V. New Rule 32.1

A. Introduction

The Committee proposed to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "non-precedential," or the like. New Rule 32.1 would also require parties who cite "unpublished" or "non-precedential" opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

B. Text of Rule and Committee Note

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of

the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in

more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — "published" and "unpublished." Courts are thus prevented from undermining Rule 32.1(a) by imposing restrictions only upon the citation of "unpublished" opinions (such as a rule permitting citation of "unpublished" opinions only when no "published" opinion addresses the same issue or a rule requiring attorneys to provide 30-days notice of their intent to cite an "unpublished" opinion). At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions).

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of

appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from

bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

C. Summary of Public Comments

As I explained in the introduction to this memorandum, I will not summarize each of the 500-plus comments that we received about Rule 32.1, as those comments are both numerous and repetitive. Rather, I will describe the major arguments that commentators made for and against adopting the proposed rule. I will then describe the (relatively few) suggestions that commentators made regarding the wording of Rule 32.1. I will conclude by listing those who commented in favor of and those who commented against adopting the proposed rule.

1. Summary of Arguments Regarding Substance

a. Arguments Against Adopting Proposed Rule

1. A circuit should be free to conduct its business as it sees fit unless there is a compelling reason to impose uniformity. This is particularly true with respect to measures such as no-citation rules, which reflect decisions made by circuits about how best to allocate their scarce resources to meet the demands placed upon them. Circuits confront dramatically different local conditions. Among the features that vary from circuit to circuit are the size, subject matter, and complexity of the circuit's caseload; the number of active and senior judges on the circuit; the geographical scope of the circuit; the process used by the circuit to decide which cases are designated as unpublished; the time and attention devoted by circuit judges to unpublished opinions; and the legal culture of the circuit (such as the aggressiveness of the local bar). These

features are best known to the judges who work within the circuit every day. No advisory committee composed entirely or almost entirely of outsiders should tell a circuit that it cannot implement a rule that the circuit has deemed necessary to handle its workload, unless that advisory committee has strong evidence that a uniform rule would serve a compelling interest.

2. The Appellate Rules Committee does not have such evidence with respect to Rule 32.1. The Committee Note fails to identify a single serious problem with the status quo that Rule 32.1 would solve.

a. The main problem identified by the Committee Note is that no-citation rules impose a "hardship" on attorneys by forcing them to "pick through the conflicting no-citation rules of the circuits in which they practice."

i. This is not much of a hardship.

— Every circuit has implemented numerous local rules, and attorneys will continue to have to "pick through" those rules whether or not Rule 32.1 is approved. It is not unreasonable to ask an attorney who seeks to practice in a circuit to read and follow that circuit's local rules — local rules that are readily available online.

— Among local rules, no-citation rules are particularly easy to follow, as they are clear and, in most circuits, stamped right on the face of unpublished opinions. A lawyer who reads an unpublished opinion is told up front exactly what use he or she can make of it.

— It is not surprising that the Committee has not identified a single occasion on which an attorney was in fact confused about the no-citation rule of a circuit, much less a single occasion on which an attorney was "sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion." Attorneys have no difficulty locating, understanding, and following no-citation rules.

ii. Rule 32.1 would do little to alleviate whatever hardship exists.

— Most litigators practice in only one state and one circuit. Thus, most litigators are inconvenienced far more by differences between the rules of their *state* courts and the rules of their *federal* courts than they are by differences among the rules of various federal courts. The minority of attorneys who practice regularly in multiple circuits tend to work for the Justice Department or for large law firms and thus have the time and resources to learn and follow each circuit's local rules.

— Although Rule 32.1 would help these Justice Department and big firm lawyers by creating uniformity among federal circuits, it would *harm* the

typical attorney who practices in only one state by creating *disuniformity* between, for example, the citation rules of the California courts and the citation rules of the Ninth Circuit.

— Even within the federal courts, Rule 32.1 would create uniformity only with respect to citation. The rule would not create uniformity with respect to the *use* that circuits make of unpublished opinions. Thus, those who practice in multiple federal circuits would still have to become familiar with inconsistent rules about unpublished opinions.

iii. If uniformity is the Committee's concern, it would be far better, for the reasons described below, for the Committee to propose a rule that would uniformly *bar* the citation of unpublished opinions.

b. The Committee Note alludes to a potential First Amendment problem. No court has found that no-citation rules violate the First Amendment, and no court will. Courts impose myriad restrictions on what an attorney may say to a court and how an attorney may say it. A no-citation rule no more threatens First Amendment values than does a rule limiting the size of briefs to 30 pages.

3. Not only has the Committee failed to identify any problems that Rule 32.1 would solve, it has failed to identify any other benefits that would result from Rule 32.1.

a. Rule 32.1 would not, as the Committee Note claims, "expand[] the sources of insight and information that can be brought to the attention of judges." Unpublished opinions provide little "insight" or "information" to anyone; to the contrary, they are most often used to mislead.

i. To understand why unpublished opinions do not provide much "insight" or "information," one needs to appreciate when and how unpublished opinions are produced.

— Appellate courts have essentially two functions: error correction and law creation. Unpublished opinions are issued in the vast majority of cases that call upon a court only to perform the former function.

— Unpublished opinions merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. As one judge wrote: "[O]ur uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do *not* make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable." [03-AP-129]

— Unpublished opinions are also issued in cases that *do* present important legal questions, but in which the court is not confident that it answered those questions correctly — most often because the facts were unusual or because the advocacy was poor or lopsided. In such circumstances, a court may not want to speak authoritatively or comprehensively about an issue — or foreclose a particular line of argument — when a future case may present more representative facts or more skilled advocacy.

— Because an unpublished opinion functions solely as a one-time explanation to the parties and the lower court, judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself. Usually the opinion is drafted by a member of the circuit's staff or by a law clerk; often, the staff member or law clerk simply converts a bench memo into an opinion. The opinion will generally say almost nothing about the facts, because its intended audience — the parties and the lower court — are already familiar with the facts. It is common for a panel to spend as little as five or ten minutes on an unpublished opinion. The opinions usually do not go through multiple drafts, members of the panel usually do not request modifications, and the opinions are not usually circulated to the entire circuit before they are released.

— An unpublished opinion may accurately express the views of *none* of the members of the panel. As long as the result is correct, judges do not care much about the language. As one judge explained: "What matters is the result, not the precise language of the disposition or even its reasoning. Mem dispos reflect the panel's agreement on the outcome of the case, nothing more." [03-AP-075]

ii. Because of these features, citing unpublished opinions will not only provide little "insight" or "information," but will actually result in judges being *misled*.

— Unpublished opinions are poor sources of law. A court's holding in any case cannot be understood outside of the factual context, but unpublished opinions say little or nothing about the facts (because they are written for those already familiar with the case). Thus, it is difficult to discern what an unpublished opinion held.

— Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate. Even slight variations in the way that a legal principle is stated can have significant consequences. If unpublished opinions could be cited, courts would often be led to believe that the law had been changed in some way by an unpublished opinion, when no such change was intended.

— Unpublished opinions are also a poor source of information about a judge's views on a legal issue. As noted, it is possible that an unpublished opinion does not

accurately express the views of *any* judge. Citing unpublished opinions might mislead lower courts and others about the views of a circuit's judges.

iii. Even in the rare case in which an unpublished opinion might be persuasive "by virtue of the thoroughness of its research or the persuasiveness of its reasoning," Rule 32.1 is not needed.

— First, any party can petition a court of appeals to publish an opinion that has been designated as unpublished. Courts recognize that they sometimes err in designating opinions as unpublished and are quite willing to correct those mistakes when those mistakes are brought to their attention.

— Second, and more importantly, nothing prevents any party in any case from borrowing — word-for-word, if the party wishes — the "research" and "reasoning" of an unpublished opinion. Parties want to cite unpublished opinions not because they are inherently persuasive, but because parties want to argue (explicitly or implicitly) that a panel of the circuit *agreed* with a particular argument — and for *that* reason, and not because of the opinion's "research" or "reasoning," the circuit should agree with the argument again. As one judge commented: "[N]othing prevents a party from copying wholesale the thorough research or persuasive reasoning of an unpublished disposition — without citation. But that's not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that *three court of appeals judges endorse that reasoning*." [03-AP-169]

This, however, is a dishonest and misleading use of unpublished opinions. As described, judges often sign off on unpublished opinions that do *not* accurately express their views; indeed, it will be the rare unpublished opinion that will precisely and comprehensively describe the views of *any* of the panel's judges.

iv. In short, no-citation rules merely prevent parties from using unpublished opinions *illegitimately* — to *mislead* a court. All *legitimate* uses of unpublished opinions — such as mining them for nuggets of research or reasoning — are already available to parties.

b. Rule 32.1 would not, as the Committee Note claims, "mak[e] the entire process more transparent to attorneys, parties, and the general public."

i. As the Committee Note itself describes, unpublished opinions are already widely available and widely read by judges, attorneys, parties, and the general public — and sometimes reviewed by the Supreme Court. Those opinions can be requested from the clerk, reviewed on the websites of the circuits and other free Internet sites, and researched with Westlaw and Lexis. Unpublished opinions are no less "transparent" than published opinions. They are not hidden from anyone.

ii. Although proponents of Rule 32.1 often cite suspicions that courts use unpublished opinions to duck difficult issues or to hide decisions that are contrary to law, there is no evidence whatsoever that these suspicions are valid. Even those (very few) judges who have expressed support for Rule 32.1 have cited only the *perception* that unpublished opinions are used improperly; they agree that the perception is not accurate. Since the Ninth Circuit changed its no-citation rule to allow parties to bring to the court's attention in a rehearing petition any unpublished opinions that were in conflict with the decision of the panel, almost no parties have been able to do so. Every judge makes mistakes, but there is no evidence that judges are intentionally and systematically using unpublished opinions for improper purposes.

4. Although Rule 32.1 would not address any real problem with the status quo — and although Rule 32.1 would not result in any real benefit — Rule 32.1 would inflict enormous costs on judges, attorneys, and parties.

a. Judges

i. The judges of many circuits are now overwhelmed. The number of appeals filed has increased dramatically faster than the number of authorized judgeships, and Congress has been slow to fill judicial vacancies. Judges and their staffs are already stretched to the limit; there is no "margin for error" when it comes to imposing new responsibilities on them.

ii. Drafting published opinions takes a lot of time. Because judges know that such opinions will bind future panels and lower courts — and because judges know that those opinions will be widely cited as reflecting the views of the judges who write or join them — published opinions are drafted with painstaking care. A published opinion provides extensive information about the facts and the procedural background, because it is written for strangers to the case, and because those strangers will not be able to identify its precise holding without such information. The author of a published opinion will devote dozens (sometimes hundreds) of hours to writing, editing, and polishing multiple drafts. Although law clerks may help with the research or produce a first draft, the authoring judge will invest a great deal of his or her own time into drafting the opinion. The final draft will be reviewed carefully by the other members of the panel, who will often request revisions. Before the opinion is released, it will be circulated to all of the members of the court, and other judges will sometimes request changes.

iii. By contrast, as described above, unpublished opinions generally take very little time. They are written quickly by court staff or law clerks, and judges give them only cursory attention — precisely because judges know that the opinions need to function only as explanations to those involved in the cases and will not be cited to future panels or to lower courts within the circuit.

iv. Rule 32.1 would force judges to spend much more time writing unpublished opinions just to make them suitable to be cited as persuasive authority. Judges will also take the time to write concurring and dissenting opinions, to prevent courts from misunderstanding their views. The Committee cannot:

— change the *audience* for unpublished opinions (from the parties, their attorneys, and the lower court under the current system to future panels, district courts within the circuit, and the rest of the world under Rule 32.1), and

— change the *purpose* of unpublished opinions (from giving a brief, one-time explanation to those already familiar with the case under the current system to being used forever to persuade courts to rule a particular way under Rule 32.1), and *not*

— not change the *nature* of unpublished opinions.

As one judge commented, "[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand." [03-AP-329]

v. Because judges will spend much more time writing unpublished opinions, at least two consequences will follow:

— Judges will have less time available to devote to published decisions — the decisions that really matter. The quality of published opinions will suffer. The law will be less clear. Apparent inconsistencies will abound. Inadvertent intra- and inter-circuit conflicts will arise more frequently. All of this will result in more litigation, more appeals, and more en banc proceedings, which will result in even more demands on judges, which will give them even less time to devote to writing published opinions.

— Parties will have to wait much longer to get unpublished decisions. Parties now often get an unpublished decision in a few days; under Rule 32.1, they may have to wait for a year or more.

vi. Although Rule 32.1 will reduce the time that judges have available to spend on opinions, it will *increase* the amount of attention that drafting opinions will require.

— Parties will cite more cases to the courts, meaning that conscientious judges and their law clerks will have more opinions to read, explain, and distinguish in the course of writing opinions. As one judge wrote: "Once brought to the court's attention, . . . there is no way simply to ignore our memorandum dispositions." [03-AP-285]

— This will be a time-consuming process, because to fully understand an unpublished opinion — which, as described above, will usually say little about the facts — the judge or the law clerk will have to go back and read the briefs and record in the case.

— The result will be that parties — who now often wait a year or more to get a published decision — will have to wait even longer.

vii. Of course, Rule 32.1 can't change the fact that there are only 24 hours in a day. Judges are already stretched to the limit. If they have to spend more time on both published and unpublished opinions, they will have to compensate in some way. One way that judges will compensate is by issuing *no* opinion in an increasing number of cases — i.e., by disposing of an increasing number of cases with one-line orders.

— One-line dispositions are unfair to the parties, who are entitled to some explanation of why they won or lost an appeal, as well as to some assurance that their arguments were read, understood, and taken seriously. Parties who are not told *why* they won or lost an appeal — and who are not provided with any evidence that their arguments were even read — will lose confidence in the judicial system.

— One-line dispositions are unfair to lower court judges, who are entitled to know why they have been affirmed or reversed. Lower court judges cannot correct their mistakes unless those mistakes are made known to them.

— One-line dispositions deprive parties of a meaningful chance to petition for en banc reconsideration by the circuit or certiorari from the Supreme Court. Without *any* explanation of the panel's decision, it is almost impossible for the en banc court or the Supreme Court to know if a case is worth further review.

— When judges issue an unpublished opinion, they have to discuss the basic rationale for the disposition. That provides at least some discipline. That discipline is completely lacking when a panel issues a one-line disposition.

b. Attorneys

i. Critics of no-citation rules represent only a small fraction of the bar — although, because they are very vocal, they have created the illusion that there is widespread dissatisfaction with such rules. In fact, most lawyers support no-citation rules, and for good reason.

ii. Abolishing no-citation rules would vastly increase the body of case law that would have to be researched. If unpublished opinions can be cited, then they might influence the court; and if unpublished opinions might influence the court, then an attorney must research them. As one oft-repeated "talking point" put it: "As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating." [03-AP-025]

iii. Even an attorney who understands that unpublished opinions are largely useless and who does not want to waste time researching them will have to prepare for the possibility that his

or her opponent will use them. One way or another, attorneys will have to read unpublished opinions.

iv. An attorney will be faced with a difficult dilemma when he or she runs across an unpublished opinion that is contrary to his or her position. Even if unpublished opinions are formally treated as non-binding, "the advocate is faced with the Hobson's choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation from her opponent (or worse, the court) for ignoring those decisions. In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedential published opinions, the *substance* of the distinction would quickly erode." [03-AP-462]

v. The hardship imposed on attorneys is not just a function of the dramatic increase in the *number* of opinions that they will have to read; it is also a function of the *nature* of those opinions. Because unpublished opinions say so little about the facts, attorneys will struggle to understand them. Attorneys will often have to retrieve the briefs or records of old cases to be certain that they understand what unpublished opinions held.

vi. Attorneys already find it almost impossible to keep current on the law — even the law in one or two specialities. So many courts are publishing so many opinions — and there are so many ambiguities and inconsistencies in those opinions — that it is often very difficult for a conscientious attorney to know what the law "is" on a particular question. Rule 32.1 will compound this problem many times over, not only because the number of opinions that will "matter" will multiply, but because the unpublished opinions that will have to be consulted are "a particularly watery form of precedent." [03-AP-169] Because so little time goes into writing them, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of circuits.

vii. Litigators are not the only attorneys who will be burdened by Rule 32.1. Transactional attorneys and others who counsel clients about how to structure their affairs will have more opinions to read and, because more law means more uncertainty, will have difficulty advising their clients about the legal implications of their conduct. This problem will be particularly acute for attorneys who must advise large corporations and other organizations that operate in multiple jurisdictions.

viii. While all attorneys — litigators and non-litigators — will be harmed by Rule 32.1, some will be harmed more than others.

— Unpublished opinions are not as readily available as published opinions. Not all libraries and legal offices can afford to purchase the Federal Appendix and rent space to store it. And not all lawyers can afford to use Westlaw or Lexis. (Indeed, not all attorneys have access to computers.) The E-Government Act will help, but it will not level the playing field entirely. For example, the Act will not require circuits to provide electronic access to their *old* unpublished decisions,

and it is unlikely that researching unpublished opinions on circuit websites will be as easy as researching those opinions on Westlaw or Lexis.

— Even if the day arrives when unpublished opinions become equally available to all, attorneys will still have to *read* them. Some attorneys are already overwhelmed with work or have clients who cannot pay for more of their time. These attorneys — including solo practitioners, small firm lawyers, public defenders, and CJA-appointed counsel — will bear the brunt of Rule 32.1. Rule 32.1 will thus increase the already substantial advantage enjoyed by large firms, government attorneys, and in-house counsel at large corporations.

c. Parties

i. As described above, all parties in all cases — both those that terminate in published opinions and those that terminate in unpublished opinions — will have to wait longer for their cases to be resolved. Delays are bad for everyone, but they are particularly harmful for the most vulnerable litigants — such as plaintiffs in personal injury cases who can no longer pay their medical bills or habeas petitioners who are unlawfully incarcerated.

ii. As described above, Rule 32.1 will result in more one-line dispositions. More parties will never be given an explanation for why they lost their appeal or even assurance that their arguments were taken seriously. This will result in *less* transparency and *less* confidence in the judicial system.

iii. As described above, Rule 32.1 will increase the already high cost of litigation. Clients will have to pay more attorneys to read more cases.

iv. Increasing the cost of litigation will, of course, harm the poor and middle class the most, adding to the already considerable advantages enjoyed by the powerful and the wealthy.

v. Rule 32.1 will particularly disadvantage pro se litigants and prisoners, who often do not have access to the Internet or to the Federal Appendix.

5. Rule 32.1 could harm state courts. For example, the rule would permit litigants to cite and federal courts to rely upon the unpublished opinions of the California *state* courts in diversity and other actions, even though the California courts themselves have determined that these cases should not be looked to for expositions of state law. This, in turn, will enable litigants to use the unpublished decisions of the California state courts to influence the development of California law, through the "back door" of the federal courts. Thus, many of the costs imposed by Rule 32.1 on federal courts — such as the need for judges to spend more time writing unpublished opinions — will also be imposed on state courts.

6. The assurances provided in the Committee Note that Rule 32.1 will not inflict the costs described above are unpersuasive.

a. The Committee Note admits that Rule 32.1 would inflict substantial costs of the type described above if it required courts to treat their unpublished opinions as binding precedent, but then gives assurance that Rule 32.1 does not do so. The Committee is naive in believe that a clear distinction between "precedential" and "non-precedential" will be maintained.

i. As noted, parties will be citing unpublished opinions precisely for their precedential value — that is, as part of an argument (implicit or explicit) that because a panel of a circuit decided an issue one way in the past, the circuit should decide the issue the same way now. The only real interest that proponents of Rule 32.1 have in citing unpublished opinions *is* as precedent.

ii. When circuits are confronted with this argument, they will not be able to say simply that the prior unpublished opinion is not binding precedent and therefore can be ignored. Rather, the court will have to distinguish it or explain why it will not be followed. As one group of judges commented: "As a practical matter, we expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions." [03-AP-396] From the point of view of the court's workload, then, the Committee Note's assurance that courts will not have to treat their unpublished opinions as binding precedent will make little difference.

iii. This phenomenon will be even more apparent in the lower courts. It will be a rare district court judge who will ignore an unpublished opinion of the circuit that will review his or her decision. If unpublished opinions are cited to lower courts, lower courts will have to treat them as though they were binding, even if that is not technically true.

iv. In sum, all of the consequences described above — such as courts having to spend more time writing unpublished opinions and attorneys having to spend more time researching them — will occur, whether or not the unpublished opinions are labeled "non-binding."

b. The Committee Note's argument that there is no compelling reason to treat unpublished opinions different than such sources as district court opinions, law review articles, newspaper columns, or Shakespearian sonnets misses a few important distinctions:

i. The fact that law review articles or newspaper columns can be cited in a brief will not have any effect on the *author* of such materials. The author of a law review article or a newspaper column is going to do precisely the same amount of work — and write precisely the same words — whether or not his or her work can later be cited to a court. By contrast, making the unpublished opinions of a court of appeals citable *will* affect their authors, as described above.

ii. There is no chance that law review articles or newspaper columns will be cited by parties for their precedential value — that is, as part of an argument that, because a circuit did *x* once, it should do *x* again. Law review articles, newspaper columns, and the like are cited *only* for their persuasive value because that is the only value they have. An unpublished opinion, by contrast, is cited by a party who wants a future panel of the circuit or a lower court within the

circuit to decide an issue a particular way — not because the unpublished opinion, like a law review article, is powerfully persuasive, but because the unpublished opinion, unlike the law review article, was at least nominally issued in the name of the circuit.

iii. The same point can be made about the opinions of other circuits, lower federal courts, state courts, or foreign jurisdictions. As one commentator wrote:

> "When the opinions, even the unpublished ones, of another court are cited, the underlying argument is as follows: the other court accepted or advanced a particular reasoning and, therefore, this court should too — it can, and should, trust the other court's judgment. When an unpublished opinion of the same court is cited, however, the underlying argument is invariably a precedential one, in the most basic sense: this court accepted or advanced a particular reasoning in another case and, therefore, it would be fundamentally unfair not to apply that same rationale in the instant case. Such opinions *are* cited for their precedential value." [03-AP-478]

iv. There is also no chance that a lower court will feel bound to adhere to the views of the author of a law review article or newspaper column. As one judge wrote, "Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value." [03-AP-169] Or, as one bar committee wrote, "unlike unpublished decisions, there is no risk these other materials will be mistaken for the law of the circuit or given undue weight by the lower courts or litigants." [03-AP-319]

v. According to commentators, this risk is particularly acute in the lower courts, which is why some no-citation rules apply to those courts, as well as to parties. "The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist." [03-AP-322]

c. The Committee Note is wrong in suggesting that, because some circuits have liberalized no-citation rules without experiencing problems, the concerns about Rule 32.1 are overblown.

i. The conditions of each circuit vary significantly, making it hazardous to assume that the experience of one circuit will be duplicated in another. As noted above, circuits vary with respect to such things as the size, subject matter, and complexity of the caseload; the number of judges; and the local legal culture. Just because the Fifth Circuit is able to permit the citation of unpublished opinions does not mean that the Ninth Circuit can do so.

ii. No circuit has gone as far as Rule 32.1 would in permitting the citation of unpublished opinions. All circuits discourage such citation, forbid it in some circumstances, or both. And three circuits with relatively liberal citation rules — the Third, Fifth, and Eleventh — either do

not make or have only recently made their unpublished opinions widely available. It is virtually costless for a circuit whose unpublished opinions do not appear in the Federal Appendix or in the Westlaw and Lexis databases to allow those opinions to be cited.

iii. Some circuits that have liberalized no-citation rules have done so only recently, so it is too early to know whether they will experience difficulties.

iv. Some of the circuits that permit liberal citation of unpublished opinions also make frequent use of one-line dispositions. This supports — rather than refutes — the arguments of those who oppose Rule 32.1.

7. Rule 32.1 is not a "general rule[] of practice and procedure" because, if Rule 32.1 is adopted, "some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material." Because Rule 32.1 would "affect the construction and import of opinions," the rule is "beyond the scope of the rulemaking authority of 28 U.S.C. § 2072." [03-AP-329]

8. If, despite all of these arguments, the Committee decides to forge ahead with Rule 32.1, it should at least amend the rule so that it applies only prospectively — that is, so that it applies only to unpublished decisions issued after the rule's effective date. It is unfair to allow citation of opinions that judges wrote under the assumption that they would never be cited. The D.C. Circuit's decision to abolish its no-citation rule was applied prospectively only; the Committee should follow the D.C. Circuit's lead.

b. Arguments For Adopting Proposed Rule

1. It is not Rule 32.1, but no-citation rules, that require a compelling justification. In a democracy, the presumption is that citizens may discuss with the government the actions that the government has taken. Under the First Amendment, the presumption is that prior restraints of speech — especially speech *about* the government made *to* the government — are invalid. In a common law system, the presumption is that judicial decisions are citable. In an adversary system, the presumption is that lawyers are free to make the best arguments available. No-citation rules — through which judges instruct litigants, "You may not even *mention* what we've done in the past, much less engage us in a discussion about whether what we've done in the past should influence what we do in this case" — are profoundly antithetical to American values. The burden should not be on the Committee to defend Rule 32.1 but on opponents of Rule 32.1 to defend no-citation rules.

2. The main problem created by no-citation rules — a problem that Rule 32.1 would eliminate — is that no-citation rules deprive the courts, attorneys, and parties of the use of unpublished opinions. The evidence is overwhelming that unpublished opinions are indeed a valuable source of "insight" and "information."

a. First, unpublished opinions are often read. "[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing

so." [03-AP-406] Numerous commentators — supporters and opponents of Rule 32.1 alike — said that they regularly read unpublished opinions.

b. Second, unpublished opinions are often cited by attorneys. One commentator wrote: "My own experience has been that the prohibition on [citation] currently in effect in the lower courts of the Ninth Circuit is utterly disregarded, not just by bad lawyers but also by good ones — even by leading lawyers, not always, to be sure, but in many cases when there is no binding, published authority available." [03-AP-473]

c. Third, unpublished decisions are often cited by judges. Researchers have identified hundreds of citations to unpublished opinions by appellate courts and district courts — including appellate courts and district courts in jurisdictions that have adopted no-citation rules. One of the most pointed of those citations appears in *Harris v. United Federation of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002):

> "There is apparently no published Second Circuit authority directly on point for the proposition that § 301 does not confer jurisdiction over fair representation suits against public employee unions. In the 'unpublished' opinion in *Corredor*, which of course is published to the world on both the Lexis and Westlaw services, the Court expressly decides the point . . . . Yet the Second Circuit continues to adhere to its technological-outdated rule prohibiting parties from citing such decisions . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one."

d. Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. One appellate judge, after describing a recent occasion on which a staff attorney had cited many unpublished decisions in advising a panel of judges about how to dispose of a case, commented as follows:

> "Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. . . . We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order. I see no reason why we ought not be allowed to consider such material, and I certainly do not understand why counsel, obligated to present the best possible case for his client, should be denied the right to comment on legal material in the public domain." [03-AP-335]

e. Fifth, unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. For example, district courts are instructed to strive for uniformity in sentencing, and thus they are often anxious for *any* evidence about how similarly situated defendants are being treated by

other judges. Many unpublished opinions provide this information. The value of unpublished opinions to district court judges may explain why only 4 of the 1000-plus active and senior district judges in the United States — including only 2 of the 150-plus district judges in the Ninth Circuit — submitted comments opposing Rule 32.1.

f. Sixth, there is not already "too much law," as some opponents of Rule 32.1 claim. As one distinguished federal appellate judge wrote in one of his books: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point."[1] Attorneys are most likely to cite — and judges are most likely to consult — an unpublished opinion not because it contains a sweeping statement of law (a statement that can be found in countless published opinions), but because the facts of the case are very similar to the facts of the case before the court. Parties should be able to bring such factually-similar cases to a court's attention, and courts should be able to consult them for what they are worth.

g. For all of these reasons, no-citation rules should be abolished. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it makes no sense to prohibit attorneys and judges from talking about the opinions that both are reading.

3. In addition to the evidence that unpublished opinions do indeed often serve as sources of "insight" and "information" for both attorneys and judges, there are other reasons to doubt the oft-repeated claim that unpublished opinions merely apply settled law to routine facts and therefore have no precedential value:

a. It is difficult for a court to predict whether a case will have precedential value. "Only when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. This point naturally leads one to question how an appellate panel can, ex ante, determine the precedential significance of its ruling. Lacking omniscience, an appellate panel cannot predict what may come before its court in future days." [03-AP-435] As one attorney commented: "[W]e can and do expect a lot from our judges, but the assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality." [03-AP-454]

b. Even if a court could reliably predict whether an opinion establishes a precedent worth being cited, making that decision would *itself* take a lot of time. "The very choice of treating an appealed case as non-precedential, if done conscientiously, has to be preceded by

[1]Richard A. Posner, The Federal Courts: Challenge and Reform 166 (1996). I should note that Judge Posner opposes Rule 32.1.

thoughtful analysis of the relevant precedents." [03-AP-435] Time, of course, is precisely what courts who issue unpublished opinions say they do not have.

c. Given these limitations, it is not surprising that courts often designate as "unpublished" decisions that should be citable. The most famous example involves the Fourth Circuit's declaring an Act of Congress unconstitutional in an unpublished opinion — something that the Supreme Court labeled "remarkable and unusual." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993). Other examples abound. For example, in *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), the court described how 20 inconsistent unpublished opinions on the same unresolved and difficult question of law had been issued by Ninth Circuit panels before a citable decision settled the issue.

d. More evidence of the unreliability of these designations can be found in the many unpublished decisions that have been reviewed by the Supreme Court. (The most recent example is *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004), in which the Supreme Court reversed an unpublished decision that "was flawed as a matter of fact" — suggesting that the facts were neither clear nor straightforward — "and as a matter of law" — because the opinion took what the Supreme Court regarded as the wrong side of a circuit split.) The fact that the Supreme Court decides to review a case does not necessarily mean that the circuit made a mistake in designating the opinion as unpublished, but the fact that an opinion was deemed "certworthy" by the Supreme Court does suggest that *something* worthy of being cited may have occurred in that opinion.

e. Many unpublished opinions reverse the decisions of district courts or are accompanied by concurrences or dissents — implying that their results may not be clear or uncontroversial.

f. Researchers who have studied unpublished opinions have found that the decision to designate an opinion as unpublished is influenced by factors other than the novelty or complexity of the issues. For example, the background of judges plays a role. The more experience that a judge had with an area of law in practice, the less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).

4. Even if, despite all of this evidence, it remains unclear whether unpublished opinions offer much "insight" or "information," Rule 32.1 has a major advantage over no-citation rules: It lets the "market" function and determine the value of unpublished opinions.

a. A glaring inconsistency runs through the arguments of the opponents of Rule 32.1. On the one hand, they argue that unpublished opinions contain nothing of value — that such opinions are useless, fact-free, poorly-worded, hastily-converted bench memos written by 26-year-old law clerks. On the other hand, they argue that, if Rule 32.1 is approved, attorneys will be devoting thousands of hours to researching these worthless opinions, briefs will be crammed with citations to these worthless opinions, district courts will feel compelled to follow these worthless opinions, and circuit judges will have no alternative but to carefully analyze and distinguish these worthless opinions.

b. Opponents of Rule 32.1 can't have it both ways. Either (i) unpublished opinions contain something of value, in which case parties *should* be able to cite them, or (ii) unpublished opinions contain nothing of value, in which case parties *won't* cite them.

c. Under no-citation rules, judges make this decision; they bar the citation of unpublished decisions. If they're wrong in their assessment, the "market" cannot correct them because there is no "market." Under Rule 32.1, the "market" makes this decision. Unpublished opinions will be cited if they are valuable, and they will not be cited if they are not valuable.

5. No-citation rules create several other problems — problems that Rule 32.1 would eliminate:

a. No-citation rules lead to arbitrariness and injustice. Our common law system is founded on the notion that like cases should be decided in a like manner. It helps no one — not judges, not attorneys, not parties — when attorneys are forbidden even to *tell* a court how it decided a similar case in the past. Such a practice can only increase the chances that like cases will not be treated alike.

b. No-citation rules undermine accountability. It is striking that judges opposing Rule 32.1 have argued, in essence: "If parties could tell us what we've done, we'd feel morally obliged to justify ourselves. Therefore, we are going to forbid parties from telling us what we've done." Put differently, judges opposing Rule 32.1 have insisted on the right to decide *x* in one case and "not *x*" in another case and not even be asked to reconcile the seemingly inconsistent decisions. Judges always have the right to explain or distinguish their past decisions or to honestly and openly change their minds. But judges should not have the right to forbid parties from mentioning their past decisions. As one judge wrote: "Public accountability requires that we not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves." [03-AP-335]

c. No-citation rules undermine confidence in the judicial system.

i. No-citation rules make absolutely no sense to non-lawyers. It is almost impossible to explain to a client why a court will not allow his or her lawyer to mention that the court has addressed the same issue in the past — or applied the same law to a similar set of facts. Clients just don't get it.

ii. Because no-citation rules are so difficult for the average citizen to understand, they create the appearance that courts have something to hide — that unpublished opinions are being used for improper purposes. As one judge wrote:

> "It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to 'revised and extended remarks' inserted into the Congressional Record

to op-ed pieces in local newspapers; why should the 'unpublished' judicial orders be the only matter off limits to citation and argument? It implies judges have something to hide.

"In some corners, there is a perception that they do — that unpublished orders are used to sweep under the rug departures from precedent. [This judge is confident that, at least in his circuit, unpublished opinions are not used improperly.] Still, to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice." [03-AP-367]

iii. No-citation rules also give rise to the appearance — if not the reality — of two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low-quality justice for "no-name appellants represented by no-name attorneys." [03-AP-408]

— Large institutional litigants — and the big firms that represent them — disproportionately receive careful attention to their briefs, oral argument, and a published decision written by a judge. Others — including the poor and the middle class, prisoners, and pro se litigants — disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk.

— Defenders of no-citation rules insist that, although judges pay little attention to the language of unpublished opinions, they are careful to ensure that the results are correct. The problem with this argument is that it "assumes that reasoning and writing are not linked, that is, that clarity characterizes the panel's thinking about the proper decisional rule, but writing out that clear thinking is too burdensome." [03-AP-435] As every judge who has had the experience of finding that an initial decision just "won't write" — and that is every judge — it is manifestly untrue that reasoning and writing can be separated. One judge put it this way: "There is . . . a wholesome, and perhaps necessary, discipline in our ensuring that unpublished orders can be cited to the courts. . . . [R]elegating this material to non-citable status is an invitation toward mediocrity in decisionmaking and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered." [03-AP-335]

d. The inconsistent local rules among circuits do indeed create a hardship for attorneys who practice in more than one circuit — a hardship that opponents of Rule 32.1 too quickly dismiss.

i. The suggestion of some opponents of Rule 32.1 that the Committee is insincere in its concern for the impact of inconsistent local rules on those who practice in more than one circuit is belied by the fact that perhaps no problem has been the focus of more of the Advisory Committee's and Standing Committee's attention over the past few years. The Appellate Rules have been amended several times — most recently in 2002 — to eliminate variations in local

rules. Rule 32.1 and other of the rules published in August 2003 would do the same. The Advisory Committee and the Standing Committee believe strongly that an attorney should be able to file an appeal in a circuit without having to read and follow dozens of pages of local rules.

ii. Inconsistent local rules can only be eliminated one at a time. Any rule that makes federal appellate practice more uniform by eliminating one set of inconsistent local rules is obviously going to leave other inconsistent local rules untouched. That is not an excuse for opposing the rule.

e. Opponents of Rule 32.1 have also been too quick to dismiss the First Amendment problems posed by no-citation rules.

i. No-citation rules offend First Amendment values — if not the First Amendment itself — in banning truthful speech about a matter of public concern — indeed, about a governmental action that is in the public domain. They also offend First Amendment values in forbidding an attorney from making a particular type of argument in support of his or her client — a type of argument that is forbidden, at least in part, because it would put the court to the inconvenience of having to defend, explain, or distinguish one of its own prior actions. What the Supreme Court said in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-45 (2001), about restrictions that Congress had placed on legal services attorneys could be said about the restrictions that no-citation rules place on all attorneys:

> "Restricting LSC attorneys in . . . presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . . An informed, independent judiciary presumes an informed, independent bar. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."

ii. No-citation rules are not like limits on the size of briefs. They differ in the character of the restriction and in the interest purportedly being served by the restriction. A 30-page limit on briefs does not forbid an attorney from making a particular argument or citing a particular action of the court, and page limits — which every court in America imposes — are necessary if courts are to function. No-citation rules, by contrast, forbid particular arguments (arguments that ask a court to follow one of its prior unpublished decisions), are imposed by only some courts, and are imposed by courts in order to protect themselves from having to take responsibility for their prior actions.

6. In opposing Rule 32.1, commentators offer a "parade of horribles" that they claim will be suffered by judges, attorneys, and parties if no-citation rules are abolished.

a. Many of the "horribles" in this parade are the same "horribles" that were paraded out when unpublished opinions became available on Westlaw and Lexis — and then again when

unpublished opinions started being published in the Federal Appendix. None of the predictions was accurate.

b. The predictions regarding Rule 32.1 are no more reliable. Dozens of state and federal courts have already liberalized or abolished no-citation rules, and there is absolutely no evidence that the dire predictions of Rule 32.1's opponents have been realized in those jurisdictions. There is no evidence, for example, that judges are spending more time writing unpublished opinions or that attorneys are bombarding courts with citations to unpublished opinions or that legal bills have skyrocketed for clients. While it is true that there are differences among circuits, the circuits that permit citation are similar enough to the circuits that forbid citation that there should be *some* evidence that liberal citation rules cause harm, and yet no such evidence exists.

c. It is no accident that most of the opposition to permitting citation to unpublished opinions comes from judges and attorneys who have no experience permitting citation to unpublished opinions. It is likewise no accident that little opposition to Rule 32.1 was heard from the judges and attorneys who have such experience. As one judge commented: "What *would* matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished opinions. And from that quarter no protest has been heard. This implies to me that the benefits of accountability and uniform national practice carry the day." [03-AP-367]

7. Regarding the argument that Rule 32.1 would dramatically increase the workload of judges:

a. First, there is no evidence that this has occurred in jurisdictions that have abandoned or liberalized citation rules. One reason why liberalizing citation rules does not seem to result in more work for judges is that unpublished opinions have never been written just for parties and counsel, as proponents of no-citation rules insist. Those decisions have also been written for the en banc court and the Supreme Court. "This may be why the nine circuits that allow citation to these documents have not experienced difficulty: the prospect of citation to a different panel requires no more of the order's author than does the prospect of criticism in a petition for a writ of certiorari." [03-AP-367]

b. Second, judges already have available to them options that would reduce their workloads far more than no-citation rules.

i. Judges now spend too much time on drafting published opinions.

— The overwork that judges cite in arguing against Rule 32.1 is in part a function of increasing caseloads — which are largely outside of judges' control — but also a function of a particular style of judging. Some of the arguments against Rule 32.1 reflect an attitude toward judging that has become too common in the federal appellate courts and that should be changed.

— A judge who claims that he or she sometimes needs to go through 70 or 80 drafts of an opinion before getting every word exactly right has confused the function of a judge with the function of a legislator. Judges are appointed not to draft statutes, but to resolve concrete disputes. What they hold is law; everything else is dicta. Lower court judges understand this; they know how to read a decision and extract its holding.

— Judges could save a lot of time if they would abandon "the discursive, endless federal appellate opinion." [03-AP-435] Judges should write short, direct opinions that address only the one or two issues that most need substantial discussion. Instead, judges too often trudge through every issue mentioned anywhere in a brief. Judges should also spend less time obsessing over every footnote and comma.

ii. Judges also now spend too much time on drafting unpublished opinions.

— If unpublished opinions were written as judges claim — if they were two- or three-paragraph opinions that started with "the parties are familiar with the facts" and then very briefly described why the court agreed or disagreed with the major contentions — then parties would not *want* to cite them. But many unpublished decisions go far beyond this. They are 10 or 12 pages long, they contain a great deal of discussion of the facts, and they go on and on about the law. If an opinion looks like a duck and quacks like a duck, parties are going to want to cite it like a duck.

— It is odd to fix the problems with unpublished opinions not by fixing the problems with unpublished opinions but by barring people from talking about unpublished opinions. Judges would not need no-citation rules if they would confine themselves to issuing (1) full precedential opinions in cases that warrant such treatment or (2) two- or three-paragraph explanations in cases that do not. The problem is that judges insist on "a third, intermediate option: a full and reasoned but unprecedent[ial] appellate opinion." [03-AP-219] Judges have only themselves to blame.

c. Third, if abolishing no-citation rules had the impact on judges' workload that Rule 32.1's opponents fear, then no-citation rules would not be on the wrong side of history. But they are. "The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling." [03-AP-032] As courts have uniformly gotten *more* busy, the trend has uniformly been toward *liberalizing* rules regarding the citation of unpublished opinions. Obviously even busy courts have been able to handle their caseloads despite abolishing no-citation rules.

d. Rule 32.1 would, in some respects, *reduce* the workload of judges, because no-citation rules require judges and litigants to treat as issues of first impression questions that have already been addressed many times by the circuit.

i. Take, for example, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), in which the Ninth Circuit admitted that various panels had issued at least 20 unpublished opinions resolving the same unsettled issue of law at least three different ways — all before any published opinion addressed the issue. To quote *Rivera-Sanchez*,

> "Our conclusion that this decision meets the criteria for publication was prompted by the fact that it establishes a rule of law that we had not previously announced in a published opinion. Various three-judge panels of our court, however, have issued a number of unpublished memorandum decisions taking different approaches to resolving the question whether the Supreme Court's opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), requires a district court faced with a defendant convicted of illegal re-entry after deportation whose indictment refers to both 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) to resentence or merely correct the judgment of conviction. These conflicting mandates undoubtedly have created no small amount of confusion for district judges who serve in border districts. While our present circuit rules prohibit the citation of unpublished memorandum dispositions, see 9th Cir. R. 36-3, we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis.
>
> "During oral argument, we asked counsel to submit a list of the unpublished dispositions of this court that have confronted this issue. The parties produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct the problem. Under our rules, these unpublished memorandum dispositions have no precedential value, see 9th Cir. R. 36-3, and this opinion now reflects the law of the circuit. To avoid even the possibility that someone might rely upon them, however, we list these unpublished memorandum decisions below so that counsel and the district courts will know that each of them has been superseded today."

ii. It is hard to know how the Ninth Circuit's no-citation rule saved the court any time in this instance. An issue that could have been settled authoritatively on the first or second occasion instead was litigated at least 21 times. Had an attorney representing a party in, say, the sixth case been able to draw the court's attention to its five prior decisions, it seems likely that the court would have issued a published opinion settling the issue. And attorneys likely would not have litigated the issue over and over again if the court's rules had not required them to treat an issue that had already been addressed 20 times as an issue of first impression. No-citation rules keep issues "in play" — and thus encourage litigation — much longer than necessary.

8. Regarding the argument that Rule 32.1 would result in more one-line dispositions:

a. Opponents of Rule 32.1 have argued both (i) that one-line dispositions would be harmful because parties would not get an explanation of why they won or lost *and* (ii) that the

explanation that many unpublished opinions give parties about why they won or lost is not accurate. What judges are arguing is that they need to be able to keep up the *illusion* of giving parties adequate explanations for the results of cases. This is not a compelling reason to maintain no-citation rules.

b. It would be better for courts to issue no opinion at all than an opinion that so poorly reflects the views of the judges that those judges are unwilling to have it cited back to them. If, as many judges claim, unpublished opinions accurately report only a result — and not necessarily the reason for the result — then the court should just issue a *result*. As one commentator wrote: "If the result of adopting the proposed rule is to force judicial *staff* to write less in unpublished orders, then so be it. It is better to have a one-sentence disposition written by an actual judge th[a]n three pages written by a recent law school graduate masquerading as a judge. There is no point . . . for offering an explanation of the court's reasoning to litigants when the court itself is unwilling to be bound by that reasoning." [03-AP-414]

9. Regarding the argument that Rule 32.1 would result in unpublished opinions being used to mislead courts — or that courts would misuse or misunderstand unpublished opinions:

a. The circuit judges who write unpublished opinions do not need this protection. Whatever the flaws of unpublished opinions, those flaws are best known to the judges who write them. It is unlikely that a court will give its own opinion "too much" weight or not understand the limitations of an opinion that it wrote.

b. Lower court judges also do not need this protection.

i. Some of the comments against Rule 32.1 take a dim view of the abilities of district court judges. Commentators suggest, for example, that no-citation rules are needed to keep district court judges from being "distracted" by citations to unpublished opinions and to prevent judges from giving those opinions too much weight.

ii. This concern is misplaced. District court judges are entrusted on a daily basis with the lives and fortunes of those who appear before them. They regularly grapple with the most complicated legal and factual issues imaginable. They are quite capable of understanding and respecting the limitations of unpublished opinions.

iii. District courts have nonbinding authorities cited to them every day. For example, a district court in Oregon may have a decision of the Ninth Circuit, a decision of the Second Circuit, a decision of the Illinois Supreme Court, and a law review article cited to it in the course of one brief. It is not terribly difficult for the district court to understand the difference between the Ninth Circuit cite and the other cites. Likewise, it will not be terribly difficult for the district court to understand the difference between a published opinion of the Ninth Circuit that it is obligated to follow and an unpublished decision that it is not.

iv. District judges have the courage to disagree with unpublished decisions that they believe are wrong. Moreover, given that numerous circuit judges have commented publicly

about the poor quality of unpublished decisions, it may not even take much courage to disagree with those decisions. In several circuits, unpublished decisions can be cited to district courts, and there is no evidence that district courts have felt compelled to treat those decisions as binding for fear of provoking the appellate courts.

10. Regarding the argument that Rule 32.1 would result in attorneys having to do much more legal research and clients having to pay much higher legal bills:

a. To begin with, if no-citation rules really spared attorneys and their clients from the fate predicted by opponents of Rule 32.1, then those rules would be widely supported by the bar. They are not, at least outside of the Ninth Circuit:

i. The ABA House of Delegates declared in 2001 that no-citation rules are "contrary to the best interests of the public and the legal profession" and called upon the federal appellate courts to "permit citation to relevant unpublished opinions."

ii. The former chair of the D.C. Circuit's Advisory Committee on Procedures wrote: "Probably more than any other facet of appellate practice, these [no-citation] policies have drawn well-deserved criticism from the bar and from scholars. When I chaired the D.C. Circuit's Advisory Committee on Procedures, this kind of practice was perennially and uniformly condemned — all to no avail." [03-AP-016]

iii. Rule 32.1 is supported by such national organizations as the ABA and the American College of Trial Lawyers, by bar organizations in New York and Michigan, and by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice.

iv. By contrast, only lawyers who clerked for or who appear before Ninth Circuit judges have complained in great number about Rule 32.1. If Rule 32.1 were likely to create the predicted problems, lawyers from throughout the United States should be rising up against it, led by such organizations as the ABA.

b. In any event, Rule 32.1 would not create serious problems for attorneys and their clients:

i. Opponents of Rule 32.1 are simply wrong in arguing that they now have *no* duty to research unpublished opinions, but, if those opinions could be cited, they would then have a duty to research *all* unpublished opinions.

ii. It is not the ability to *cite* unpublished opinions that triggers a duty to research them.

— If unpublished opinions contain something of value, then attorneys *already* have an obligation to research them — so as to be able to advise clients about the legality of their conduct, predict the outcome of litigation, and get ideas about how to frame and argue issues before the court.

— If unpublished opinions do not contain something of value, then attorneys will not have an obligation to research them even if they can be cited. No rule of professional responsibility requires attorneys to research useless materials.

iii. In researching unpublished opinions, attorneys already apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney will not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney will look at unpublished opinions, as he or she should.

11. Several of those who commented in favor of Rule 32.1 made clear that they were doing so only because they view it as a valuable "first step." These commentators argued that the practice of issuing unpublished decisions should be abolished and criticized the Committee for "legitimizing" or "tacitly endorsing" the practice in Rule 32.1. At the same time, at least one judge said that he did not object to Rule 32.1, but that he wanted to put the Committee on notice that he would strongly oppose any future rule requiring that unpublished opinions be treated as precedential.

2. Summary of Arguments Regarding Form

Not surprisingly, the comments that we received about Rule 32.1 focused on the substance, not on the drafting. Most of the remarks about the drafting were off-hand, such as the occasional comment that Rule 32.1 was "clear" or "well drafted." The commentators did not seem to have any trouble understanding the rule.

The only confusion about the meaning of the rule that appeared with any frequency in the comments was the assumption that the rule would require courts to treat unpublished opinions as binding precedent. (I am not referring to the commentators who explained why they thought Rule 32.1 would do so *de facto*; I am referring only to those who seemed to assume that it would do so *de jure*.) It is difficult to know how much confusion exists on this point, as the commentators used the word "precedent" loosely. Some used it to mean binding precedent; others used it to mean merely non-binding guidance; and still others were not clear about how they were using it. In any event, I do not believe that this confusion can be traced to the drafting of either the rule or the Committee Note. Rather, I suspect that, to the extent that there was confusion on the point, it was confined to commentators who had heard about the rule but had not read it themselves.

Several commentators — in reference to the sentence in the Committee Note about the "conflicting" local rules of the courts of appeals — pointed out that the rules do not "conflict," in the sense of demanding inconsistent conduct from any person, because each circuit's rule applies only to that circuit's unpublished opinions.

Only **three commentators** — all supporters of Rule 32.1 — suggested that it be rewritten in some respect:

Philip Allen Lacovara, Esq. (03-AP-016) supports Rule 32.1, but recommends a couple of changes:

1. Mr. Lacovara objects that, by referring to dispositions that have been "designated as . . . 'non-precedential," Rule 32.1(a) "necessarily implies that such designations have legal force and effect" — something Mr. Lacovara disputes. So as to avoid "legitimizing" the attempts by judges to label some of their opinions "non-precedential," Rule 32.1(a) should end with the word "dispositions": "No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions."

2. Mr. Lacovara argues that, even if that suggestion is rejected, the Committee should eliminate the "generally imposed" clause in Rule 32.1(a). He thinks it is "ludicrous" for the Committee to approve a proposed rule "that appears to license the circuits by local rule to ban *all* citations to all prior decisions." He also dismisses the concern, mentioned in the Committee Note, that a circuit might promulgate a local rule requiring that copies of all unpublished opinions cited in a brief be served and filed. He believes that such a local rule is already foreclosed by Rule 32.1(b).

Prof. Stephen R. Barnett of the University of California at Berkeley School of Law (Boalt Hall) (03-AP-032) strongly supports the substance of Rule 32.1(a), but, in a recent law review article, was very critical of its drafting — and, in particular, of the decision to forego what he calls a "permissive" approach (that is, to state affirmatively that unpublished opinions may be cited) in favor of a "prohibitory" approach (that is, to bar restrictions on the citation of unpublished opinions):

1. Despite acknowledging that the text of the rule addresses only the "citation" of unpublished opinions, and despite acknowledging that the Committee Note "is at pains to make clear that [the] proposed Rule 'says nothing whatsoever about the effect that a court must give' to an unpublished opinion," Prof. Barnett still believes that it is "not clear" whether Rule 32.1(a) would force courts to treat unpublished opinions as binding precedent. He argues that a local rule deeming unpublished opinions to be "non-precedential" could be seen as a "restriction" placed upon the "citation" of those opinions — and, because this "restriction" would be placed only upon unpublished opinions, it would be barred by Rule 32.1(a) as drafted. Prof. Barnett argues this problem — and others — could be avoided if Rule 32.1(a) would simply state affirmatively: "Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court."

2. Prof. Barnett acknowledges that his alternative would not prevent courts from placing restrictions upon the citation of unpublished opinions, such as branding them as "disfavored" or providing that they can be cited only when no published opinion will serve as well. But Prof. Barnett makes three points about these restrictions (which he refers to as "discouraging words"):

a. First, Prof. Barnett argues that it is not clear whether a local rule that disfavors the citation of unpublished opinions or that restricts the citation of unpublished opinions to situations in which adequate published opinions are lacking imposes a "restriction" upon the citation of unpublished opinions — and thus it is unclear whether Rule 32.1(a) as drafted is effective in barring such local rules. He argues that to instruct counsel that citation of unpublished opinions is "disfavored" is not necessarily to "restrict" their citation. He also points out that some restrictions on citation are worded in terms of counsel's "belief" about the adequacy of published opinions on an issue — and that such rules are more "admonitory" than "enforceable." He concedes, though, that some local rules do appear to impose a "restriction" on citation, and thus would be barred by Rule 32.1(a) as drafted — but not by his alternative.

b. Second, Prof. Barnett downplays the possibility that a circuit dominated by "adamant anti-citationists . . . might impose some 'prohibition or restriction' that would make it difficult or impossible for attorneys to cite unpublished opinions." In Prof. Barnett's view, "[f]ederal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter."

c. Finally, Prof. Barnett argues that, in any event, circuits *should* be able to discourage the citation of unpublished opinions and *should* be able to impose restrictions upon them — such as the restriction that they can be cited only when adequate published opinions are absent. Prof. Barnett repeats the familiar arguments about the lesser quality of unpublished opinions and argues that there is nothing wrong with treating them as "second-class precedents" — "as long as the[ir] citation is *allowed*."

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) supports the rule, but generally agrees with Prof. Barnett's comments about drafting. He also singles out for criticism the following sentence in the Committee Note: "At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions.") Judge Easterbrook points out that Rule 32(e) *does* bar circuits from imposing typeface or other requirements, and thus the Committee Note to Rule 32.1 should not imply that circuits retain this authority.

The **Style Subcommittee** (04-AP-A) makes the following suggestions:

1. Change the heading from "Citation of Judicial Dispositions" to "Citing Judicial Dispositions."

2. In subdivision (a), change "upon the citation of" to "on citing" both places where the phrase occurs.

3. In subdivision (b), change "A party who cites" to "If a party cites," insert a comma after "database," insert "the party" before "must file," and delete "other written."

3. List of Commentators

a. Commentators Who Oppose Proposed Rule

Federal Circuit Court Judges

First Circuit

Chief Judge Michael Boudin (03-AP-192) (did not expressly oppose Rule 32.1, but said that almost all of the First Circuit's judges believe that restricting citation to situations in which no published opinion adequately addresses the issue is "a reasonable local limitation")

Second Circuit

Chief Judge John M. Walker, Jr. (03-AP-329) (on behalf of himself and 18 active and senior judges on the Second Circuit)

Third Circuit

Senior Judge Ruggero J. Aldisert (03-AP-293)

Fourth Circuit

Judge M. Blane Michael (03-AP-401)

Fifth Circuit

Senior Judge Thomas M. Reavley (03-AP-170)

Sixth Circuit

Judge Boyce F. Martin, Jr. (03-AP-269)

Seventh Circuit

Judges John L. Coffey, Richard D. Cudahy, Terence Evans, Michael S. Kanne, Daniel A. Manion, Richard A. Posner, Ilana Diamond Rovner, Diane P. Wood, and Ann Claire Williams (03-AP-396) (joint letter)

Eighth Circuit

Senior Judge Myron H. Bright (03-AP-047)

Chief Judge James B. Loken (03-AP-499) (reporting that 7 of 9 active judges and 3 of 4 senior judges expressing a view on Rule 32.1 opposed it)

Ninth Circuit

Senior Judge Arthur L. Alarcón (03-AP-290)

Judge Carlos Tiburcio Bea (03-AP-130)

Senior Judge Robert R. Beezer (03-AP-292)

Judge Marsha S. Berzon (03-AP-134)

Senior Judge Robert Boochever (03-AP-046)

Senior Judge James R. Browning (03-AP-076)

Judge Jay S. Bybee (03-AP-327)

Judge Consuelo M. Callahan (03-AP-318)

Senior Judge William C. Canby, Jr. (03-AP-110)

Senior Judge Jerome Farris (03-AP-156)

Senior Judge Warren J. Ferguson (03-AP-167)

Senior Judge Ferdinand F. Fernandez (03-AP-061)

Judge Raymond C. Fisher (03-AP-366)

Judge William A. Fletcher (03-AP-059)

Senior Judge Alfred T. Goodwin (03-AP-026)

Judge Susan P. Graber (03-AP-400)

Senior Judge Cynthia Holcomb Hall (03-AP-133)

Judge Michael Daly Hawkins (03-AP-291)

Senior Judge Procter Hug, Jr. (03-AP-063)

Judge Alex Kozinski (03-AP-169)

Senior Judge Edward Leavy (03-AP-289)

Judge M. Margaret McKeown (03-AP-350)

Senior Judge Dorothy W. Nelson (03-AP-131)

Senior Judge Thomas G. Nelson (03-AP-067)

Senior Judge John T. Noonan, Jr. (03-AP-052)

Judge Diarmuid F. O'Scannlain (03-AP-285)

Judge Richard A. Paez (03-AP-273)

Judge Stephen Reinhardt (03-AP-402)

Judge Pamela Ann Rymer (03-AP-233)

Judge Barry G. Silverman (03-AP-075)

Senior Judge Otto R. Skopil, Jr. (03-AP-135)

Senior Judge Joseph T. Sneed (03-AP-077)

Judge Richard C. Tallman (03-AP-081)

Judge Sidney R. Thomas (03-AP-398)

Senior Judge David R. Thompson (03-AP-403)

Judge Stephen S. Trott (03-AP-129)

Senior Judge J. Clifford Wallace (03-AP-082)

Judge Kim McLane Wardlaw (03-AP-132)

Tenth Circuit

None

Eleventh Circuit

None

Federal Circuit

Judge Timothy B. Dyk (03-AP-397)

Senior Judge Daniel M. Friedman (03-AP-506)

Chief Judge Haldane Robert Mayer (03-AP-086) (on behalf of all Federal Circuit judges)

Judge Paul R. Michel (03-AP-505)

Senior Judge S. Jay Plager (03-AP-297)

Federal District Court Judges

Northern District of California

Senior Judge William W. Schwarzer (03-AP-065)

District of Hawaii

Chief Judge David Alan Ezra (03-AP-250)

Northern District of Illinois

Judge Robert W. Gettleman (03-AP-054)

Senior Judge Milton I. Shadur (03-AP-066)

Federal Magistrate Judges

District of Arizona

Magistrate Judge Virginia A. Mathis (03-AP-136)

Central District of California

Magistrate Judge Jeffrey W. Johnson (03-AP-399)

Magistrate Judge Joseph Reichmann (Retired) (03-AP-484)

Federal Bankruptcy Judges

Central District of California

Judge Alan M. Ahart (03-AP-351)

Judge Ellen Carroll (03-AP-278)

Judge Geraldine Mund (03-AP-074)

Chief Judge Barry Russell (03-AP-405)

Judge John E. Ryan (03-AP-252)

Judge Maureen A. Tighe (03-AP-294)

Judge Vincent P. Zurzolo (03-AP-174)

Southern District of California

Chief Judge John J. Hargrove (03-AP-281) (on behalf of himself and 3 other judges on his court)

Eastern District of Washington

Judge Patricia C. Williams (03-AP-056)

Other Federal Judges

U.S. Court of International Trade

Chief Judge Jane A. Restani (03-AP-137)

U.S. Tax Court

Judge Mark V. Holmes (03-AP-359)

State Appellate Judges

California

Justice William W. Bedsworth, California Court of Appeal, Fourth Appellate District (03-AP-280) (on behalf of himself and 5 colleagues)

Justice Paul Boland, California Court of Appeal, Second Appellate District (03-AP-295)

Chief Justice Ronald M. George, Supreme Court of California (03-AP-471)

Presiding Justice Laurence D. Kay, California Court of Appeal, First Appellate District (03-AP-404)

Justice Richard C. Neal (retired), California Court of Appeal, Second Appellate District (03-AP-126)

Presiding Justice Robert K. Puglia (retired), California Court of Appeal, Third Appellate District (03-AP-155)

Justice Maria P. Rivera, California Court of Appeal, First Appellate District (03-AP-048)

Justice W.F. Rylaarsdam, California Court of Appeal, Fourth Appellate District (03-AP-193)

Presiding Justice Arthur G. Scotland, California Court of Appeal, Third Appellate District (03-AP-372)

Justice Gary E. Strankman (retired), California Court of Appeal, First Appellate District (03-AP-296)

Wisconsin

Judge Ralph Adam Fine, Wisconsin Court of Appeals (03-AP-068)

State Trial Judges

California

Judge N.A. “Tito” Gonzales, Superior Court, Santa Clara County (03-AP-038)

Law Professors

Dean Scott A. Altman, University of Southern California Law School (03-AP-314)

Prof. Jerry L. Anderson, Drake University Law School (03-AP-078)

Prof. Stuart Banner, UCLA School of Law (03-AP-072)

Prof. Brian Bix, University of Minnesota Law School (03-AP-021)

Prof. Charles E. Cohen, Capital University Law School (03-AP-298)

Prof. Ross E. Davies, George Mason University School of Law (03-AP-392)

Prof. Michele Landis Dauber, Stanford Law School (03-AP-029)

Prof. Ward Farnsworth, Boston University School of Law (03-AP-221) (neither supports nor opposes rule, but raises concerns)

Prof. Victor Fleischer, UCLA School of Law (03-AP-062)

Prof. Thomas Healy, Seton Hall University Law School (03-AP-380)
Prof. Michael S. Knoll, University of Pennsylvania Law School (03-AP-093)

Prof. Mark Lemley, Boalt Hall School of Law (03-AP-153)

Prof. Rory K. Little, Hastings College of the Law (03-AP-334)

Prof. Gregory N. Mandel, Albany Law School (03-AP-274)

Prof. Brett H. McDonnell, University of Minnesota Law School (03-AP-467)

Prof. Richard W. Painter, University of Illinois College of Law (03-AP-091)

Prof. Ethan Stone, University of Iowa College of Law (03-AP-198)

Prof. George M. Strickler, Tulane Law School (03-AP-100)

Prof. Daniel P. Tokaji, Moritz College of Law, Ohio State University (03-AP-045)

Prof. Eugene Volokh, UCLA School of Law (03-AP-158)

Prof. Nhan Vu, Chapman University School of Law (03-AP-477)

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ACLU Foundation of Southern California, Los Angeles, CA (03-AP-235)

Advisory Council of the United States Court of Appeals for the Federal Circuit, Washington, DC (03-AP-410)

Appellate Courts Committee, Los Angeles County Bar Association, Los Angeles, CA (03-AP-201)

Attorney General's Office, State of California, Sacramento, CA (03-AP-395)

Attorney General's Office, State of Washington, Olympia, WA (03-AP-382)

California La Raza Lawyers Association, Los Angeles, CA (03-AP-268)

Committee on Appellate Courts, State Bar of California, San Francisco, CA (03-AP-319)

Committee on Federal Courts, State Bar of California, San Francisco, CA (03-AP-393)

Federal Circuit Bar Association, Washington, DC (03-AP-409)

Hispanic National Bar Association, Washington, DC (03-AP-415)

Litigation Section, Los Angeles County Bar Association, Los Angeles, CA (03-AP-347)

Northern District of California Chapter, Federal Bar Association, San Francisco, CA (03-AP-374)

Orange County Chapter, Federal Bar Association, Irvine, CA (03-AP-429)

b. Commentators Who Favor Proposed Rule

Federal Circuit Court Judges

Judge Frank H. Easterbrook (CA7) (03-AP-367)

Judge David M. Ebel (CA10) (03-AP-010)

Judge Kenneth F. Ripple (CA7) (03-AP-335)

Judge A. Wallace Tashima (CA9) (03-AP-288)

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Prof. Richard B. Cappalli, Temple University, James E. Beasley School of Law (03-AP-435)

Prof. Andrew M. Siegel, University of South Carolina School of Law (03-AP-219)

Prof. Michael B.W. Sinclair, New York Law School (03-AP-283)

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Robert Don Grifford, Esq., Reno, NV (03-AP-213)

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Laurence Neuton, Los Angeles, CA (03-AP-317)

Organizations

Association of the Bar of the City of New York and the Association's Committee on Federal Courts, New York, NY (03-AP-464)

Citizens for Voluntary Trade, Arlington, VA (03-AP-414; 03-AP-456)

Committee on Courts of Appellate Jurisdiction, New York State Bar Association, Albany, NY (03-AP-097)

Committee on U.S. Courts, State Bar of Michigan, Lansing, MI (03-AP-394)

Public Citizen Litigation Group, Washington, DC (03-AP-008)

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c. Requests to Testify

Jessie Allen, Esq., on behalf of Brennan Center for Justice, New York University School of Law, New York, NY (03-AP-035)

Judah Best, Esq., on behalf of Section of Litigation of American Bar Association, Washington, DC (03-AP-069)

William T. Hangley, Esq., and James W. Morris, III, Esq., on behalf of American College of Trial Lawyers, Philadelphia, PA (03-AP-083)

Steven I. Wallach, Esq., Morrison, Cohen, Singer & Weinstein, LLP, New York, NY (03-AP-003)

D. Recommendation

Given the strong public interest in Rule 32.1, this memorandum will likely be read by many who are not members of the Committee, and therefore I should probably start by emphasizing that what follows is merely my recommendation. It does not necessarily represent the views of the Chair or any member of the Committee. As Reporter, I give the Committee my best advice and help the Committee implement its decisions, but those decisions are emphatically the Committee's, and the Committee can and often does disagree with me. (Indeed, in the specific case of Rule 32.1, the Committee has already disagreed with me once, as I will describe below.)

I recommend that Rule 32.1 be removed from the Committee's study agenda — or, failing that, that further action on Rule 32.1 be postponed to give the Federal Judicial Center ("FJC") time to study some of the issues raised by the commentators.

In the seven years that I have served as Reporter to the Committee, I have often been impressed by the unique credibility enjoyed by the Rules Enabling Act ("REA") process. Several factors account for that credibility, but one of the most important, I think, is that the REA process generally works on a consensus or near-consensus basis. For the most part, the advisory committees identify technical problems and propose uncontroversial solutions.

There are exceptions, of course. Judges like to do things the way judges like to do things, so even a proposal about something like word limits on briefs filed in cross-appeals can attract strong arguments. Generally, though, the advisory committees work hard to find common ground and build consensus. As a result, objections to proposed rules are usually neither many nor passionate.

Only rarely do advisory committees take on truly controversial issues and push ahead over the strong opposition of substantial numbers of judges. These rare occasions have at least two things in common. First, the advisory committees are addressing truly serious problems. Second, the advisory committees have a high level of confidence that, despite opposition, the proposals are correct on the merits.

Obviously, rules governing the citation of unpublished opinions are controversial. At our April 2001 meeting, Judge Will Garwood and I argued against proceeding with the Justice

Department's proposal to abolish no-citation rules[2] precisely because we knew from our surveys of the chief judges that the proposal would generate much controversy, that it would likely not be approved by the Judicial Conference, and that even publishing the proposal for comment would use up a great deal of this Committee's time and "capital."

Obviously, a majority of the Committee disagreed with our arguments, but, with respect, I continue to believe that we were right about the strength of the opposition to national rulemaking on the topic of unpublished opinions. I recognize, of course, that most of the opposition to Rule 32.1 came from one circuit, where a campaign against the rule was led by some of that circuit's judges. But even taking that into account, one cannot deny that many outstanding judges and lawyers of various backgrounds, temperaments, and philosophies have thought carefully about Rule 32.1, strongly object to it, and will feel aggrieved if Rule 32.1 is approved over their objections.

Rule 32.1 is therefore one of those rare proposals that is highly controversial. I ask, then, whether the two features I described above are true: Does Rule 32.1 address a truly serious problem? And, if so, does the Committee have a high level of confidence that Rule 32.1 is correct on the merits?

For me, the first question is easier than the second. I agree with those opponents of Rule 32.1 who ask, in essence: "What's the big deal? What's the problem crying out for a solution? Are no-citation rules really inflicting a lot of harm on a lot of people?" I know that there are answers to those questions, having summarized those answers above. But, at the end of the day, I am just not convinced that no-citation rules pose a problem of the same magnitude as discovery abuse, misuse of class actions, or admissibility of expert testimony — problems that have been addressed in the past by controversial rules. My conclusion is bolstered by the fact that no-citation rules already seem to be on their way to extinction; whatever harm they cause, they cause less of it every year.

I find the merits to be a closer call. I started as an agnostic on the question of whether no-citation rules are necessary or wise. The comments persuade me that they are not — and that Rule 32.1 is probably right on the merits. Sometimes one is influenced to support a proposal by the strength of the arguments for it, and other times one is influenced to support a proposal by the weakness of the arguments against it. My support for Rule 32.1 is more a product of the latter than the former.

Some of the arguments against Rule 32.1 strike me as clearly incorrect. For example, the argument that Rule 32.1 exceeds the authority granted by 28 U.S.C. § 2072 has several problems, not the least of which is that the no-citation rules that Rule 32.1 seeks to abolish are

[2]An identical proposal had been removed from the Committee's study agenda in April 1998 after nearly all of the chief judges surveyed by Judge Garwood opposed it.

themselves promulgated under Rule 47(a), which gives each court of appeals authority to "make and amend rules governing its practice." I cannot agree that a court of appeals has power to use its local rules to *bar* citation, but the Supreme Court does not have power to use the Appellate Rules to *permit* citation. If a no-citation rule is a rule of "practice" for purposes of Rule 47(a), then surely Rule 32.1 is a rule of "practice" for purposes of § 2072.

Other arguments against Rule 32.1 are internally inconsistent. To cite one example, opponents argue both (1) that unpublished opinions contain nothing of value and (2) that, if unpublished opinions could be cited, attorneys would have a professional obligation to research them, briefs would be full of citations to them, district courts would feel bound to follow them, and circuit courts would have to distinguish and explain them. To cite another, opponents argue both (1) that unpublished opinions often do not accurately describe the reasoning behind a decision and (2) that it is important that courts be able to continue to issue unpublished opinions because the parties are entitled to know the reasoning behind a decision. Opponents walk fine lines in trying to reconcile these and other tensions within their arguments, but I don't think they always succeed.

Still other arguments against Rule 32.1 suffer from gaps in their reasoning. Commentators often stated — with little or no elaboration — that, if Rule 32.1 was approved, *x* would occur, and then devoted paragraphs to describing how awful *x* would be. What was often missing was a careful explanation of why Rule 32.1 would necessarily lead to *x* in the first place. Take, for example, the following "talking point," which appeared in almost identical form in dozens of letters:

> "If unpublished opinions *could* be cited, lawyers would have no choice but to treat them as a significant source of authority. [*Why?*] As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating. [*Why?*] Even if courts did not regard unpublished dispositions as controlling, lawyers would still be obliged to afford them significant weight in practicing before circuit courts. [*Why?*]" [03-AP-025]

This paragraph basically repeats the same assertion three times. The assertion may very well be true, but repetition does not make it so.

Many of the arguments against Rule 32.1 were exaggerated. For example, I was not impressed with the argument that judges would be obliged to read every unpublished opinion cited in every brief — and, because those opinions are so cryptic, judges would have to call up the records and read the briefs to try to figure out what they really held. I clerked on two federal appellate courts, and I know that judges and their law clerks rarely read every *precedential* source that is cited in a brief, much less every non-precedential authority. A 10-case string cite is a 10-case string cite, and no one reads all 10 cases — whether published or not — unless there is good reason to do so. Judges and their law clerks have always used discretion in doing research, and they would continue to use discretion if Rule 32.1 was approved.

What most struck me about the arguments against Rule 32.1 is that they sometimes made a better normative case *for* Rule 32.1 than the arguments of the rule's supporters. Take, for example, the following argument, made in a letter signed by several judges:

> "[Unpublished orders will be] thrown back in our faces . . . no matter how often we state that unpublished orders though citable (if the proposed rule is adopted) are not precedents. For if a lawyer states in its brief that in our unpublished opinion in *A v. B* we said X and in *C v. D* we said Y and in this case the other side wants us to say Z, we can hardly reply that when we don't publish we say what we please and take no responsibility. We will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel. Citability would upgrade case-specific orders that this circuit has intentionally confined to the law of that particular case to de facto precedents that we must address." [03-AP-396]

Putting aside whether this prediction is sound as an empirical matter, I am struck by the notion that the "moral duty" referred to by the letter is characterized as a duty that does not arise when a court *does* something, but only when what the court does is *pointed out* to it. In other words, the moral duty is not a duty to do or not to do something, but rather a duty to respond after someone calls the court's attention to its own actions. And, we are told, it is imperative to prevent this moral duty from arising by silencing litigants.

This is a rather revealing argument. Indeed, even the use of the term "thrown back in our faces" to describe the citation of an unpublished opinion is telling. It implies that "say[ing] what we please and tak[ing] no responsibility" is *exactly* what courts want to do in unpublished opinions. It also implies that the real objection to Rule 32.1 is not that it would prevent courts from continuing to issue unpublished opinions that are sloppily drafted by clerks and all of that, but that it would make judges *take responsibility* for the way they produce unpublished opinions. And that, it seems to me, is one of the best arguments that can be made for Rule 32.1.

On balance, I obviously was not persuaded by many of the arguments against Rule 32.1. At the same time, I was not entirely convinced that Rule 32.1 should be approved. Here is my major concern:

I do not doubt that the judges on at least some circuits are absolutely overwhelmed. I also agree that, with so little margin for error, this Committee must be extremely careful before approving a rule change that might substantially increase the workload of federal judges. I think it undeniable that Rule 32.1 would change — at least in some circuits and at least to some extent — both the purpose of and the audience for unpublished opinions. It is not unreasonable to fear that, as a result, *something* about the drafting of unpublished opinions might change.

This is, of course, an empirical question — indeed, it is *the* empirical question that is at the heart of the disagreement over Rule 32.1. Although supporters and opponents have normative differences, what underlies their dispute is an enormous gulf between their perceptions about what would happen if Rule 32.1 was approved. How would the lives of judges and attorneys change? Supporters answer "not much and for the better." Opponents answer "a great deal and for the worse."

At this point, I just don't think the Committee has the information it needs to confidently assess who is right. It is possible, though, that the Committee could collect that information with the help of the FJC. As noted by Rule 32.1's supporters, many federal and state appellate courts have abolished or liberalized no-citation rules in recent years. These jurisdictions can provide evidence about the effect of those actions on judges and attorneys.

It is also true, as noted by Rule 32.1's opponents, that the data will have to be analyzed with care, and that apple-to-apple comparisons will be difficult. Rule 32.1 would combine with the E-Government Act to create a system in which (1) all unpublished opinions would be available online and (2) the circuits would not be able to discourage or restrict the citation of those opinions in any way. No federal circuit has had any experience with such a system — either because the circuit discourages or restricts citation or because the circuit's unpublished opinions have only recently been made available to Westlaw and Lexis (or, in the case of the Eleventh Circuit, are still not made available).

Despite these problems, data collected by a well-designed study could be quite helpful. But it may not be worth doing that study, as no amount of data is likely to sway the most ardent supporters and opponents of Rule 32.1. Instead, they will (with some justification) cite the differences between Rule 32.1 and current circuit practices and argue that, because of these differences, data contrary to their positions prove nothing.

In short, I recommend that the Committee remove Rule 32.1 from its study agenda or, if the Committee thinks it would be worthwhile, postpone further action on Rule 32.1 to give the FJC time to study the empirical claims made by supporters and opponents of the rule.

Two additional points:

1. I obviously do not favor approving Rule 32.1 at this time, but, in the interest of completeness, here is what I consider to be the best argument for going forward with the rule:

Let us suppose that the worst-case scenario predicted by Rule 32.1's opponents comes true. Let us suppose that Rule 32.1 is approved and, as a result, judges change their practices. Judges devote more time to writing some unpublished opinions, so that they cannot be misused or misunderstood — and, as to the others (the vast majority), judges write no opinion at all but instead substitute one-line dispositions.

Is this worst-case scenario really so bad? Is it clear that this system is not preferable to the current system? Consider two of the arguments made frequently by opponents of Rule 32.1:

First, many of Rule 32.1's opponents stress the poor quality of unpublished opinions. They tell us that the opinions are drafted hurriedly by law clerks — often by cutting-and-pasting bench memos. They tell us that judges spend little time reviewing the language of the opinions, being concerned only about the result. They tell us that the opinions may not accurately reflect the views of even a single judge. They tell us that the opinions do not adequately describe the

facts and are not precise in the way that they describe the law. In a word, the quality of the opinions is lousy.

Second, many of Rule 32.1's opponents complain that the world is already awash in too much law. There are too many decisions to read. It is too expensive to do legal research. There are too many ambiguities and conflicts in the law because too many courts have said the same things too many times — inevitably in slightly different ways. Unpublished opinions already contribute to this problem, because, even in jurisdictions in which they cannot be cited, they are regularly read. (Does anyone think that the attorneys in *Rivera-Sanchez* did not read any of the Ninth Circuit's 20 previous directly-on-point decisions because those decisions were unpublished?)

If one accepts these two arguments, then wouldn't the ideal solution be to get rid of unpublished opinions altogether? Would it not be *good* if Rule 32.1 resulted in judges issuing (1) full, published, citable, precedential decisions in cases that warrant them and (2) one-line (or perhaps one-paragraph) orders in cases that do not? Would not a world of fewer and better opinions be preferable for everyone? One leading opponent of Rule 32.1 analogized unpublished opinions to "sausage [that is] not safe for human consumption." [03-AP-169] Isn't the best way to deal with such "sausage" to *stop making it*?

The more I think about the comments on Rule 32.1, the more I am struck by how strange the current system is. Unpublished opinions are the crazy uncle in the attic of the federal judiciary, and no-citation rules are the whispered instructions to party guests not to hurt the hosts' feelings by mentioning that uncle. One commentator — a former Ninth Circuit clerk and opponent of Rule 32.1 — described the current system well:

> "No one knows what to do with unpublished circuit decisions. Even in circuits that allow citation, such as the Tenth Circuit, they represent a limbo of pseudo-precedent that is not binding but yet has more effect than merely legal advocacy. The respect they are given varies from near zero to that given binding precedent; they may be treated like a law review article, a Federal Supplement decision from another circuit, or a published opinion of the authoring court itself. Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid." [03-AP-432]

Right now, federal courts handle the problem of this "limbo of pseudo-precedent" by *ignoring* it — by averting their gaze. If Rule 32.1 makes it impossible for judges to avert their gaze — and, as a result, judges stop issuing lousy unpublished opinions in favor of either good published opinions or one-line orders — I personally would regard that as an improvement over the current system.

I recognize, of course, that many will object that one-line dispositions deprive the parties of an explanation of the outcome of their appeals, leaving them feeling cheated and eroding their confidence in the judicial system. No doubt there is something to this, but bear in mind the following: First, the judicial system already issues millions of one-word decisions, from a trial

judge's "sustained" in response to an objection at trial to the Supreme Court's "denied" in response to a petition for a writ of certiorari. People may not like it, but they seem to live with it. Second, providing reasons for every appellate decision may no longer be possible, given that the resources of the courts are not keeping pace with rising caseloads. Congress cannot give courts fewer resources to handle more cases and expect nothing to change. Finally, given what we've been told about unpublished opinions, I wonder whether they are preferable to one-line dispositions. Is an inaccurate explanation really better than no explanation at all?

2. Regarding the drafting of Rule 32.1: Although we struggled with the wording — and although none of us was entirely satisfied with the drafting — we received little feedback regarding drafting from either the commentators or the Style Subcommittee. The major complaint was Prof. Barnett's. He believes that the rule should be stated affirmatively ("unpublished opinions may be cited"), not negatively ("restrictions may not be placed on the citation of unpublished opinions"). He does not share the Committee's concern that judges who oppose Rule 32.1 will try to undermine it by imposing restrictions on the citation of unpublished opinions, such as warnings that such citation is disfavored or instructions that such citation is not allowed unless no published decision is on point. In any event, Prof. Barnett believes that circuits *should* be free to impose such restrictions.

I have a great deal of respect for Prof. Barnett, but I do not agree with him on either point. First, even reading a small sample of the comments opposing Rule 32.1 makes clear the depth of feeling against citing unpublished opinions. I was struck in particular by one judge's not-too-subtle threat that, if Rule 32.1 is adopted, his circuit will simply ignore it by using the authority given to courts in Rule 2 to "suspend any provision of these rules in a particular case." [03-AP-289] Second, this Committee and the Standing Committee should not expend a great deal of their "capital" in a major political struggle in order to change the rules of 4 of the 13 circuits from altogether banning the citation of unpublished opinions to banning it unless there is no published decision on point. That hardly seems worth the candle. If the Committee is going to press forward, it should press forward with a version of Rule 32.1 that would make a real difference — one that does not permit any restrictions on the citation of unpublished opinions.

VI. Rule 35(a)

A. Introduction

Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits follow two different approaches when one or more active judges are disqualified. Seven circuits follow the "absolute majority" approach (disqualified judges count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc), while six follow the "case majority" approach (disqualified judges do not count in the base). Two circuits — the First and the Third — explicitly qualify the case majority approach by providing that a majority of all judges — disqualified or not — must be eligible to participate in the case; it is not clear whether the other four case majority circuits agree with this qualification.

The Committee proposed amending Rule 35(a) to adopt the case majority approach.

B. Text of Rule and Committee Note

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8-9 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the

disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) "strongly" supports the proposed amendment.

Chief Judge Michael Boudin of the First Circuit (03-AP-009; 03-AP-192) reports that his court has abandoned the absolute majority approach in favor of the qualified case majority approach. He also reports that the First Circuit supports the proposed amendment to Rule 35(a), with one important proviso. Judge Boudin draws the attention of the Committee to 28 U.S.C. § 46(d), which provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." In Judge Boudin's view, this provision *requires* the "qualification" in the "qualified case majority rule" — that is, the qualification that a case cannot be heard or reheard en banc unless a majority of *all* judges in regular active service are eligible to participate. Judge Boudin believes that the omission of an explicit quorum requirement in the proposed amendment to Rule 35(a) "is not a problem so long as the committee notes . . . make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or — if I have misread that section — any quorum requirement that a court of appeals might reasonably adopt."

Judge J. Harvie Wilkinson III of the Fourth Circuit (03-AP-012) opposes the proposed amendment. He is "not certain why a difference in circuit practice needs to be replaced by a uniform command," especially as "[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct." He is also concerned that, under the proposed amendment, "the en banc court could be convened by less than a majority of the active judges, and that a disposition could issue from a majority of the reduced court" — something that he believes would "undermine the purpose of an institutional voice for which the en banc court was designed." Finally, he is also concerned that the proposed amendment would result in an increase in the number of en banc proceedings, consuming much-needed resources and possibly aggravating internal tensions within courts.

Chief Judge William W. Wilkins of the Fourth Circuit (03-AP-013) opposes the proposed amendment for the reasons given by Judge Wilkinson.

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendment: "The Advisory Committee's proposal for a single, national approach is sound. It represents a reasonable interpretation of the governing statute, 28 U.S.C. § 46(c). By analogy to the '*Chevron* doctrine,' the Advisory Committee's interpretation of the range of permissible options deserves deference."

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on the Federal Circuit — which currently follows the absolute majority rule — unanimously oppose the proposed amendment. The courts of appeals should be left to interpret Rule 35(a) inconsistently. If uniformity is to be imposed, it should be the absolute majority approach followed by a majority of the circuits, not the case majority approach followed by a minority. The case majority approach is deficient in permitting a small number of judges to issue opinions on behalf of the en banc court; for example, on a 12-member court with 5 members disqualified, 4 judges could issue en banc opinion binding all 12 judges on the court, even if 8 of the 12 judges do not agree with it. En banc review is reserved for cases of exceptional important (or cases involving a conflict of authority), and such cases should be decided only by an absolute majority of judges. Finally, although national uniformity may be important with respect to rules that govern the conduct of the parties, it is not as important when it comes to the internal procedures of each court.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment, as it is "sensible" to "standardize" en banc procedures and to "exclude from the count those judges who are disqualified."

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) "fully supports" the proposed amendment. Practice on this issue should not vary from circuit to circuit. Moreover, the absolute majority approach is objectionable because, under it, "the disqualification of a judge is essentially deemed as a vote against granting an en banc hearing," which is "contrary to the purpose of a judge recusing him/herself."

Chief Judge Douglas H. Ginsburg of the D.C. Circuit (03-AP-368) reports that a majority of the active judges of the D.C. Circuit oppose the proposed amendment for the reasons described by Judge Mayer.

Prof. Arthur D. Hellman of the University of Pittsburgh School of Law (03-AP-369) strongly supports the proposed amendment, largely for the reasons given by Judge Edward Carnes in his *Gulf Power Co.* opinion. Prof. Hellman writes mainly to respond to the arguments of Judge Mayer:

Judge Mayer objects that the case majority rule permits a minority of judges to control the law of the circuit. What Judge Mayer fails to acknowledge is that the absolute majority approach does exactly the same thing — and makes such a phenomenon both more likely and more pernicious. Under the absolute majority approach, a three-judge panel — perhaps a panel with one senior judge and one visiting judge in the majority, and one active judge in dissent — can decide a case in a manner that is acceptable to *no* active judge. If 6 of the circuit's 12 judges are disqualified, there is nothing that the circuit can do to correct the error.

If the panel's error is one of creating law, then the circuit may be able to take another case presenting the same issue en banc in a few years — that is, if a majority of nondisqualified judges can be mustered. (The stock holdings of the judges and a lack of turnover on the court might mean that it will be many years before a majority of nonrecused judges will be available.) In the meantime, the lower courts of the circuit are stuck applying bad law, and the citizens of the circuit are stuck conforming their behavior to bad law.

Importantly, though, the en banc court will *never* get a chance to correct the injustice inflicted on the parties in the particular case. "[T]he absolute majority rule disables the only *relevant* majority from working its will at the only time when it matters." One function of the appellate courts is to declare and clarify law, but the more important function is to do justice in individual cases.

Judge Mayer's further argument that this issue merely relates to "the internal procedures of each court" ignores one crucial point: "By definition, a judge who is recused from participation in a case should have no influence over that case's outcome. Yet under the absolute majority rule, nonparticipation is equivalent to a 'no' vote." In other words, use of the absolute majority rule is not just a matter of how paper is pushed inside a circuit; it directly affects the rights of the parties. "Recused judges . . . have a direct influence over the outcome of the case," which violates the very notion of recusal.

Prof. Hellman points out that these concerns led to inclusion in the Judicial Improvements Act of 2002 of a provision that would have amended 28 U.S.C. § 46(c) to more clearly impose the case majority rule. That provision was dropped from the bill (which eventually became law) because Congress was informed that the Committee was actively addressing the issue. Prof. Hellman hints that if the proposed amendment to Rule 35(a) is not enacted, Congress may very well impose the case majority rule itself.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment, largely for the reasons described in the Advisory Committee Note. The Committee believes that fundamental fairness requires that parties be treated alike under the same statute and rule, no matter the circuit in which the parties are litigating. The Committee also believes that recusal of a judge should not result in the equivalent of a vote against rehearing. Finally, the Committee criticizes the absolute majority approach because it can leave the en banc court helpless to overturn a panel decision with which all or almost all of the active judges disagree.

Citizens for Voluntary Trade (03-AP-414) supports the proposed amendment. The argument of the Federal Circuit that each circuit should be free to choose its own approach has already been rejected by Congress (which enacted a national statute) and the Supreme Court (which promulgated a national rule). The specter of a minority of active judges issuing an en banc opinion for the court — which can occur under the case majority approach — is not terribly troubling, given that several circuits have already adopted the case majority approach and given that *every* en banc opinion of the Ninth Circuit is issued by a minority of active judges (sometimes by less than a quarter of the active judges). More importantly, counting recused judges in the base violates general principles of parliamentary law and unfairly prejudices the litigant seeking rehearing, because it counts each recused judge as the equivalent of a vote against rehearing.

Chief Judge James B. Loken of the Eighth Circuit (03-AP-499) reports that "[t]en of the eleven Eighth Circuit judges who responded on this question, including all eight active judges, join the Federal Circuit in opposing the adoption of proposed Rule 35(a)." Those judges opposed Rule 35(a) because they did not believe that a national rule is "necessary []or appropriate." In addition, some judges opposed Rule 35(a) because the case majority rule makes en banc rehearings more likely — and such rehearings "require a large investment of our widely-dispersed judicial resources, a geographical factor that is doubtless not uniform among the circuits."

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Recommendation

I recommend that the proposal be approved as published, except that I recommend that the Committee Note be revised in certain respects (explained below).

None of the commentators who argues that each circuit should be free to do as it wishes comes to grips with the fact that Congress (in enacting § 46(c)) and the Supreme Court (in approving Rule 35(a)) have already decided differently. It is highly unlikely that either Congress or the Court intended that "majority" mean one thing in half of the circuits and another thing in the other half. A national standard already *exists*; circuits just conflict in their interpretations of what that standard means.

Judge Wilkinson is correct, of course, that "[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct." [03-AP-012] (Judge Mayer made a similar point.) But that is not the same as saying that the rule relates only to the internal operating procedures of the court. In some circuits, recusals act as votes against a party's request for rehearing en banc; in others, recusals do not. The rights of the parties are directly affected.

On the merits of the rule, I have been persuaded that the case majority rule is superior to the absolute majority rule. The case majority rule seems to me, first, to represent a more plausible interpretation of § 46(c) (for reasons that I describe in the revised Committee Note

below), and, second, to be a better policy choice (for the reasons described by Prof. Hellman). As we have discussed several times, both rules leave open the possibility of a "worst-case scenario": The absolute majority rule makes it possible for a *panel* to determine the law of the circuit over the objection of most (or even all) of the circuit's active judges; the case majority rule makes it possible for an *en banc court* composed of substantially fewer than all of the circuit's active judges to determine the law of the circuit.

On balance, it seems to me that the worst-case scenario that arises under the absolute majority rule is "worse" — considering both the likelihood that it will occur and what will happen when it does occur — than the worst-case scenario that arises under the case majority rule. Morever, the absolute majority rule, unlike the case majority rule, counts every recusal as a vote against rehearing — which, as several commentators pointed out, defeats the purpose of recusals. Finally, circuits can protect themselves to some degree from the case majority rule's worst-case scenario by following the lead of the First and Third Circuits and insisting that a case cannot be heard en banc unless a majority of all active judges are eligible to participate.

While I recommend approval of the amendment to Rule 35(a), I also recommend that the Committee Note be revised in three respects:

1. I recommend that the Committee Note put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). One of the strongest arguments in favor of the amendment is that the existence of § 46(c) means that there should be a consistent national practice. In addition, Standing Committee members have argued that, in deciding what approach to adopt, this Committee should choose the approach that represents the best interpretation of § 46(c), whether or not that approach is the one that the Committee would choose as an original matter.

2. I recommend that the Committee accommodate Judge Boudin's request. Judge Boudin's reading of § 46(d) is at least plausible (although it is not the only plausible reading). More importantly, Judge Boudin is not asking that either the text of the amendment or the Committee Note *endorse* his reading; rather, he is asking merely that a line or two be added to the Committee Note to make clear that the amendment is not meant to *foreclose* it.

From the beginning, this Committee has regarded the Third Circuit's approach as the best policy choice; its only concern has been reconciling that approach with the language of § 46(c). If the text of the amendment remains unchanged, and if the Committee Note points circuits to the quorum requirement of § 46(d), then it seems likely that most or all circuits will end up with the Third Circuit approach. If a split over the meaning of § 46(d) later develops, the Committee can revisit Rule 35(a) at that time. But there is no reason for the Committee to be more specific about the meaning of § 46(d) now. The statute has almost never been interpreted, most likely because it is difficult to find any example of a "case majority" circuit taking a case en banc when only a minority of its active judges were eligible to participate.

3. In his comment, Prof. Hellman — who is the leading expert on § 46(c) and Rule 35(a) — has made a couple of points that had not occurred to me and that I think strengthen the case

for the case majority approach. I have added a few words to the Committee Note to incorporate those points.

ALTERNATIVE DRAFT

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, seven of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to vote.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard by a court en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of the number of circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.