

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ARTICLES

LOCAL RULES IN THE WAKE OF FEDERAL RULE OF APPELLATE PROCEDURE 32.1

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I. INTRODUCTION

Any significant change in the Federal Rules of Appellate Procedure is likely to have a ripple effect throughout the local rules of the federal courts of appeals. This is especially true of a rule as fundamentally important and widely debated as Federal Rule of Appellate Procedure 32.1,¹ which was created to permit

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1. Patrick J. Schiltz, *Much Ado about Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1429, 1429-30 (2005) (“On the day that I became Reporter, the issue of unpublished opinions was the most controversial issue on the Advisory Committee’s agenda. Eight years later, the issue of unpublished opinions continues to be the most controversial issue on the Advisory Committee’s agenda. I have devoted more attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined.”); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 Fordham L. Rev. 23, 23 (2005) (“This seemingly modest proposal—in essence, a proposal that someone appearing before a federal court may remind the court of its own words—is extraordinarily controversial. . . . Only once before in the history of federal rulemaking has a proposal attracted more comments.”).

citation of unpublished opinions issued on or after January 1, 2007.² It was intended to create uniformity regarding citation of unpublished opinions in the federal circuits. It has failed to do so, however, in two respects. First, by inserting a provision applying the rule only prospectively,³ the Judicial Conference undercut the very uniformity that the representatives of the bench and bar involved in the rulemaking process had intended to create.⁴ Second, as the comment to the rule makes clear, the rule takes no position regarding the precedential value of unpublished opinions,⁵ which leaves unresolved the most critical⁶ and least well-justified aspect of the practice of issuing unpublished opinions.⁷

2. Fed. R. App. P. 32.1(a)(ii) (LEXIS 2010).

3. The Federal Judicial Conference Standing Committee on Rules of Practice and Procedure had labored over the proposed rule for over fifteen years and approved a carefully crafted rule without such provision, but the full Judicial Conference inserted a provision applying the new rule only to unpublished opinions decided after January 1, 2007. Readers interested in the text proposed for a rule without the 2007 restriction can consult the minutes of the Committee's Spring 2005 meeting. See Advisory Committee on Appellate Rules & Procedure, Judicial Conference of the United States, *Minutes of Spring 2005 Meeting 2* (Apr. 14-15 2005), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP04-2005-min.pdf> (accessed Aug. 18, 2010; copy on file with Journal of Appellate Practice and Process) [hereinafter *Spring 2005 Committee Minutes*].

4. Fed. R. App. P. 32.1, comment ("Rule 32.1(a) is intended to replace . . . inconsistent standards with one uniform rule.").

5. *Id.* ("Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential"—whether or not those dispositions have been published in some way or are precedential in some sense." (emphasis in original)).

6. See David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. App. Prac. & Process 61, 65 (2009) ("While this may seem a small and innocuous step to some, particularly those who have studied and practiced law solely in the period when uncitable and non-precedential unpublished opinions were the norm, a decision to remove precedential value from some decisions was a radical paradigm shift. For the first time in the history of Anglo-American common law, courts were free to render opinions that played no part in prescribing the law in similar future cases. Future factually similar cases would find no refuge, by precedent or reason, in these prior "unpublished" decisions. These unpublished cases were now neither evidence of the law nor the law itself.").

7. See *id.* ("[T]he Advisory Council expressly considered a provision assigning unpublished opinions no precedential value, but it purposely avoided making such a suggestion to avoid the 'morass of jurisprudence' such a debate would entail."); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 Marq. L. Rev. 685, 699 (2009) ("Neither the 1973 Committee's report nor its recommendation reveal that any consideration was given to whether the federal circuits had

In the wake of Rule 32.1, some circuits have changed their local rules to comply with the new requirements. Others have gone beyond the requirements of Rule 32.1 to expand citation even further, by, for example, removing the prospectivity limitation.⁸ In addition, circuits continue to answer the question of precedential status of unpublished opinions left open by Rule 32.1 in various ways.⁹ The local rules regarding publication, citation, and precedent will be examined in this article to demonstrate the lack of uniformity in the treatment of unpublished opinions that continues to plague the federal courts. This article proposes ending this unjustified discrimination between the decisions of the federal courts of appeals, removal of the prospectivity requirement, and adoption of an amendment to Rule 32.1 granting precedential status to all opinions.

II. PUBLICATION, CITATION, PRECEDENT, AND LOCAL RULES

Publication, citation, and precedent are three different aspects of common law opinions. They are related, but not necessarily dependent upon one another. The degree to which common law opinions have possessed these characteristics has varied throughout the history of the common law. Early decisions were rarely published, and were precedent only in the aggregate, but were always citable to the court.¹⁰ Later, as decisions became more commonly published, the power of

the power to remove some cases from the body of precedent, whether such a move would be constitutional, or whether jurisprudentially this was a good idea.”).

8. *See e.g.* 10th Cir. R. 32.1(C) (2009) (“Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.”)

9. *Compare* D.C. Cir. R. 32.1 (2009) (“All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent.”) and 4th Cir. R. 32.1 (2010) (“If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited.”) with 9th Cir. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent.”).

10. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43, 68 (2001) (noting that early judges “gave little weight to a single decision, or even two decisions”); John H. Baker, *An Introduction to English Legal History* 204 (3d ed. Butterworths 1990) (explaining that even when the only record of decision was the courts’ rolls, lawyers and judges would rely upon their own memories and understanding of the cases’ decisions “vouch[ing] [for] the record” as needed).

precedent increased, and, of course, litigants remained free to urge upon the court an action it had previously taken by citing past decisions.¹¹ This trend of increasingly common publication and increasingly strong precedent was a feature of both colonial America and England in that period.¹² By the end of the nineteenth century, the entrepreneur John West had created a system of comprehensive publication of all federal appellate opinions, an effort that was of great interest to the bench and bar.¹³ While other, less comprehensive, reporters and even summaries of the law like the early Restatements existed, “[l]awyers chose the comprehensive style of reporting, preferring that all precedent be available.”¹⁴ From the dawn of the twentieth century until the mid-1970s, that was the state of the federal judiciary as a whole: full publication, strong precedent, and unfettered citation.¹⁵

In the 1970s, a committee of the Federal Judicial Council, the Advisory Council on Appellate Justice’s Committee on Use of Appellate Court Energies,¹⁶ drafted its report proposing that courts issue some decisions as unpublished and uncitable.¹⁷ When faced with the question of whether this new class of decisions would be precedent, that committee chose not to examine the issue, its constitutionality, or its practicality, calling it a “morass of jurisprudence.”¹⁸ This proposal altered the characteristics of common law opinions in a manner previously unknown to the common law. Suddenly, decisions would be divided into two categories: 1) decisions that were published, citable, and precedential and 2) decisions that were unpublished,

11. Cleveland, *supra* n. 6, at 74-82.

12. *Id.*

13. Thomas A. Woxland, “Forever Associated With the Practice of Law”: *The Early Years of the West Publishing Company*, 5 Leg. Ref. Serv. Q. 115, 119-20 (Spring 1985).

14. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Cal. L. Rev. 15, 21 (1987).

15. Some circuits had already begun to experiment with limitations of publication or citation, however. See Committee on Use of Appellate Court Energies, Advisory Council on Appellate Justice, Federal Judicial Council, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Energies of the Advisory Council on Appellate Justice* (Fed. J. Ctr. 1973) 29-38 [hereinafter *Standards for Publication*].

16. Elsewhere in this article, the committee is sometimes referred to as “the 1973 Committee.”

17. See generally *Standards for Publication*, *supra* n. 15.

18. *Id.* at 21.

not citable, and of questionable precedential value. It was essentially a declaration that some appellate opinions were not binding upon the issuing courts or the lower courts and that a gag rule would prevent the bar from urging these cases upon the courts in the future.¹⁹ In addition, cases were increasingly placed on one of these two tracks shortly after filing, often by judicial staff rather than judges themselves.²⁰

The local rules that followed the 1973 Committee's recommendation adopted its denial of both publication and citation to a subset of federal appellate decisions, and increasingly took a more definitive stance on denying precedent to these opinions. Some circuits' local rules did so quite blatantly, while others allowed for the possibility that such a decision may be precedential despite the appellate panel's determination on that issue.²¹ Within a few years, the courts of appeals had a variety of rules giving guidelines for (non)publication, restrictions or prohibitions on citation, and some statement on the precedent of these opinions.

This tripartite system has largely fallen apart—crushed under the inexorable turn of the wheels' progress, which themselves are driven by the inherent demand for readily accessible precedent among lawyers, litigants, and judges. The restrictions on publication have been undone by changes in technology and by persistent practices of the federal bar and federal judiciary.²² Though still labeled “unpublished opinions,”

19. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 221 (1999) (“If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.”)

20. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1, 6-7 (2007).

21. Compare 9th Cir. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent.”) with 4th Cir. R. 32-5 (“If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited.”). Whether a circuit's denying precedential value to some of its decisions by local rule is constitutional is certainly a valid question.

22. Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 551 (1997) (“These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current

these opinions are published, not only online but also in printed volumes such as the West's Federal Appendix. This is in large part due to the continuous use of these opinions by practitioners and judges—despite the opinions' citation or precedential status.²³ Second, new Rule 32.1 allows citations of all opinions presently being issued by the federal courts of appeals.²⁴ This was good news for the large number of judges and lawyers already using these opinions despite the citation ban.²⁵ These opinions are now effectively published and plainly citable. What remains is the same ambiguity inherent in the system since the first local rules on the subject following the 1973 Committee's recommendation: What is the precedential value of these opinions? New Rule 32.1 did not resolve this issue, and the local rules in its wake have continued to come to different answers in different circuits.

III. NEW RULE 32.1

Federal Rule of Appellate Procedure 32.1 represents the culmination of a nearly twenty-year process of removing the unpublished-opinion gag rule from the federal bar. Though this

technology.”); Berring, *supra* n. 14, at 19-21 (suggesting that early attempts to substitute actual case opinions with restatements were unsuccessful because lawyers wanted the rulings of the courts themselves).

23. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 43-45 (“The evidence is overwhelming that unpublished opinions are indeed a valuable source of ‘information and insight.’ First, unpublished opinions are often read. . . . Second, unpublished opinions are often cited by attorneys. . . . Third, unpublished opinions are often cited by judges. . . . Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. . . . Fifth, unpublished opinions can be particularly helpful to district judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. . . . Sixth, there is not already ‘too much law,’ as some opponents of Rule 32.1 claim.”).

24. Fed. R. App. P. 32.1.

25. Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. Rev. 399, 405-07 (2002) (summarizing the relevant data from the White Commission's surveys of federal judges and lawyers); Salem M. Katsh & Alex V. Chachkes, *The Constitutionality of No-Citation Rules*, 3 J. App. Prac. & Process 287, 301-02 (2001) (“[I]t behooves counsel to review unpublished opinions because they still may influence a court that reads (or remembers deciding) them itself.”); Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report—Working Papers* (1998) 15, 78 (including tables of survey results indicating that a substantial number of both judges and lawyers read unpublished opinions).

practice was subject to immediate critique,²⁶ it was conflicts in the local rules that brought this issue to the Federal Judicial Conference's attention in 1990.²⁷ The Local Rules Project, started in 1984 by the Judicial Conference to examine areas of inconsistency in the local rules of the circuits, found that one of the areas of greatest inconsistency was in the treatment of unpublished opinions.²⁸ The Local Rules Project recommended resolution of this issue by a uniform national rule in the form of amendments to the Federal Rules of Appellate Procedure.²⁹

From there the rule moved through an arduous rulemaking process.³⁰ In 2006, the rule was approved by the Judicial Conference, the Supreme Court, and Congress. Rule 32.1 states, in pertinent part:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
- (ii) issued on or after January 1, 2007.

The effect of this rule was to eliminate the variety of local rules that were then in effect treating unpublished opinions in a

26. William L. Reynolds & 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).

27. An earlier report suggested that the Judicial Conference study the issue, but no action was taken until after the Local Rules Project Report was made. See *Report of the Federal Courts Study Committee, April 2, 1990*, at 130 (1990) (noting that, “non-publication and non-citation rules present many problems”—both doctrinally and in the application of such rules—and calling upon the Federal Judicial Conference to study the issue).

28. Schiltz, *Much Ado about Little*, *supra* n. 1, at 1437 (citing Daniel R. Coquillette & Mary P. Squiers, *Report of the Local Rules Project: Local Rules on Appellate Practice* 68 (Jud. Conf. of the U.S. 1991)).

29. *Id.*

30. That process has been described by Judge Patrick J. Schiltz of the United States District Court for the District of Minnesota, who was, as a law professor, the Reporter for the Advisory Committee on the Federal Rules of Appellate Procedure during the drafting, comment, and recommendation period of new Rule 32.1. See generally Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1; Schiltz, *Much Ado About Little*, *supra* n. 1.

variety of ways.³¹ As previously noted, this rule contains an express prospectivity limitation in (a)(ii), and the comment expressly abstains on the issue of precedent:

Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as “unpublished” or “non-precedential”—whether or not those dispositions have been published in some way or are precedential in some sense.³²

Neither the prospectivity limitation nor the perpetuation of the uncertainty regarding precedential value is a beneficial development in federal jurisprudence. The circuits’ enactment of local rules demonstrates a continued lack of uniformity on these critical issues.

Rule 32.1 represents the only Federal Rule of Appellate Procedure on the citation of unpublished opinions. There is no similar rule governing how the courts of appeals should determine which opinions are suitable for non-publication, only the 1973 Committee’s recommended rule, which has been the template for some, but not all, circuit rules:

1. Standard for Publication

An opinion of the [court] shall not be designated for publication unless:

- a. The opinion established a new rule or law or alters or modified an existing rule; or
- b. The opinion involves a legal issue of continuing public interest; or

31. Compare 9th Cir. R. 36-3 (providing that unpublished dispositions and orders are not binding precedent and may not be cited) with 6th Cir. R. 28(g) (providing that citation of unpublished decisions is disfavored, but if a party believes that an unpublished disposition has precedential value and that no published opinion would serve as well, it may be cited) and D.C. Cir. R. 28(C)(1)(a) & (b) (providing that unpublished dispositions entered on or after January 1, 2002, may be cited as precedent and those prior to that date may not be cited as precedent). The then-existing local rules can be found in an excellent contemporary compilation. See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. App. Prac. & Process 349 (2004).

32. Fed. R. App. P. 32.1, comment (emphasis in original).

- c. The opinion criticizes existing law; or
- d. The opinion resolves an apparent conflict of authority.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication.³³

And there is no national rule regarding what precedential value should be accorded these opinions.³⁴ Some circuits lack a local rule on one or more of these three characteristics as well, but most have set forth some rule on each, and they are far from consistent.

IV. LOCAL RULES IN THE WAKE OF NEW RULE 32.1

Rather than proceed circuit by circuit, the following examination looks at the rules by category: publication guidelines, citation rules, and precedent limitations.³⁵

A. Publication Guidelines

What makes a decision suitable for non-publication is still subject to different rules in different circuits.³⁶ The generally

33. *Standards for Publication*, *supra* n. 15, at 22-23.

34. The Supreme Court is certainly aware of the courts' experimentation with unpublished opinions, but it has never formally approved of the process, leaving open the questions of whether such rules are permissible rulemaking or constitutional. The Court has been scrupulously careful not to approve of the circuits' treatment of unpublished opinions as non-precedential. *See Commr. v. McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.").

35. In addition, a series of charts organized by circuit follows this article. *See* Appendix. Each contains summary-form information about the particular circuit's rules and guidelines.

36. The 1973 Committee considered proposing that the circuits create their own publication plans but rejected it, "because it would introduce undesirable variations in publication practice within the system." That undesirable variation has come to pass despite the Committee's desire for uniformity. *See Standards for Publication*, *supra* n. 15, at 9.

accepted characteristic of unpublished opinions is that they apply settled law to facts so unremarkable that the case does not expand or contract the law. The 1973 Committee's recommended Model Rule creates a default position of non-publication, by stating that an opinion "shall not be published unless" it meets one or more of the listed criteria.³⁷ It provides no catch-all provision or allowance for publication of opinions outside the enumerated categories. The local rules of the federal courts of appeal deviate considerably from this model, often changing the default position of non-publication, adding their own considerations that may lead to publication, or foregoing the format altogether in favor of their own formulations.³⁸

1. Circuits Adopting Some Form of the Model Rule

Five circuits have adopted publication rules very similar to the Model Rule.³⁹ For example, the Fourth Circuit follows the

37. *Id.* at 22-23 (providing that "a. The opinion established a new rule or law or alters or modified an existing rule; or b. The opinion involves a legal issue of continuing public interest; or c. The opinion criticizes existing law; or d. The opinion resolves an apparent conflict of authority").

38. For the purposes of this analysis, it is sufficient to note that the local rules lack uniformity because this statement itself demonstrates the need for a national rule. But the extent to which courts follow these written guidelines is the subject of considerable skepticism, not least because of the sheer number of decisions issued as unpublished. *See e.g. Judicial Business 2008* at 44 (Admin. Office of the U.S. Courts 2008) (tbl. S-3), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S03Sep08.pdf> (noting 81.8 percent of all cases as unpublished in the twelve-month period ending September 30, 2007, with the Fourth Circuit issuing over 92 percent of its cases as unpublished) (accessed Aug. 11, 2010; copy on file with Journal of Appellate Practice and Process).

39. *See* 4th Cir. R. 36(a):

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file

a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten calendar days.

Id.

See also 5th Cir. R. 47.5.1:

The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

- (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
- (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
- (c) Explains, criticizes, or reviews the history of existing decisional or enacted law;
- (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;
- (e) Concerns or discusses a factual or legal issue of significant public interest; or
- (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

Id.

See also 6th Cir. R. 206:

(a) The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter:

- (1) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
- 2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;
- (3) whether it discusses a legal or factual issue of continuing public interest;
- (4) whether it is accompanied by a concurring or dissenting opinion;
- (5) whether it reverses the decision below, unless:
 - (A) the reversal is caused by an intervening change in law or fact, or,
 - (B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
- (6) whether it addresses a lower court or administrative agency decision that has been published; or,
- (7) whether it is a decision that has been reviewed by the United States Supreme Court.

(b) Designation for Publication. An opinion or order shall be designated for publication upon the request of any member of the panel.

(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published

Model Rule closely, similarly stating that decisions are not to be published unless they meet certain criteria and adding only a

opinion of the court.”)

Id.

See also 9th Cir. R. 36-2:

A written, reasoned disposition shall be designated as an opinion only if it:

- (a) Establishes, alters, modifies or clarifies a rule of law, or
- (b) Calls attention to a rule of law which appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
- (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Id.

See also D.C. Cir. R. 36(c):

- (1) Policy. It is the policy of this court to publish opinions and explanatory memoranda that have general public interest.
- (2) Published Opinions. An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria:
 - (A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court;
 - (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court;
 - (C) it calls attention to an existing rule of law that appears to have been generally overlooked;
 - (D) it criticizes or questions existing law;
 - (E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;
 - (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion;
 - (G) it warrants publication in light of other factors that give it general public interest.

All published opinions of the court, prior to issuance, will be circulated to all judges on the court; printed prior to release, unless otherwise ordered; and rendered by being filed with the clerk.

Id.

single additional criterion to the Model Rule.⁴⁰ However, most circuits that generally follow the Model Rule's form have abandoned the default position of non-publication and added additional considerations to the enumerated categories. The Fifth Circuit, for instance, has a strong presumption of publication in its local rules and lists numerous categories of cases not suitable for unpublished opinions:

The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published.⁴¹

In addition to the categories of cases suitable for publication under the Model Rule, the Fifth Circuit local rule also directs publication of any case that:

- Calls attention to an existing rule of law that appears to have been generally overlooked;
- Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
- Explains, criticizes, or reviews the history of existing decisional or enacted law;
- Creates a conflict of authority either within the circuit or between the Fifth circuit and another;
- Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court;
- Is accompanied by a concurring or dissenting opinion; or

40. 4th Cir. R. 36(a)(iv) ("It contains a historical review of a legal rule that is not duplicative.").

41. 5th Cir. R. 47.5.1.

- Reverses the decision below or affirms it upon different grounds.⁴²

This greatly expands the types of cases that are required to be published from those indicated in the Model Rule. In particular, the provision for publication of a decision that “explains, criticizes, or reviews the history of existing decisional or enacted law” suggests that even cases that break no new legal ground themselves are relevant because of the reasoning, analysis, and notice these decisions provide. This is a significant expansion of the purposes stated in the Model Rule as justifying publication (i.e., decisions of general precedential value). In addition, the Fifth Circuit requires unanimity to issue a decision as unpublished: “An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication.”⁴³ Overall, Fifth Circuit Rule 47.5 suggests a strong commitment to publication.⁴⁴

The Sixth Circuit also uses an approach similar to the Model Rule except that it defaults to neither publication nor non-publication. The factors enumerated in the rule are merely issues for consideration. Thus, Sixth Circuit Rule 206(a) states: “The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter,” and lists the model rule’s factors plus the following as weighing in favor of publication:

- Applies an established rule to a novel fact situation;
- Creates a conflict of authority either within this circuit or between the Sixth Circuit and another circuit;

42. *Id.*

43. 5th Cir. R. 47.5.2.

44. *But see Judicial Business 2008, supra n. 38, at 44* (showing the percentage of Fifth Circuit dispositions issued as unpublished in the twelve-month period ending September 30, 2008, to be 86.9).

- Is accompanied by a concurring or dissenting opinion;
- Discusses a factual issue of continuing public interest;
- Reverses a lower court decision;
- Addresses a published lower court or agency decision; or
- Is a decision that has been reviewed by the United States Supreme Court.⁴⁵

As with the Fifth Circuit's local rule, the Sixth Circuit has expanded considerably the range of cases that ought to be published, and it requires unanimity to issue a decision as unpublished.⁴⁶

The Ninth Circuit creates a system similar to that proposed by the Model Rule, though it uses slightly different terminology. Ninth Circuit decisions are rendered in one of three ways: Memoranda, Orders, or Opinions. Despite this naming convention, the Ninth Circuit essentially has the same categories as the other circuits—unpublished (“memoranda”) and published (“opinions”)—but also adds orders, which are by default unpublished but may be published by request of the court.⁴⁷ In conformity with the Model Rule, the Ninth Circuit rule sets the default at non-publication and states that a decision “shall be designated as an OPINION only if” it meets one of the enumerated categories. Those categories have some overlap with the categories of the Fifth and Sixth Circuits, but are consistent with neither. Beyond the Model Rule categories, the Ninth Circuit will publish a decision if it:

- Calls attention to a rule of law which appears to have been generally overlooked;

45. 6th Cir. R. 206(a).

46. 6th Cir. R. 206(b) (“An opinion or order shall be designated for publication upon the request of any member of the panel.”).

47. 9th Cir. R. 36-2.

- Disposes of a case in which there is a prior published opinion, unless the panel believes publication unnecessary;
- Involves a legal or factual issue of unique interest or substantial public importance;
- Disposes of a case following a reversal or remand by the United States Supreme Court; or
- Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.⁴⁸

Unlike the Fifth and Sixth Circuits, which allow a single judge to insist upon publication, the Ninth Circuit requires a majority vote to publish or unpublish a decision, and the judge desiring publication must author a separate opinion to have the right to force the publication.⁴⁹ The Ninth Circuit seems to have agreed with the Model Rules that the default position should be non-publication, and it has gone even further in that regard than the Model Rule itself, but it also seems to have regarded the Model Rule's categories suitable for publication as insufficient.

The D.C. Circuit's Local Rule 36(c) uses a structure similar to that of the proposed Model Rule, and it states a policy of publishing only opinions of "general public interest."⁵⁰ Like the Model Rules, this local rule sets the default at non-publication, publishing only if a case meets one or more of the criteria, which exceed the Model Rules by mandating publication for an opinion that:

- Is a case of first impression or the first case to present the issue in this court;

48. *See generally id.*

49. 9th Cir. R. 36-2(g).

50. D.C. Cir. R. 36(c)(1).

- Calls attention to an existing rule of law that appears to have been generally overlooked;
- Reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion; or
- Warrants publication in light of other factors that give it general public interest.⁵¹

Although their rules differ, these five circuits all give guidance regarding what opinions should be published and do so in a general form similar to that of the 1973 Committee's proposed Model Rule. They have apparently agreed that the Model Rule's view of published cases is too narrow, but they have not necessarily agreed on what characteristics make a case worthy of publication. In addition, they vary in their assumptions about whether cases should default to being published or unpublished.

2. Circuits Giving Guidance in a Form Other Than That Proposed in the Model Rule

The First, Second, Third, and Federal Circuits give some decision-publication guidance in a form other than the form used by the Model Rules.⁵² The First Circuit local rule states a strong

51. D.C. Cir. R. 36(c)(2).

52. See 1st Cir. R. 36:

(a) The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in the official West reporter, and may not be cited in unrelated cases. As indicated in Local Rule 36(b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36(b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.

(b) **Publication of Opinions.** The Judicial Council of the First Circuit, pursuant to resolution of the Judicial Conference of the United States, hereby adopts the following plan for the publication of opinions of the United States Court of Appeal for the First Circuit.

(1) **Statement of Policy.** In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.)

(2) **Manner of Implementation.**

(A) As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in the light of further research and reflection.

(B) With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in the cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.

(C) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.

(D) Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.

(E) If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion.

(F) Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise. Unpublished means the opinion is not published in the printed West reporter.

(G) Periodically the court shall conduct a review in an effort to improve its publication policy and implementation.

Id.

See also 2d Cir. R. 32.1(a):

The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.

Id.

See also Fed. Cir. I.O.P. 10(4):

The court's policy is to limit precedent to dispositions meeting one or more of these criteria:

(a) The case is a test case.

preference for publication⁵³ and states the contexts in which an unpublished opinion may be issued, such as those that do not: break new legal ground or contribute otherwise to legal development; articulate a new rule of law; modify an established rule; apply an established rule to novel facts; or otherwise serve as a significant guide to future litigants.⁵⁴ The local rule also provides that unanimity is required to issue a decision as unpublished, particularly in cases involving dissents or multiple opinions.⁵⁵ This rule differs in two ways from the local rules more closely patterned after the Model Rule. First, its policy is firmly pro-publication.⁵⁶ Second, it contains a catch-all

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- (b) An issue of first impression is treated.
 - (c) A new rule of law is established.
 - (d) An existing rule of law is criticized, clarified, altered, or modified.
 - (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.
 - (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.
 - (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
 - (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.
 - (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
 - (j) A new constitutional or statutory issue is treated.
 - (k) A previously overlooked rule of law is treated.
 - (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.
 - (m) The case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.
 - (n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

Id.

53. 1st Cir. R. 36.0(a), (b)(1) (providing that “[t]he court’s policy, when opinions are used, is to prefer that they be published and available for citation,” and that “[i]n general, the court thinks it desirable that opinions be published and thus be available for citation”).

54. 1st Cir. R. 36.0(a), (b). In addition, the local rule specifically identifies one type of case that will “clearly fall within the exception” and be unpublished: claims under the Social Security Act. 1st Cir. R. 36.0(b)(1).

55. First Cir. R. 36.0(b)(2)(B), (C).

56. See *Judicial Business 2008*, *supra* n. 44, which shows the percentage of First Circuit decisions issued as unpublished opinions in the twelve-month period ending September 30, 2008, to be 58.2 percent. This percentage is the next-to-lowest figure among all circuits during that twelve-month period.

provision for the publication of any decision that may serve as a guide to future litigants. Finally, it names, by United States Code provision, a type of case that will be typically issued as unpublished: those involving the Social Security Act.⁵⁷ There is no indication whether this is intended as an example or if appeals on these particular claims were of specific concern to the circuit when the rule was drafted.

The Second Circuit local rule gives minimal, almost tautological, guidance for determining which cases should be published and which unpublished. It simply divides cases into opinions, which are published, and summary orders, which are not published, and provides that

in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.⁵⁸

The criteria by which a judge is to determine whether a decision serves a “jurisprudential purpose” is undefined by the rules or operating procedures of the court. In addition, this particular process turns the usual manner of determining whether publication is justified on its head; typically, the rules on publication determine only whether an opinion is suitable for publication, leaving for a separate rule (or unanswered) the question of whether unpublished decisions are precedential.

The Third Circuit local rules do not mention the issue of publication or non-publication of opinions. Vague guidance, similar to that given by the Second Circuit, is given in Third Circuit Internal Operating Procedure 5, which states that there are two types of decisions in the Third Circuit: precedential and non-precedential.⁵⁹ Precedential opinions are published; non-precedential opinions are not.⁶⁰ This rule truly gives no guidance on which category a case might fall into, stating only that “[a]n opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not

57. 1st Cir. R. 36.0(b)(1) (referring to 42 U.S.C. § 205(g)).

58. 2d Cir. R. 32.1(a).

59. 3d Cir. I.O.P. 5.

60. 3d Cir. I.O.P. 5.1.

precedential.”⁶¹ In addition, while most circuits state a list of factors that weigh in favor of or against publication, the Third Circuit merely provides a list of things that are not relevant: “A not precedential opinion may be issued without regard to whether the panel’s decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief.”⁶²

The Federal Circuit has no local rule on the issue, but in its Internal Operating Procedure, it goes to the opposite extreme, offering an extensive list of characteristics that would make a case publication-worthy.⁶³ This list includes:

- The case is a test case;
- An issue of first impression is treated;
- A new rule of law is established;
- An existing rule of law is criticized, clarified, altered, or modified;
- An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied;
- An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued;
- A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved;
- A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth;

61. 3d Cir. I.O.P. 5.

62. 3d Cir. I.O.P. 5.3.

63. Fed. Cir. I.O.P. 10(4).

- A new interpretation of a Supreme Court decision, or of a statute, is set forth;
- A new constitutional or statutory issue is treated;
- A previously overlooked rule of law is treated;
- Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise;
- The case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court; or
- A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.⁶⁴

Like the Third Circuit, the Federal Circuit views the initial question as one of precedent or not, which governs the question of published or not. The two are essentially collapsed into a single inquiry with precedent being the governing aspect.

Thus, three of these four circuits offer only minimal guidance, and the Second and Third Circuits give essentially no guidance except to provide that the court should determine whether an opinion is precedential.

3. Circuits Giving No Guidance

Four circuits, the Seventh, Eighth, Tenth, and Eleventh, offer no guidance or rules to explain which decisions should be published or unpublished. The Seventh Circuit had a rule in place prior to the 1973 Committee's Model Rule that spelled out cases that would be published and those that would be

64. *Id.*

unpublished.⁶⁵ It then adopted a local rule in accordance with the Model Rule: Local Rule 53, which has since been rescinded. Now, the Circuit appears to offer no guidance by rule or Internal Operating Procedure to explain, to its judges or the public, how it decides which decisions are published. The local rule notes only that it is “the policy of the circuit not to issue unnecessary opinions,” but gives no guidance on what would make a decision necessary or unnecessary,⁶⁶ and notes that the court has the power to issue opinions as published or unpublished without any description of the basis for such a decision.⁶⁷ The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.

Similarly, the Eighth Circuit has no rule or Internal Operating Procedure to guide or explain its judgments on publication of only certain opinions,⁶⁸ and neither does the Tenth Circuit, which states only that the court has the power to issue opinions as unpublished but not the characteristics of a case that would justify non-publication.⁶⁹ The Eleventh Circuit states only that an opinion is to be “unpublished unless a majority of the panel decides to publish it.”⁷⁰ Despite the lack of

65. *See Standards for Publication, supra* n. 15, at 29-32 (reproducing the then-current Seventh Circuit Local Rule 28).

66. 7th Cir. R. 32.1(a).

67. 7th Cir. R. 32.1(b) (“The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.”).

68. 8th Cir. I.O.P IV(B) (“The panel determines whether the opinion in the case is to be published or unpublished.”).

69. 10th Cir. R. 36.1 (“The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.”).

70. 11th Cir. R. 36-2.

guidance, these circuits do issue unpublished opinions at significant rates.⁷¹

Four circuits give no guidance to courts (or notice to the public) regarding which cases will be published and which will not. In the circuits that do give guidance, the default position on publication, published or unpublished, varies, as do the criteria that justify moving from that default position. Overall, this is not the uniformity the 1973 Committee's proposed model rule suggested, nor is it a minor technical matter. The decision to publish or not publish a case implicates (and under the odd Second and Third rules, follows from) the question of precedential value. This determination should not be made without some guidance or publicly known criteria, nor should it be made on conflicting criteria. The 1973 Committee's goal of a uniform rule governing publication has not come to pass.

B. Citation Rules

Federal Rule of Appellate Procedure 32.1 was intended as a uniform rule regarding citation of unpublished opinions.⁷² However, some circuits already have variations on the citation rule, either as holdovers from before the new rule was enacted or in response to the rule's inadequacy. Three circuits, the Third, Fifth, and Sixth, essentially rely entirely on Rule 32.1,⁷³ which

71. See *Judicial Business 2008*, *supra* n. 38 (showing the percent unpublished in the twelve-month period ending September 30, 2007, in the Eighth, Tenth, and Eleventh Circuits to be 63%, 72.8%, and 83.3%, respectively).

72. At least in one sense, it aimed at uniformity across circuits. But it actually explicitly split unpublished opinions into two groups, one on either side of January 1, 2007, which destroyed uniformity in another sense. Fed. R. App. P. 32.1(a)(ii) (limiting citation to decisions "issued on or after January 1, 2007").

73. 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); 5th Cir. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of *res judicata*, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b). The first page of each unpublished opinion bears the following legend: Pursuant to

states in relevant part:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
- (ii) issued on or after January 1, 2007.⁷⁴

The Fifth Circuit has a local rule, but regarding citation it states only, “[a]n unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a).”⁷⁵ Likewise, the Sixth Circuit local rule states only that “[c]itation of unpublished opinions is permitted,” and that Rule 32.1(b) applies to all such citations.⁷⁶ Finally, while it has no local rule, the Third Circuit does have an Internal Operating Procedure that states the court’s reluctance to cite its own unpublished decisions, but it makes no comment about counsel’s citation of them.⁷⁷ Because the Federal Rules of Appellate Procedure state only what the courts of appeals may not do—restrict the citation of certain opinions—which leaves these circuits’ rules ambiguous about whether pre-2007 opinions are citable, it seems likely that such citation is permitted, given the lack of restrictive language.

Three circuits, the Second, Seventh and Ninth, rely upon the Federal Rules of Appellate Procedure but explicitly forbid citation of unpublished opinions not covered by the federal rule—those issued before January 1, 2007.⁷⁸ The Ninth Circuit,

5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.”) (footnote omitted); 6th Cir. R. 28(f) (“Citation of unpublished opinions is permitted. FRAP 32.1(b) applies to all such citations.”).

74. Fed. R. App. P. 32.1.

75. 5th Cir. R. 47.5.4.

76. Sixth Cir. R. 28(f).

77. 3d Cir. I.O.P. 5.7 (“The court by tradition does not cite to its not precedential opinions as authority.”).

78. 2d Cir. R. 32.1(c):

Dispositions by Summary Order.

(c) Citation of Summary Orders.

(1) Citation to summary orders filed after January 1, 2007, is permitted.

(A) In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one

for example, states, “Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit [except in specified circumstances regarding the case at bar].”⁷⁹

citation must either be to the Federal Appendix or be accompanied by the notation: “(summary order).”

(B) Service of Summary Orders on Pro Se Parties: A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at <http://www.ca2.uscourts.gov/>). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

(2) Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court, except in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata.”)

Id.

See also 7th Cir. R. 32.1(d) (“No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding”).

See also 9th Cir. R. 36-3(c):

Citation of Unpublished Dispositions and Orders

(a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(b) Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007. Unpublished Dispositions and orders of this court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1.

(c) Citation of Unpublished Dispositions and Orders Issued before January 1, 2007: Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to 9th Cir. R. 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

79. 9th Cir. R. 36-3(c).

Two others, the First and D.C. Circuits, have rejected the federal rule's prospectivity limitation regarding their own opinions, one permitting citation of its own unpublished opinions regardless of the date of issuance, and the other permitting citation of its own unpublished opinions back to 2002.⁸⁰ The First Circuit rule states: “[a]n unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance,” and “the citation of dispositions of other courts is governed by Fed. R.

80. *See* First Cir. R. 32.1(a):

An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term “unpublished” as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d.

Id.

See also D.C. Cir. R. 32.1(b):

(1) Unpublished dispositions of this court.

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

(3) Procedures Governing Citation to Unpublished Dispositions. A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

App. P. 32.1 and the local rules of the issuing court.”⁸¹ The D.C. Circuit rule is nearly identical with respect to the opinions of other courts.⁸²

Three others, the Fourth, Eighth and Eleventh Circuits, similarly dispense with the federal rule’s prospectivity limitation as to their own opinions, but they are less clear on their treatment of other circuits’ unpublished opinions.⁸³ The Fourth Circuit rule speaks specifically of its own unpublished opinions issued before January 1, 2007, when stating that

81. 1st Cir. R. 32.1(a), (b).

82. D.C. Cir. R. 32.1(b)(2) (providing that unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited “only under the circumstances and for the purposes permitted by the court issuing the disposition.”).

83. 4th Cir. R. 32.1:

Citation of this Court’s unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.

Id.

See also 8th Cir. R. 32.1(A):

Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publically accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Id.

See also 11th Cir. R. 36-2:

An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. But see I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule.

Id.

[i]f a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.⁸⁴

The Eighth Circuit similarly states that “parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”⁸⁵ The Eleventh Circuit has a similar provision that speaks only in terms of “an unpublished opinion” or “[u]npublished opinions” without specifying whether the issuing court matters.⁸⁶ None of these circuits have a separate provision in their rules regarding the treatment of other circuits’ unpublished opinions. Presumably, absent a specific restriction like that in the Eleventh Circuit’s Internal Operating Procedures,⁸⁷ such decisions are citable on the same basis as the circuits’ own decisions, but an ambiguity remains in the Fourth and Eighth Circuits.

Two circuits seem even more generous about the citation of unpublished opinions.⁸⁸ The Tenth Circuit explicitly gives

84. 4th Cir. R. 32.1.

85. 8th Cir. R. 32.1A.

86. 11th Cir. R. 36-2; *but see* 11th Cir. I.O.P. 36(6) (indicating that court will give unpublished opinions of other courts only the weight to which they are entitled under the issuing court’s rules).

87. 11th Cir. I.O.P. 36(6).

88. *See* 10th Cir. R. 32.1(C):

Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.

See also Fed. Cir. R. 32.1:

(a) Disposition of Appeal, Motion, or Petition. Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A nonprecedential disposition shall bear a legend designating it as nonprecedential. A precedential disposition shall bear no legend.

(b) Nonprecedential Opinion or Order. An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law.

(c) Parties’ Citation of Nonprecedential Dispositions. Parties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007. This rule does not preclude assertion of claim preclusion, issue preclusion,

retroactive effect to the citation allowance of the federal rule: “Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Fed. R. App. P. 32.1(a)(i) and part (A) of this local rule.”⁸⁹ The Federal Circuit does not have any restriction on the citation of unpublished opinions in its local rules;⁹⁰ its relevant rule reaffirms that there is no restriction on the citation of unpublished opinions issued after January 1, 2007, but nothing in the rule prohibits citation of decisions preceding that date. The rule notes the court’s willingness, generally, to review unpublished opinions.⁹¹

The citability of unpublished opinions issued before January 1, 2007, remains in flux; local rules vary from completely permissive to completely restrictive to unclear. This undercuts the uniformity that the new federal rule was supposed to bring to the federal justice system regarding the use of unpublished opinions. Just as with the issue of publication, a court’s determination about whether an opinion is citable has powerful, though often unspoken, implications for the precedential status that decision receives. The circuits’ local rules themselves bear out this uncertainty and unevenness regarding the precedential status of unpublished opinions.

judicial estoppel, law of the case, and the like based on a nonprecedential disposition issued before that date.

(d) Court’s Consideration of Nonprecedential Dispositions. The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential dispositions of another court as binding precedent of that court unless the rules of that court so provide.

Id.

89. 10th Cir. R. 32.1(C).

90. *See* Fed. Cir. R. 32.1(c) (providing that “[p]arties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007”).

91. Fed. Cir. R. 32.1(d) (“The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential dispositions of another court as binding precedent of that court unless the rules of that court so provide.”).

C. Precedent Limitations

The question that the 1973 Committee left open—the precedential status of unpublished opinions—remains an issue of particular disagreement among the circuits' local rules.

Two circuits, the D.C. and Fifth Circuits, recognize the precedential value of some of their decisions based on a date cutoff.⁹² The D.C. Circuit's local rules provide that unpublished

92. See D.C. Cir. R. 32.1(b):

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(2) Unpublished Opinions of Other Courts. Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the *res judicata* or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

Id.

See also 5th Cir. R. 47.5:

(a) 47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

decisions issued after January 1, 2002, are precedent, and those issued before that date may not be cited as precedent.⁹³ The Fifth Circuit grants precedential status to unpublished opinions issued prior to January 1, 1996, and denies it to those issued after that date.⁹⁴

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.3 Unpublished Opinions Issued Before January 1, 1996*. Unpublished opinions issued before January 1, 1996*, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). The party citing to an unpublished judicial disposition must provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document, as required by FED. R. APP. P. 32.1(b).

47.5.4 Unpublished Opinions Issued on or After January 1, 1996*. Unpublished opinions issued on or after January 1, 1996*, are not precedent, except under the doctrine of *res judicata*, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by FED. R. APP. P. 32.1(b). The first page of each unpublished opinion bears the following legend:

Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

47.5.5 Definition of "Published." An opinion is considered as "published" for purposes of this rule when the panel deciding the case determines, in accordance with 5TH CIR. R. 47.5.2, that the opinion will be published and the opinion is issued.

Id. (capitalization in original).

93. D.C. Cir. R. 32.1(b)(1)(A), (B).

94. 5th Cir. R. 47.5.3; 5th Cir. R. 47.5.4.

Two others, the Fourth and Sixth, allow for the possibility that unpublished opinions are precedential by neither affirming nor denying that proposition in their local rules.⁹⁵ For example, the Fourth Circuit expresses that citation to its unpublished opinions is disfavored but leaves open the possibility that they may have precedential value:

If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.⁹⁶

This is a very different approach to the idea of precedent from that taken by circuit rules that put the court in the position of unequivocally declaring something to be precedent or not precedent.⁹⁷ The local rules of the Sixth Circuit used to contain a functionally equivalent provision,⁹⁸ but it has been amended to state only that “[c]itation of unpublished opinions is permitted,” and to refer to the federal rule.⁹⁹

Four Circuits, the Third, Eighth, Ninth, and Tenth, explicitly deny unpublished opinions precedential value.¹⁰⁰ In

95. 4th Cir. R. 32.1 (“Citation of this Court’s unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.”); 6th Cir. R. 28(f) (“Citation of unpublished opinions is permitted. FRAP 32.1(b) applies to all such citations.”).

96. 4th Cir. R. 32.1.

97. Compare 4th Cir. R. 32.1 with 8th Cir. R. 32.1A (“Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent.”)

98. See 6th Cir. R. 28(g) (superseded) (“Citation of unpublished decisions in briefs and oral arguments in the Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.”).

99. 6th Cir. R. 28(f).

100. See 3d Cir. I.O.P. 5.1:

There are two forms of opinions: precedential and not precedential. A majority of the panel determines whether an opinion is designated as precedential or not precedential, unless a majority of the active judges of the court decides

otherwise. The face of an opinion states whether it is precedential or not precedential.”)

Id.

See also 3d Cir. I.O.P 5.2:

An opinion, whether signed or per curiam, is designated as precedential and printed as a slip opinion when it has precedential or institutional value.

Id.

See also 3d Cir. I.O.P. 5.3:

An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and is not printed as a slip opinion but, unless otherwise provided by the court, it is posted on the court’s internet website. A not precedential opinion may be issued without regard to whether the panel’s decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief.

Id.

See also 8th Cir. R. 32.1A:

Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publically accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion’s unpublished status.

Id.

See also 9th Cir. R. 36-3:

(a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(b) Citation of Unpublished Dispositions and Orders Issued on or after January 1, 2007. Unpublished dispositions and orders of this court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1.

(c) Citation of Unpublished Dispositions and Orders Issued before January 1, 2007. Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to 9th Cir. R. 36-4, or in a petition for panel rehearing

the Third Circuit, “[t]here are two forms of opinions: precedential and not precedential The face of an opinion states whether it is precedential or not precedential.”¹⁰¹ The decision whether to publish follows that initial determination.¹⁰² The Eighth and Ninth Circuits’ rules are equally clear, stating that “[u]npublished opinions are decisions which a court designates for unpublished status” and that “[t]hey are not precedent,”¹⁰³ and “[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”¹⁰⁴ And the Tenth Circuit is also unmistakably direct: “Unpublished decisions are not precedential.”¹⁰⁵

The rules of the First, Second, Seventh, and Federal Circuits talk in terms of how the opinions are considered or treated, each set of rules denying them precedential value.¹⁰⁶

or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

Id.

See also 10th Cir. R. 32.1(A):

The citation of unpublished decisions is permitted to the full extent of the authority found in Fed. R. App. P. 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. Citation to unpublished opinions must include an appropriate parenthetical notation. *E.g.*, *United States v. Wilson*, No. 06-2047, 2006 WL 3072766 (10th Cir. Oct. 31, 2006) (unpublished); *United States v. Keeble*, No. 05-5190, 184 Fed. Appx. 756, 2006 U.S. App. LEXIS 14871 (10th Cir. June 15, 2006) (unpublished).

Id.

101. 3d Cir. I.O.P. 5.1.

102. 3d Cir. I.O.P. 5.3.

103. 8th Cir. R. 32.1A.

104. 9th Cir. R. 36-3.

105. 10th Cir. R. 32.1(A).

106. *See* 1st Cir. R. 32.1.0:

(a) Disposition of this court. An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term “unpublished” as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, *e.g.*, F., F.2d, and F.3d.

(b) Dispositions of other courts. The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court. Notwithstanding the above, unpublished or nonprecedential dispositions of other courts may always be cited to establish a fact about the case before the court (for

The First Circuit has decreed, “[t]he court will consider such dispositions for their persuasive value but not as binding precedent.”¹⁰⁷ The Second Circuit has stated, “[r]ulings by summary order do not have precedential effect,”¹⁰⁸ and the Seventh Circuit provides, “[o]rders, which are unsigned, are released in photocopied form, are not published in the Federal

example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.

Id.

See also 2d Cir. R. 32.1(b):

Rulings by summary order do not have precedential effect.

Id.

See also 7th Cir. R. 32.1(b):

The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: “Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1.”

Id.

See also Fed. Cir. R. 32.1:

(a) Disposition of Appeal, Motion, or Petition. Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A nonprecedential disposition shall bear a legend designating it as nonprecedential. A precedential disposition shall bear no legend.

(b) Nonprecedential Opinion or Order. An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law.

(c) Parties’ Citation of Nonprecedential Dispositions. Parties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, and the like based on a nonprecedential disposition issued before that date.

(d) Court’s Consideration of Nonprecedential Dispositions. The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential dispositions of another court as binding precedent of that court unless the rules of that court so provide”.

Id.

107. 1st Cir. R. 32.1.0(a).

108. 2d Cir. R. 2.1(b).

Reporter, and are not treated as precedents.”¹⁰⁹ Despite the differences in these wordings, they leave little ambiguity about the fact that these circuits do not believe themselves to be bound by unpublished opinions.

The Eleventh Circuit almost certainly does not treat unpublished opinions as precedent, but its local rule uses language considerably less definitive than that in other precedent-denying circuits.¹¹⁰ For example, the Eleventh Circuit rule states that unpublished opinions are not “considered” precedential or that they are opinions the court “believes to have no precedential value.”¹¹¹ Likewise, the Federal Circuit states both that an unpublished opinion is one determined by the deciding panel not to have precedential value, and that, while it may look at such opinions, it will not find them to be binding.¹¹²

While the majority of circuits do not view unpublished opinions as precedential, there is a significant minority that take a different, if less unequivocally stated, position. On an issue so critical—which decisions are part of the body of precedent—greater uniformity is needed to avoid the ills associated with an unclear or uneven federal law: loss of public confidence, a sense of injustice or unfairness, uneven development of the law, forum shopping, and uncertainty and unpredictability in the law.

109. 7th Cir. R. 32.1(b).

110. 11th Cir. R. 36-2 (“An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. But see I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule.”); 11th Cir. I.O.P. 36-3(6) (“A majority of the panel determine whether an opinion should be published. Opinions that the panel believes to have no precedential value are not published. Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. The court will not give the unpublished opinion of another circuit more weight than the decision is to be given in that circuit under its own rules. Parties may request publication of an unpublished opinion by filing a motion to that effect in compliance with FRAP 27 and the corresponding circuit rules”).

111. 11th Cir. R. 36-2; 11th Cir. I.O.P. 36-3(6).

112. Fed. Cir. R. 32.1(d) (“An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law. . . . The court may refer to a nonprecedential disposition . . . but will not give one of its own nonprecedential dispositions the effect of binding precedent.”).

V. PROPOSALS TO UNIFY THE PUBLICATION, CITATION, AND PRECEDENT STANDARDS

These differences from circuit to circuit should not exist. When the issue is merely technical or procedural in nature, it is appropriate to allow individual circuits to tailor the federal appellate process to their individual needs and preferences. However, on issues as fundamental as what is and is not law, and how that determination is made, uniformity is necessary. In fact, uniformity on the issue of unpublished opinions' citability was the animating purpose of the new federal rule, but it did not achieve that purpose.¹¹³ Likewise, the Model Rule on publication guidelines proposed by the 1973 Committee has not been uniformly adopted, leaving courts with varying (and in some cases no) criteria to use when deciding what should be binding law. Finally, on the critical issue of precedent, the Federal Judicial Conference has never issued clear guidance on whether unpublished opinions may properly be treated as non-precedential.¹¹⁴

This lack of uniformity is essentially a circuit split. Splits between the circuits are sometimes viewed as beneficial because they allow for experimentation and development of the law.¹¹⁵ However, the differences surrounding unpublished opinions are not likely to aid in development of the law or produce any other benefits of experimentation.¹¹⁶ Instead, these differences implicate negative aspects of a division between the circuits such as "the sense of injustice caused by different interpretations of ideally uniform federal law . . . and the uncertainty and unpredictability engendered in circuits which have not yet ruled on the issues."¹¹⁷ These problems have led to numerous petitions

113. Fed. R. App. P. 32.1, comment ("Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule.").

114. Both the 1973 Committee and the drafters of the new rule purposefully avoided addressing whether reducing unpublished opinions to non-precedential status was constitutional, jurisprudentially sound, or prudent. *Standards for Publication*, *supra* n. 15, at 21; Fed. R. App. P 32.1, comment.

115. See J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?* 71 Cal. L. Rev. 913, 930-31 (1983).

116. *Id.*

117. Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 Hastings Const. L.Q. 457, 468 (1984).

for certiorari to the Supreme Court,¹¹⁸ comments in favor of a uniform rule on citation,¹¹⁹ and considerable scholarship calling for change.¹²⁰ For example, in *Family Fare, Inc. v. NLRB*,¹²¹ the Sixth Circuit issued an unpublished opinion contradicting the legal standard expressed in its local rules, which required opinions that modify or create new law to be published.¹²² This meant that the Sixth Circuit panel did one of two things, either of which violated Family Fare's constitutional rights: (1) It departed from the published legal standard in a way that does not alter the published law of the circuit, effectively treating Family Fare differently from all other similarly situated parties before and after this decision, or (2) it altered the established law

118. Cleveland, *supra* n. 7 at 688 n.14 (2009).

119. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1449-51.

120. See e.g. Cleveland, *supra* n. 6; Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 Vt. L. Rev. 555 (2005); J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 Seton Hall Cir. Rev. 27 (2005); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?* 32 Hofstra L. Rev. 1215 (2004); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (2004); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435 (2004); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 Ind. L.J. 711 (2004); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. Davis L. Rev. 761 (2004); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755 (2003); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. Pitt. L. Rev. 695 (2003); Robel, *supra* n. 25; Lauren Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940 (1989); William L. Reynolds & 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); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 807; William L. Reynolds & 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).

121. 205 Fed. Appx. 403, *cert. denied*, 551 U.S. 1133 (2007).

122. Pet. for Writ of Cert. at 3, *Family Fare, Inc. v. NLRB*, 551 U.S. 1133 (2007), 2006 US Briefs LEXIS 1536 (asserting that the Sixth Circuit's "unpublished decision in this case directly conflicts with and overrules prior published authority of that court in violation of the Circuit's own rule," citing Sixth Circuit Rule 206, and taking the position that "[t]his unpublished panel decision, coupled with the court's refusal to rehear the case under the correct controlling authority or to grant *en banc* review, has violated Petitioner's constitutional rights to equal protection and procedural due process").

of the circuit contrary to its own Rule 206(c).¹²³ It is common for one party to feel that the lack of publication is unfair,¹²⁴ but what is striking about *Family Fare* is that both sides agreed that the decision should be published, yet it was not.¹²⁵

It is clear that left to their own devices the circuits will not adopt consistent rules regarding publication standards, citation, or precedential status. In some circuits, on some of these issues, the circuits have adopted no rules and given no notice at all regarding their practices. Uniform rules should be adopted to redress this inequality and lack of clarity.

First, if the practice of issuing unpublished opinions is to continue, despite the fact that such decisions are now published in both private and government databases, a uniform set of publication guidelines should be adopted. The sources of law in the circuits should be uniform and uniformly available. The guidance, or lack of guidance, now existing creates the potential for uneven development of the law, forum shopping, and other ills associated with a split in the law of the circuits, such as a sense of injustice and unequal treatment among litigants.

Second, the prospectivity limitation should be removed from the new federal rule. This action has already been taken by six circuits in regard to their own unpublished opinions.¹²⁶ The prospectivity limitation of Rule 32.1 impedes uniformity both in the treatment of decisions within a circuit and decisions of the various circuits. The prospectivity limitation in Rule 32.1 was not a part of the proposed rule drafted by the Advisory Committee.¹²⁷ This provision was added by the Judicial

123. *Family Fare* noted that Sixth Circuit Rule 206(c) “prohibits a panel of the court from overruling prior published authority without granting *en banc* review,” *id.* at 4 (citing rule), and was concerned that “[t]he Sixth Circuit has subjected the election here to a legal standard different than the one that applies in every other comparable union election case in the Sixth Circuit,” *id.* at 6, which would suggest the former; yet the NLRB seemed to view the case as the latter, an alteration of the governing law, as evidenced by its motion to the Sixth Circuit to publish the case as one that “sets a framework for addressing an issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [has] been an area of dispute between the Board and [the Sixth Circuit].” *Id.* (quoting from NLRB motion for publication).

124. *Cleveland*, *supra* n. 118, at 688 n. 14 (identifying over thirty petitions for certiorari on this issue since the mid-1980s).

125. *See Family Fare*, 205 Fed. Appx. 403.

126. *See* Section III.B. *supra* (First, Fourth, Eighth, Tenth, Eleventh, D.C. Circuits).

127. *Spring 2005 Committee Minutes*, *supra* n. 3, at 2.

Conference despite the fact that it undermines the very purpose of the rule—creating uniformity in the citation of unpublished opinions.¹²⁸ It should be removed. The idea that a court may not bar a litigant from urging a similar outcome to one previously issued is fundamental to the American legal system.¹²⁹

Third, Rule 32.1 should be amended to address the long-overlooked issue of precedent. Whether such a rule acknowledges or denies the precedential status of unpublished opinions, the rule would provide beneficial uniformity. Perhaps more importantly, the national discussion leading up to the rule would be a long-overdue inquiry into the jurisprudential, constitutional, and practical justifications for denying precedential value to common law decisions. Ultimately, as argued at length elsewhere, these decisions are precedent and failure to accord them that status violates the constitution, the rulemaking authority of the federal courts of appeals, and common conceptions of law and justice.¹³⁰ While the rule could be drafted to plainly deny precedential status,¹³¹ the better rule would be:

(c) The precedential value of any opinion, order, judgment, or written disposition shall not be affected by its designation as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

This language tracks that already in Rule 32.1 for similar concepts and does nothing more than treat all decisions of the courts of appeals as fundamentally equal. Whether they are valuable precedents in any given case would be up to the panel

128. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 36-37 (Sept. 20, 2005) (noting that “The Conference . . . after discussion, approved new Rule 32.1 with the stipulation that it apply only to judicial dispositions issued on or after January 1, 2007”) (available at http://www.uscourts.gov/judconf/sept05proc_final.pdf (accessed Aug. 18, 2010; copy on file with Journal of Appellate Practice and Process)).

129. See generally Robel, *supra* n. 25.

130. See generally Cleveland, *supra* n. 118.

131. For example, it could have been drafted this way: “(c) Any opinion, order, judgment, or written disposition designated as ‘non-precedential’ or ‘not precedent’ shall not be considered binding precedent.” However, there are significant questions whether such a rule would be constitutional and within the courts’ rulemaking authority. See *e.g.* Cleveland, *supra* n. 6, at 143-60; Cleveland, *supra* n. 118, at 689 n. 18.

hearing that case, which had been the practice throughout the centuries of common law tradition prior to 1973.¹³²

Unless and until changes like these are implemented, the treatment of unpublished opinions in the federal courts of appeals remains inconsistent. Uniform rules regarding publication, citation, and precedent are needed to avoid the sense of injustice caused by variation in a supposedly uniform federal legal system and the uncertainty and unpredictability engendered in circuits that have either unclear rules or no rules addressing one or more of these issues.

132. Cappalli, *supra* n. 120, at 772-73; accord K.N. Llewellyn, *The Bramble Bush* 53 (Oceana Pub., Inc. 1973) (pointing out that “the true rule of the case [is] *what it will be made to stand for by another later court*” (emphasis in original)); see also Cleveland, *supra* n. 118, at 120-21 (“The power and the duty to determine the precedential effect of a decision has traditionally rested not with the precedent-making court but with the precedent-applying court. It is only with a set of new facts in hand, to which the rule is to be applied, that a court can determine whether a prior case is or is not a valid precedent.”).

APPENDIX

Table 1—First Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>1st Cir. R. 36:</p> <p>Opinions used when case calls for more than summary determination, but some may be unpublished</p> <p>Publication favored if opinion articulates new rule of law; modifies established rule or applies it to novel facts; or otherwise serves as guide for later cases</p> <p>Single judge’s belief that opinion should be published will trigger publication</p> <p>If case generates more than one opinion (if, for example, it includes a concurrence or dissent), all opinions must be published</p> <p>En banc opinions published</p> <p>Parties or other interested persons may apply to have opinions published</p>	<p>1st Cir. R. 32.1:</p> <p>No prohibition on or restriction of citation to unpublished 1st Circuit opinions</p> <p>Unpublished opinions of other courts may be cited in accordance with Fed. R. App. P. 32.1</p>	<p>1st Cir. Rule 32.1:</p> <p>Unpublished 1st Circuit opinions may be cited, but are not considered binding precedent</p> <p>Citation of other courts’ opinions governed by Fed. R. App. P. 32.1 and the rules of the issuing court</p> <p>Other courts’ unpublished opinions may be cited to establish res judicata, collateral estoppel, or the like</p>

Table 2—Second Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>2d Cir. R. 32.1:</p> <p>Court may rule by summary order instead of opinion when decision is unanimous and no jurisprudential purpose would be served by issuing full opinion</p>	<p>2d Cir. R. 32.1:</p> <p>Citation of summary orders issued after January 1, 2007, permitted</p> <p>Citation of summary orders issued before January 1, 2007, not permitted save in related case or to establish res judicata or collateral estoppel</p>	<p>2d Cir. Rule 32.10:</p> <p>No precedential effect for rulings by summary order</p>

Table 3—Third Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>3d Cir. I.O.P. 5.1, 5.2, 5.3:</p> <p>Only precedential opinions published (majority of panel decides whether opinion is precedential or non-precedential, but majority of active judges on court may override either designation)</p> <p>Opinions printed only if of precedential or institutional value</p> <p>Non-precedential opinions not printed; posted on court website instead</p>	<p>3d Cir. I.O.P. 5.7:</p> <p>Court does not cite to non-precedential opinions as authority and does not regard them as authority because they do not circulate to full court</p> <p>IOP addresses court action only; no apparent prohibition on citation of non-precedential opinions by parties</p>	<p>3d Cir. I.O.P. 5.1, 5.2, 5.3:</p> <p>Only precedential opinions published (majority of panel decides whether opinion is precedential or non-precedential, but majority of active judges on court may override either designation)</p> <p>Opinions printed only if of precedential or institutional value</p>

Table 4—Fourth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>4th Cir. R. 36:</p> <p>Opinion published only if it establishes, alters, modifies, clarifies, or explains rule of law; involves legal issue of public interest; criticizes existing law; contains historical review of existing legal rule; resolves conflict between 4th Circuit panels; creates conflict with another circuit</p> <p>Opinions published only after full briefing and oral argument</p> <p>Opinion published only if author believes, or majority of joining judges believe, that it meets publication standards</p>	<p>4th Cir. R. 32.1:</p> <p>Citation of unpublished opinion issued before January 1, 2007, disfavored except to establish res judicata, collateral estoppel, or law of the case</p> <p>Unpublished opinion may be cited if it has precedential value in connection with material issue and party believes that no published opinion serves as well</p>	<p>4th Cir. R. 32.1:</p> <p>Unpublished opinion citable if party believes that it has precedential value and that no published opinion serves as well</p>

Table 5—Fifth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>5th Cir. R. 47.5.1, 47.5.2:</p> <p>Opinions of interest to persons other than parties should be published</p> <p>Opinions published unless every member of panel agrees that they do not meet publication standards</p> <p>Publication required if opinion establishes new rule of law, alters or modifies existing rule, or calls attention to overlooked rule; applies established rule to facts unlike those in published opinions; explains, criticizes, or reviews history; creates or resolves a conflict; involves issue of significant public interest; is rendered in case previously considered by U.S. Supreme Court</p> <p>Publication permitted if opinion accompanied by concurrence or dissent, or if decision reverses court below or affirms on different grounds</p>	<p>5th Cir. R. 47.5.4:</p> <p>Unpublished opinions citable under standards set out in Fed. R. App. P. 32.1</p>	<p>5th Cir. R. 47.5.3, 47.5.4:</p> <p>Unpublished opinions issued before January 1, 1996, precedential</p> <p>Unpublished opinions issued after January 1, 1996, not precedent except in connection with res judicata, collateral estoppel, or law of the case (or to show sanctionable conduct, double jeopardy, and the like)</p>

Table 6—Sixth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>6th Cir. R. 206:</p> <p>Opinion designated for publication upon request of any panel member</p> <p>Criteria for publication: opinion establishes, alters, or modifies rule of law; applies existing law to novel facts; creates or resolves a conflict; discusses issue of public interest; is accompanied by concurring or dissenting opinion; reverses decision below, unless reversal caused by intervening change in law or fact or is mere remand of case by U.S. Supreme Court; addresses published decision of lower court or administrative agency; or is decision that has been reviewed by U.S. Supreme Court</p>	<p>6th Cir. R. 28:</p> <p>Citation of unpublished opinions permitted in accordance with Fed. R. App. P. 32.1</p>	<p>6th Cir. R. 32.1:</p> <p>Unpublished opinions citable in accordance with Fed. R. App. P. 32.1</p>

Table 7—Seventh Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>7th Cir. R. 32.1:</p> <p>Orders differ from full opinions, which are published</p> <p>Orders are unsigned, are not printed, and are distributed only as photocopies</p>	<p>7th Cir. R. 32.1:</p> <p>No citation of orders issued before January 1, 2007, except in support of a claim of preclusion or to establish law of the case</p> <p>Unpublished orders citable only pursuant to Fed. R. App. P. 32.1</p>	<p>7th Cir. R. 32.1:</p> <p>Unpublished orders not treated as precedent</p>

Table 8—Eighth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>8th Cir. I.O.P. IV(B):</p> <p>Panel determines whether opinion to be published or unpublished</p> <p>Counsel may request publication of unpublished opinion</p>	<p>8th Cir. R. 32.1A:</p> <p>Unpublished opinions issued on or after January 1, 2007, citable as allowed by Fed. R. App. P. 32.1</p> <p>Unpublished opinions issued before January 1, 2007, generally should not be cited unless relevant to establishing res judicata, collateral estoppel, or law of the case</p> <p>But unpublished opinion citable if it has persuasive value on material issue and no published opinion of any court would serve as well</p>	<p>8th Cir. R. 32.1A:</p> <p>Unpublished opinions not precedent except when relevant for establishing res judicata, collateral estoppel, or law of the case</p>

Table 9—Ninth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>9th Cir. R. 36-2:</p> <p>Decisions characterized as either unpublished orders or published opinions</p> <p>Criteria for designation as opinion: decision establishes, alters, modifies, or clarifies rule of law; calls attention to rule of law apparently overlooked; criticizes existing law; involves legal issue of unique interest or substantial public importance; disposes of case in which there was a published opinion below; disposes of a case upon its reversal by or on remand from the U.S. Supreme Court; is accompanied by separate concurring or dissenting opinions and concurring or dissenting judges agree to publication</p>	<p>9th Cir. R. 36-3:</p> <p>Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with Fed. R. App. P. 32.1</p> <p>Unpublished opinions issued before January 1, 2007, may be cited to establish law of the case; to establish claim or issue preclusion; for factual purposes, such as to show double jeopardy or sanctionable conduct; in a request for publication or rehearing; or to show the existence of a conflict</p>	<p>9th Cir. R. 36-3:</p> <p>Unpublished dispositions or orders not precedential except when relevant under law of the case or for purposes of asserting issue or claim preclusion</p>

Table 10—Tenth Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
No relevant rule or I.O.P.	<p>10th Cir. R. 32.1:</p> <p>Unpublished decisions issued before January 1, 2007, citable as allowed by Fed. R. App. P. 32.1</p> <p>Unpublished decisions citable as persuasive authority; to establish law of the case; or to establish issue or claim preclusion</p>	<p>10th Cir. R. 32.1:</p> <p>Unpublished decisions not precedential, but may be cited for persuasive value</p>

Table 11—Eleventh Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>11th Cir. R. 36-2:</p> <p>Opinions unpublished unless majority of panel decides to publish</p> <p>11th Cir. I.O.P. 36.(6):</p> <p>Opinions that panel believes have no precedential value not published</p> <p>Parties may request publication of unpublished opinions</p>	<p>11th Cir. R. 36-2:</p> <p>Unpublished opinions citable only as persuasive authority</p> <p>11th Cir. I.O.P 36(6):</p> <p>Unpublished opinions of other courts given only weight accorded by those courts' rules</p>	<p>11th Cir. R. 36-2:</p> <p>Unpublished opinions not binding precedent, but may be cited as persuasive authority</p> <p>11th Cir. I.O.P. 36(7):</p> <p>Court may cite unpublished opinions where relevant for res judicata, collateral estoppel, double jeopardy, or law of the case, or to establish procedural history or facts of case</p>

Table 12—District of Columbia Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>D.C. Cir. R. 36:</p> <p>Opinion published if it is case of first impression or first case to present issue in circuit; alters, modifies, or significantly clarifies rule of law; calls attention to a rule of law apparently overlooked; criticizes or questions existing law; resolves a conflict within the circuit or creates conflict with another circuit; reverses a case in which decision below was published or affirms decision below on grounds different from those appearing in published decision; or warrants publication because of public interest</p>	<p>D.C. Cir. R. 32.1:</p> <p>Unpublished dispositions issued before January 1, 2002, citable only if binding or preclusive effect relevant; may not be cited as precedent</p> <p>Unpublished dispositions issued on or after January 1, 2002, citable as precedent; those issued by other courts of appeals before January 1, 2007, citable when relevant for binding or preclusive effect, but otherwise only as permitted by issuing courts</p> <p>Unpublished dispositions of other courts of appeals issued on or after January 1, 2007, citable as allowed by Fed. R. App. P. 32.1</p> <p>Unpublished dispositions of district courts issued before January 1, 2007, not citable</p>	<p>D.C. Cir. R. 32.1:</p> <p>Unpublished orders or judgments entered before January 1, 2002, not precedential</p> <p>Unpublished orders or judgments entered on or after January 1, 2002, precedential</p>

Table 13—Federal Circuit		
Publication Guidelines	Citation Rules	Precedent Limitations
<p>Fed. Cir. I.O.P. 10(4):</p> <p>Opinion published as precedential if case is test case; involves issue of first impression; establishes new rule or criticizes, clarifies, alters, or modifies existing rule; applies existing rule to novel facts; involves, resolves, or continues actual or apparent intra-circuit conflict or conflict with other courts; involves issue of substantial public interest not sufficiently treated recently; involves new facts of public interest; involves new interpretation of statute or U.S. Supreme Court decision; involves new constitutional or statutory issue; involves previously overlooked rule; involves correction of procedural errors or errors in conduct of judicial process; is case returned by U.S. Supreme Court for disposition; or involves panel’s adoption of lower-court opinion as precedent</p>	<p>Fed. Cir. R. 32.1:</p> <p>Nonprecedential opinions issued on or after January 1, 2007, may be cited freely</p> <p>Nonprecedential opinions issued before January 1, 2007, may be cited to establish issue or claim preclusion, judicial estoppel, and the like</p>	<p>Fed. Cir. R. 32.1:</p> <p>Nonprecedential opinions not precedent, but court may look to its nonprecedential opinions for guidance or persuasive reasoning</p> <p>Nonprecedential opinions of other courts not treated as binding precedent unless issuing court’s rules provide that they are binding precedent</p>

