a concern that allowing citation to unpublished decisions is unfair
28 because certain litigants would have more access to the body of unpublished opinions than
29 others. The Report discusses these justifications and concludes that they are no longer valid in
30 the modern legal profession.
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