

## RESPONSE

### THE CITATION OF UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS

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The Advisory Committee on the Federal Rules of Appellate Procedure (“Advisory Committee”) has proposed adding a new Rule 32.1 to the Federal Rules of Appellate Procedure (“FRAP” or “Appellate Rules”). The new rule<sup>1</sup> would authorize litigants in the federal courts of appeals to cite in their briefs and other papers the unpublished opinions of those courts. This seemingly modest proposal—in essence, a proposal that someone appearing before a federal court may remind the court of its own words—is extraordinarily controversial. Over 500 public comments have been submitted by supporters and opponents of Rule 32.1.<sup>2</sup>

Only once before in the history of federal rulemaking has a proposal attracted more comments. In 1993, the Advisory Committee on the Federal

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1. Proposed Rule 32.1 has been revised several times, as has the accompanying Committee Note. The version of the rule and Committee Note that was published for comment in August 2003 appears in an appendix to this Article. I will refer to that version in this Article, as it is the version to which all of the public comments were directed. The current version of the rule, which differs in only minor respects from the published version, is as follows:

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

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

Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 2 (May 6, 2005), *available at* <http://www.uscourts.gov/rules/Reports/AP5-2005.pdf> [hereinafter May 2005 Report].

2. The comments are available on CD-ROM from the Administrative Office of the U.S. Courts and online from the “Secret Justice” website at [http://www.secretjustice.org/public\\_comments\\_re\\_frap\\_32\\_1.htm](http://www.secretjustice.org/public_comments_re_frap_32_1.htm) (last visited Aug. 22, 2005).

Rules of Civil Procedure proposed to amend Civil Rule 30. The existing rule required that depositions be recorded stenographically (i.e., by a court reporter) unless all of the parties agreed on another method of recording. The proposed amendment authorized the party taking the deposition to select the method of recording. The nation's court reporters—fearing that the amendment would lead to less stenography and therefore less income for court reporters—submitted hundreds of comments opposing the amendment.<sup>3</sup> The amendment was nevertheless approved.

Although it has attracted fewer comments, proposed Rule 32.1 is even more controversial. Most of the comments on Civil Rule 30 were preprinted postcards sent in by one group (court reporters) motivated by one concern (lost income). By contrast, the comments on Rule 32.1 have been individually drafted (albeit sometimes cribbed from “talking points” distributed by opponents of the rule<sup>4</sup>) and submitted by a broad range of commentators who have expressed a broad range of concerns. Most comments have been at least a page or two in length; some have been much longer, and some have included lengthy attachments. Comments have been submitted on behalf of most of the federal appellate bench; many other judges (federal and state; appellate and trial; active, senior, and retired); scores of attorneys from all segments of the profession; two dozen law professors; several prominent bar organizations and public-interest groups; and a number of ordinary citizens. Proposed Rule 32.1 is, without question, one of the most controversial proposals in the history of federal rulemaking.<sup>5</sup>

The purpose of this Article is fourfold. First, I will briefly describe the events that led to the publication for comment of Rule 32.1.<sup>6</sup> Second, I will summarize the arguments that commentators have made for and against Rule 32.1.<sup>7</sup> Third, I will describe the findings of two new studies—one by the Federal Judicial Center (“FJC”)<sup>8</sup> and the other by the Administrative

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3. My information about the number and nature of these comments comes from conversations with two long-time employees of the Administrative Office of the U.S. Courts: Peter G. McCabe, Assistant Director, Office of Judges Programs, and John K. Rabiej, Chief, Rules Committee Support Office.

4. Those “talking points” have been attached to or incorporated in many of the comments. See, e.g., Letter from Eric C. Liebeler, Kirkland & Ellis LLP, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Dec. 2, 2003), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-025.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-025.pdf) [hereinafter Liebeler Letter] (Comment 03-AP-025) (attaching three pages of talking points entitled “Why Proposed Rule 32.1 Is A Bad Idea”).

5. I tried to explain why people feel so passionately about this seemingly unimportant issue in Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 Wash. & Lee L. Rev. (forthcoming 2005).

6. See *infra* Part I.

7. See *infra* Part II.

8. See Tim Reagan et al., Fed. Judicial Ctr., Citations to Unpublished Opinions in the Federal Courts of Appeals (2005). The Federal Judicial Center (“FJC”) is the major research and training arm of the federal judiciary. Among its purposes are “to conduct research and study of the operation of the courts of the United States,” 28 U.S.C. § 620(b)(1) (2000), and “to develop and present for consideration by the Judicial Conference of the

Office of the U.S. Courts (“AO”)<sup>9</sup>—that explore whether any of these arguments are supported or refuted by empirical evidence.<sup>10</sup> Finally, I will share some reflections about Rule 32.1,<sup>11</sup> which is still wending its way through the Rules Enabling Act (“REA”) process.<sup>12</sup>

Before I begin, I should make clear that I am not a disinterested party. I have served as Reporter to the Advisory Committee since 1997, and, in that capacity, I have been responsible for drafting Rule 32.1 and the accompanying Committee Note, reading and summarizing all of the comments on Rule 32.1, and giving advice to the Advisory Committee about how to proceed with Rule 32.1. I have spent hundreds of hours working on Rule 32.1 for the Advisory Committee, and much of this Article is derived from that work.<sup>13</sup> I emphasize that the views expressed in this

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United States recommendations for improvement of the administration and management of the courts of the United States,” *id.* § 620(b)(2). The Judicial Conference is the policy-making arm of the federal judiciary. It is headed by the Chief Justice of the United States and consists of twenty-seven members: the Chief Justice, the chief judges of the thirteen courts of appeals, the chief judge of the Court of International Trade, and a district judge from each of the twelve geographic circuits. *See* 28 U.S.C. § 331. The Conference typically meets twice each year about a wide range of matters, including proposed amendments to the federal rules of practice and procedure. *See id.*

9. *See* Memorandum from John K. Rabiej, Chief, Rules Comm. Support Office, Admin. Office of the U.S. Courts, to Advisory Comm. on Appellate Rules (Feb. 24, 2005) [hereinafter Rabiej Memorandum] (on file with author). The Administrative Office of the U.S. Courts (“AO”) is the administrative arm of the federal judiciary, responsible for assisting the federal courts by providing administrative support, program management, and policy development. The AO is also charged with implementing the policies of the Judicial Conference and supporting the committees that work on behalf of the Conference, including the five advisory committees and the Committee on Rules of Practice and Procedure. *See* Administrative Office of the U.S. Courts, <http://www.uscourts.gov/adminoff.html> (last visited Aug. 22, 2005). The Committee on Rules of Practice and Procedure—commonly known as the “Standing Committee”—is charged with reviewing the recommendations of the advisory committees and recommending changes in the rules of practice and procedure to the Judicial Conference. 28 U.S.C. § 2073(b).

10. *See infra* Part III.

11. *See infra* Part IV.

12. The Rules Enabling Act, 28 U.S.C. § 2072, established the basic procedural framework for amending the rules of practice and procedure (including the Federal Rules of Appellate Procedure (“FRAP” or “Appellate Rules”). Today, the process typically includes eight steps: (1) the Advisory Committee recommends the proposed amendment for publication; (2) the Standing Committee approves the proposed amendment for publication; (3) the proposed amendment is published and public comment is received; (4) the Advisory Committee, after reviewing the public comment, approves the proposed amendment; (5) the Standing Committee approves the proposed amendment; (6) the Judicial Conference approves the proposed amendment at its fall meeting; (7) the U.S. Supreme Court approves the proposed amendment by the following May 1; (8) the proposed amendment takes effect on December 1, unless Congress passes legislation blocking it. *See* 28 U.S.C. §§ 2071-2077; Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, *The Rulemaking Process: A Summary for the Bench and Bar* (2004), available at <http://www.uscourts.gov/rules/proceduresum.htm>.

13. This Article is adopted in part from two memoranda that I drafted. The first was a memorandum from me to members of the Advisory Committee. *See* Memorandum from Patrick J. Schiltz, Reporter, Advisory Comm. on Appellate Rules, to Advisory Comm. on Appellate Rules (Mar. 18, 2004) (on file with author). (My memorandum was later converted into a May 2004 report from the Advisory Committee to the Standing Committee.

Article are mine alone and not necessarily those of the Advisory Committee or any of its present or former members.

### I. THE BACKGROUND

Last year, the federal courts of appeals disposed of 56,381 cases.<sup>14</sup> Over half of those were either “procedural” terminations (26,835) or terminations brought about through “Consolidations & Cross Appeals” (2108).<sup>15</sup> The remainder (27,438) were terminations “on the merits”—that is, cases in which the parties submitted briefs and the court rendered a decision after considering the facts and the law.<sup>16</sup>

In general, dispositions on the merits can be grouped into three categories. In the first category are dispositions that are accompanied by a “published” opinion—that is, an opinion that is published in West’s *Federal Reporter* and that is universally recognized as creating binding precedent.<sup>17</sup> Less than nineteen percent of the cases disposed of on the merits last year resulted in published opinions.<sup>18</sup> In the second category are dispositions that are accompanied by an “unpublished” opinion—that is, an opinion that is not published in the *Federal Reporter* and that, in almost all circuits, is not considered to create binding precedent.<sup>19</sup> Last year, over eighty-one percent of the merits dispositions resulted in unpublished opinions.<sup>20</sup> In the third category are dispositions that are not accompanied by any opinion—published or unpublished. These dispositions are often referred to as

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*See* Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 14, 2004), available at <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> [hereinafter May 2004 Report]. The second was a May 2005 report from the Advisory Committee to the Standing Committee. *See* May 2005 Report, *supra* note 1.

14. *See* Admin. Office of the U.S. Courts, Fed. Court Mgmt. Statistics 2004, Courts of Appeals, <http://www.uscourts.gov/cgi-bin/cmsa2004.pl> (follow “National Totals” hyperlink). This figure does not include the work of the Federal Circuit, which categorizes workload data differently than the other twelve circuits.

15. *Id.* “Procedural” terminations are appeals that were dropped after the case was settled or the appellant decided not to proceed.

16. *Id.*

17. Scholars disagree about what it means to treat a decision of a court as “precedent” or “binding precedent.” When I use those terms, I am resorting to what Polly J. Price described as the “traditional” definition of precedent—“that the holding of a case . . . must either be followed, distinguished, or overruled.” Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81, 86 (2000). I use the traditional definition not because I wish to endorse it—I do not know enough to have a position—but because commentators who refer to “precedent” or “binding precedent” in the debate over Rule 32.1 almost invariably have in mind the traditional definition.

18. *See* Leonidas Ralph Mecham, Admin. Office of the U.S. Courts, Judicial Business of United States Courts Supplemental Table, 2004 Annual Report of the Director 39 tbl.S-3 (2004), available at <http://www.uscourts.gov/judbus2004/tables/s3.pdf> [hereinafter Judicial Business]. Those published opinions include 4782 that were “signed” (i.e., attributed to a specific author) and 366 that were “unsigned” (i.e., issued per curiam).

19. “Unpublished opinion” is, of course, a misnomer, given that many unpublished opinions are published (in West’s *Federal Appendix* and elsewhere). But it is has become a term of art within the legal profession.

20. *See* Judicial Business, *supra* note 18, at 39 tbl.S-3.

“judgment orders” or “summary dispositions.” They are one-line orders that simply affirm (or, rarely, reverse) the decision below without providing any explanation for the court’s action. Only about three percent of last year’s merits dispositions resulted in judgment orders.<sup>21</sup>

Proposed Rule 32.1 addresses only one category of dispositions: unpublished opinions. And Rule 32.1 addresses only one question about unpublished opinions: Can they be cited? Rule 32.1 does not address any other question, including the question whether Article III of the U.S. Constitution requires a federal court to treat all of its opinions (published or not) as precedent. (This issue is often referred to as “the *Anastasoff* issue,” after a decision of the U.S. Court of Appeals for the Eighth Circuit<sup>22</sup>—later vacated—holding that a federal court is indeed required to treat all of its prior decisions as precedent.) In the words of the Committee Note to Rule 32.1,

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an “unpublished” opinion as binding precedent is constitutional. 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.<sup>23</sup>

In short, Rule 32.1 addresses only the simple question whether a litigant who submits a paper to, say, the Second Circuit may cite in that paper an unpublished opinion of the Second Circuit (or any other federal court).<sup>24</sup>

This question is not addressed—one way or another—in FRAP. Instead, it is addressed by the local rules of the thirteen circuits. The circuits take

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21. *See id.*

22. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

23. *See* Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 33-34 (2003) [hereinafter Preliminary Draft] (citation omitted).

24. No court prohibits all citation of unpublished opinions. Rather, every circuit allows an unpublished opinion issued in a related case to be cited—for example, to support an assertion of issue preclusion or double jeopardy. Where circuits differ is in the degree to which they permit an unpublished opinion issued in an unrelated case to be cited. Typically, a party seeks to cite such an opinion for the same reason that the party might cite the opinion of a district court or a foreign court: not because the opinion binds the court of appeals, but because the party hopes that the court of appeals will be persuaded by the opinion’s reasoning or result. When I refer in this Article to the “citation of unpublished opinions,” I am referring only to this latter type of citation—the type of citation that is the focus of the controversy over Rule 32.1.

three approaches. Four “restrictive”<sup>25</sup> circuits—the Second, Seventh, Ninth, and Federal—altogether ban the citation of unpublished opinions.<sup>26</sup> Six “discouraging” circuits—the First, Fourth, Sixth, Eighth, Tenth, and Eleventh<sup>27</sup>—discourage parties from citing unpublished opinions but permit it in some circumstances (typically, when no published opinion adequately addresses the same issue as the unpublished opinion). Three “permissive” circuits—the Third, Fifth, and D.C.—freely permit such citation.<sup>28</sup>

Like nature, appellate lawyers abhor a vacuum—at least when the vacuum is in FRAP and the vacuum is filled with conflicting and sometimes confusing local rules. The appellate bar also abhors any rule that functions as a gag order, dictating to lawyers what they may and may not argue on behalf of their clients. As a result, appellate lawyers (and others) have for years been urging the Advisory Committee to propose national rules that would force the circuits to permit the citation of unpublished opinions. I have elsewhere detailed these efforts and the tortured history of the Advisory Committee’s consideration of the unpublished-opinions issue.<sup>29</sup> A very brief recap will suffice for purposes of this Article.

The issue was first added to the Advisory Committee’s study agenda in 1991 at the behest of the Federal Courts Study Committee,<sup>30</sup> which expressed concern about the “many problems” created by “non-publication policies and non-citation rules,”<sup>31</sup> and at the behest of the Local Rules Project,<sup>32</sup> which recommended that unpublished opinions should be governed by consistent national standards rather than by inconsistent local

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25. The categorization and terminology are taken from the FJC’s report. *See* Reagan et al., *supra* note 8, at 1.

26. *See* 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv), 53(e); 9th Cir. R. 36-3(b); Fed. Cir. R. 47.6(b).

27. *See* 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(i); 10th Cir. R. 36.3(B); 11th Cir. R. 36-2.

28. *See* 3d Cir. Internal Operating P. 5.7; 5th Cir. R. 47.5.4; D.C. Cir. R. 28(c)(1). The Fifth Circuit’s rule applies only to unpublished opinions issued on or after January 1, 1996, and the D.C. Circuit’s rule applies only to unpublished opinions issued on or after January 1, 2002.

29. *See* Schiltz, *supra* note 5.

30. The Federal Courts Study Committee was created by Congress in 1988 and charged with studying the American judicial system and making recommendations for improvement. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified in scattered sections of 28 U.S.C. (2000)).

31. *See* Fed. Courts Study Comm., Report of the Federal Courts Study Committee 130 (1990).

32. The Project was authorized by the Judicial Conference and operated under the auspices of the Standing Committee. *See* Report of the Proceedings of the Judicial Conference of the United States: September 19-20, 1984, at 67 (1984). The Project was a massive, multi-year undertaking, involving a close review of the 5000-plus local rules in effect in the federal courts at the time. *See* Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Report of the Local Rules Project (1988).

rules.<sup>33</sup> The issue languished on the agenda of the Advisory Committee until 1998, when the Advisory Committee voted not to pursue it after a survey of the chief judges of the circuits revealed almost unanimous—and, on the whole, quite passionate—opposition to rulemaking on the topic of unpublished opinions.<sup>34</sup>

After about a thirty-month hiatus, the issue was put back on the Advisory Committee's agenda by the Solicitor General of the United States,<sup>35</sup> who serves as a member of the Advisory Committee. Although Judge Will Garwood (then the chair of the Advisory Committee) and I both argued that the Advisory Committee should not proceed in light of the strong views that the chief judges had expressed less than three years earlier,<sup>36</sup> we were in the minority. The Advisory Committee decided to press ahead. The Advisory Committee's efforts eventually culminated in the publication of proposed Rule 32.1.

Rule 32.1 was published for comment—along with several other proposed amendments to FRAP—in August 2003.<sup>37</sup> By February 2004, when the comment period closed, the Advisory Committee had received 513 written comments about the proposed rules.<sup>38</sup> Almost all of those comments addressed Rule 32.1; only nine comments did not mention Rule 32.1 at all.<sup>39</sup> Interestingly, about seventy-five percent of all comments (pro and con) regarding Rule 32.1—and about eighty percent of the comments opposing Rule 32.1—came from a single circuit (the Ninth).<sup>40</sup>

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33. See Memorandum from Daniel R. Coquillette, Reporter, Comm. on Rules of Practice & Procedure, and Mary P. Squiers, Director, Local Rules Project, to Comm. on Rules of Practice & Procedure 68 (Jan. 14, 1991) (on file with author).

34. See Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules 26-30 (Apr. 16, 1998) [hereinafter Spring 1998 Minutes]. The minutes of all of the recent meetings of the Advisory Committee (and of the Standing Committee and the other advisory committees) are available on the website maintained by the AO. See Admin. Office of the U.S. Courts, Federal Rulemaking, Minutes of Committee Meetings, <http://www.uscourts.gov/rules/minutes.htm> (last visited Aug. 22, 2005).

35. See Letter from Seth P. Waxman, Solicitor General, to Will Garwood, Chair, Advisory Comm. on Appellate Rules (Jan. 16, 2001) (on file with author).

36. See Minutes of Spring 2001 Meeting of the Advisory Committee on Appellate Rules 64-65 (Apr. 11, 2001), available at <http://www.uscourts.gov/rules/Minutes/app0401.pdf>.

37. See Preliminary Draft, *supra* note 23, at 1-44.

38. In addition, fifteen witnesses testified at a public hearing on April 13, 2004. See Transcript of Hearing Before Advisory Committee on Appellate Rules (Apr. 13, 2004) [hereinafter Hearing Transcript]. All fifteen witnesses testified about Rule 32.1.

39. This can be determined by reviewing the summaries of the comments contained in the May 2004 Report. See May 2004 Report, *supra* note 13.

40. See *id.* at 2. For example, of the twenty-one law professors who wrote to oppose Rule 32.1, see *id.* at 99-100, only two have no obvious Ninth Circuit connection—that is, a Ninth Circuit connection that appears in their online biographies. Seventeen are former Ninth Circuit clerks (eight of those seventeen clerked for Judge Alex Kozinski), and two others did not clerk on the Ninth Circuit but now teach there.

## II. THE ARGUMENTS

When over 500 of the best judges, lawyers, and law professors in America get into a fight over a proposed rule, no stone will be left unturned, and no argument will be left unmade. In this section, I set forth the main arguments that have been made for and against Rule 32.1. I have distilled these arguments from the thousands of pages of public comments that have been submitted.<sup>41</sup>

### A. *Arguments Against Rule 32.1*

#### 1. Circuit Autonomy

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 on 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 opinions 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 national rule is needed to solve a serious problem.

#### 2. Lack of Problems Solved by Rule 32.1

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

##### a. *Inconsistent Local Rules*

The main problem identified by the Committee Note is that no-citation rules impose a "hardship[]" on attorneys by forcing them to "pick through

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41. I will not litter this Part II with dozens of footnotes citing hundreds of comments. Some of the arguments that I will set forth were made by literally hundreds of commentators. Other arguments were not made in their entirety by anyone; I have instead patched together the arguments from various points made by various commentators. All of the comments are public documents and can be obtained from the AO or online. *See supra* note 2.

the conflicting no-citation rules of the circuits in which they practice.”<sup>42</sup> 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 from the clerk or online. Moreover, no-citation rules are particularly easy to follow, as they are generally clear and, in most circuits, they appear right on the face of unpublished opinions. A lawyer who reads an unpublished opinion is told up front exactly what use he or she may make of it. It is not surprising that the Advisory Committee has not identified any occasion on which an attorney was in fact confused about the no-citation rule of a circuit, much less any occasion on which an attorney was “sanctioned or accused of unethical conduct for improperly citing an ‘unpublished’ opinion.”<sup>43</sup> Attorneys have no difficulty locating, understanding, and following no-citation rules.

Even if inconsistent local rules on citing unpublished opinions posed a hardship, Rule 32.1 would do little to alleviate that hardship. 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 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 the Justice Department and big firms by creating uniformity among federal circuits, it could harm the typical attorney who practices in only one state by creating disuniformity between, for example, the rules of the California courts (which bar the citation of unpublished opinions of the intermediate appellate courts<sup>44</sup>) and the rules of the Ninth Circuit (which, under Rule 32.1, would have to permit citation). Moreover, 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. If uniformity is the Advisory Committee’s concern, it would be far better, for the reasons described below, to propose a rule that would uniformly bar the citation of unpublished opinions.

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42. Preliminary Draft, *supra* note 23, at 38.

43. *Id.*

44. *See* Cal. R. Ct. 977.

b. *First Amendment*

The Committee Note also alludes to a potential First Amendment problem.<sup>45</sup> 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 thirty pages.<sup>46</sup>

3. Lack of Benefits Provided by Rule 32.1

Not only has the Advisory Committee failed to identify any problems that Rule 32.1 would solve, it has failed to identify any benefits that Rule 32.1 would provide.

a. *Insight and Information*

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.”<sup>47</sup> Unpublished opinions provide little “insight” or “information.” To understand why, one needs to appreciate when and how unpublished opinions are produced.

Appellate courts have essentially two functions: error correction and law creation. With few exceptions,<sup>48</sup> unpublished opinions are issued in the vast majority of cases that call on a court only to correct error. 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.”<sup>49</sup>

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45. See Preliminary Draft, *supra* note 23, at 38.

46. See, e.g., Fed. R. App. P. 32(a)(7)(A).

47. Preliminary Draft, *supra* note 23, at 38.

48. Unpublished opinions are sometimes issued in cases that present important legal questions, but in which the court is not confident that it has answered those questions correctly—usually because the facts were unusual or 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.

49. Letter from Stephen S. Trott, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 1 (Jan. 8,

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 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 usually are not circulated to the entire court 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. [Unpublished opinions] reflect the panel's agreement on the outcome of the case, nothing more."<sup>50</sup>

Because of these features, citing unpublished opinions will not only provide little insight or information, but will actually result in judges being misled. A court's holding 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 actually held, and easy for judges and parties to be misled. In addition, 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. And finally, unpublished opinions are a poor source of information about a particular judge's views on a legal issue. As noted, it is possible that an unpublished opinion of a panel does not accurately express the views of any judge on that panel. Citing unpublished opinions might mislead lower courts and others about the personal views of a judge.

Even assuming that there are cases in which citing an unpublished opinion would be valuable—cases in which an unpublished opinion might be persuasive "by virtue of the thoroughness of its research or the persuasiveness of its reasoning"<sup>51</sup>—Rule 32.1 is not needed. Any party can

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2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-129.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-129.pdf) (Comment 03-AP-129).

50. Letter from Barry G. Silverman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure 1 (Dec. 17, 2003), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-075.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-075.pdf) (Comment 03-AP-075).

51. Preliminary Draft, *supra* note 23, at 34.

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. 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.

The fact is, though, that 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*.<sup>52</sup>

This, however, is a dishonest and misleading use of unpublished opinions. As described above, 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. 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. *Transparency*

Rule 32.1 would not, as the Committee Note claims, “mak[e] the entire process more transparent to attorneys, parties, and the general public.”<sup>53</sup> 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.

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, but there is no evidence that these suspicions are valid. Even those (very few) judges who have expressed support for Rule 32.1 have cited only

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52. Letter from Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 4 (Jan. 16, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-169.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-169.pdf) [hereinafter Kozinski Letter] (Comment 03-AP-169).

53. Preliminary Draft, *supra* note 23, at 38.

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,<sup>54</sup> almost no party has 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. Costs Imposed by Rule 32.1

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, and perhaps even on state courts.

##### a. *Federal Judges*

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.

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 in 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.

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.

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54. See 9th Cir. R. 36-3(b)(iii).

Rule 32.1 will force judges to spend as much time drafting unpublished opinions as they now spend drafting published opinions. Judges will also take the time to write concurring and dissenting opinions, to prevent courts from misunderstanding their personal views. The Advisory Committee cannot: (i) 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 (ii) 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 (iii) change the nature of unpublished opinions. As one group of judges commented, “[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that shorthand 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.”<sup>55</sup>

Because judges will spend much more time writing unpublished opinions if Rule 32.1 is approved, at least two consequences will follow. First, 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. Second, 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, because judges will be putting much more effort into them, and because judges generally will be busier.

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.”<sup>56</sup> 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

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55. Letter from John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 7 (Feb. 11, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-329.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-329.pdf) [hereinafter Walker Letter] (Comment 03-AP-329).

56. Letter from Diarmuid F. O’Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 3 (Feb. 5, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-285.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-285.pdf) (Comment 03-AP-285).

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.

Of course, Rule 32.1 cannot change the fact that there are only twenty-four 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 judgment orders. This will be harmful, for a number of reasons.

First, 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. Second, 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. Third, 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. Finally, 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 lacking when a panel issues a one-line disposition.

#### b. *Attorneys*

Attorneys who oppose 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.

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.”<sup>57</sup> 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.

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57. Liebeler Letter, *supra* note 4, app. at 1.

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.<sup>58</sup>

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.

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 “matter” will multiply, but because the unpublished opinions that will have to be consulted are “a particularly watery form of precedent.”<sup>59</sup> 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. It will be harder than ever for attorneys to keep up with the law.

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.

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 West's *Federal Appendix* and rent space to store it. And not all lawyers can afford to use Westlaw or LEXIS.

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58. Letter from Robert G. Badal et al., to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure 4 (Feb. 12, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-462.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-462.pdf) (Comment 03-AP-462).

59. Kozinski Letter, *supra* note 52, at 13.

(Indeed, not all attorneys have access to computers.) The E-Government Act<sup>60</sup> (which requires circuits to make all of their decisions—published and unpublished—available on their websites) will help, but it will not level the playing field entirely. For example, the Act does 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 counsel appointed under the Criminal Justice Act of 1964<sup>61</sup>—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*

If Rule 32.1 is approved, all parties in all cases—both cases that terminate in published opinions and cases that terminate in unpublished opinions—will have to wait longer for their cases to be resolved, for the reasons described above. Delays are bad for everyone, but they are particularly harmful to 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.

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.

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

#### d. *State Courts*

Rule 32.1 could harm state courts. For example, the rule would permit litigants to cite, and federal courts to rely on, 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

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60. E-Government Act of 2002, 44 U.S.C.A. § 3501 (2004).

61. 18 U.S.C. § 3006A (2000).

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.

*e. De Facto Precedent*

The Committee Note admits that Rule 32.1 would inflict the costs 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.<sup>62</sup> The Advisory Committee is naive in believing that a clear distinction between “precedential” and “non-precedential” will be maintained.

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, another panel of the circuit should decide the issue the same way now. When circuits are confronted with this argument, they will not be able to say 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.”<sup>63</sup>

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. 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. 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.”

## 5. Other Non-binding Authority

The Committee Note argues that there is no compelling reason to treat unpublished opinions differently from other non-binding sources of authority, such as “the opinions of federal district courts, state courts, and

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62. See Preliminary Draft, *supra* note 23, at 36.

63. Letter from John L. Coffey et al., Circuit Judges, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1 (Feb. 11, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-396.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-396.pdf) [hereinafter Coffey Letter] (Comment 03-AP-396).

foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles.”<sup>64</sup> This argument overlooks important distinctions.

First, 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.

Second, 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 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.

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.<sup>65</sup>

Finally, there is 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.”<sup>66</sup> Or, as one bar committee wrote, “unlike unpublished decisions, there is no risk these other materials will be

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64. Preliminary Draft, *supra* note 23, at 35.

65. Letter from Lee A. Casey, Baker & Hostetler LLP, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 2 (Feb. 12, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-478.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-478.pdf) (Comment 03-AP-478).

66. Kozinski Letter, *supra* note 52, at 2.

mistaken for the law of the circuit or given undue weight by the lower courts or litigants.”<sup>67</sup>

The risk that unpublished opinions will be given undue weight 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.<sup>68</sup>

## 6. Experience of Permissive Courts

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.<sup>69</sup> 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.

In addition, almost no circuit has gone as far as Rule 32.1 in permitting the citation of unpublished opinions. All circuits (except the Fifth) discourage such citation in some way, forbid it in some circumstances, or both. And three circuits with liberal citation rules—the Third, Fifth, and Eleventh—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.

Two other facts should be noted. First, 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. Second, 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.

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67. E-mail from John A. Taylor, Jr., Chair, Comm. on Appellate Courts, State Bar of Ca., to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 2 (Feb. 10, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-319.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-319.pdf) (Comment 03-AP-319).

68. Letter from E. Vaughn Dunnigan to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 1 (Feb. 8, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-322.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-322.pdf) (Comment 03-AP-322).

69. See Preliminary Draft, *supra* note 23, at 37.

## 7. Rules Enabling Act Authority

The Advisory Committee does not have the authority to force circuits to permit citation of unpublished opinions. Rule 32.1 is not a “general rule[] of practice and procedure”<sup>70</sup> because, if the rule 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.”<sup>71</sup> 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.”<sup>72</sup>

### B. Arguments for Rule 32.1

#### 1. Civic Values

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 on 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 Advisory Committee to defend Rule 32.1 but on opponents of Rule 32.1 to defend no-citation rules.

#### 2. Insight and Information

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.”<sup>73</sup>

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.”<sup>74</sup> Numerous commentators—

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70. 28 U.S.C. § 2072(a) (2000).

71. Walker Letter, *supra* note 55, at 5.

72. *Id.*

73. Preliminary Draft, *supra* note 23, at 38.

74. E-mail from Richard Frankel, Trial Lawyers for Pub. Justice, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure, app. at 4 (Feb. 14, 2004), *available at*

supporters and opponents of Rule 32.1 alike—said that they regularly read unpublished opinions.

Second, unpublished opinions are often cited by attorneys. One commentator wrote the following:

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.”<sup>75</sup>

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*:

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[ly]-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.<sup>76</sup>

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

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[http://www.secretjustice.org/pdf\\_files/Comments/03-AP-406.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-406.pdf) [hereinafter Frankel Letter] (Comment 03-AP-406).

75. Letter from Leslie R. Weatherhead, Witherspoon, Kelley, Davenport & Toole, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 3 (Feb. 11, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-473.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-473.pdf) (Comment 03-AP-473).

76. *Harris v. United Fed’n of Teachers*, No. 02-Civ. 3257, 2002 WL 1880391, at \*1 n.2 (S.D.N.Y. Aug. 14, 2002).

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.<sup>77</sup>

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 four of the 1000-plus active and senior district judges in the United States—including only two of the 150-plus district judges in the Ninth Circuit—submitted comments opposing Rule 32.1.<sup>78</sup>

Sixth, there is not already “too much law,” as some opponents of Rule 32.1 claim. Judge Richard A. Posner (ironically, an opponent of Rule 32.1<sup>79</sup>) has written, “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.”<sup>80</sup> 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.

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. Legal Significance

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.

To begin with, it is difficult for a court to predict whether a case will have precedential value.

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77. Letter from Kenneth F. Ripple, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 1-2 (Feb. 12, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-335.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-335.pdf) [hereinafter Ripple Letter] (Comment 03-AP-335).

78. See May 2004 Report, *supra* note 13, at 97.

79. See Coffey Letter, *supra* note 63, at 3.

80. Richard A. Posner, *The Federal Courts: Challenge and Reform* 166 (1996).

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.<sup>81</sup>

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 even me as hero-worship taken beyond the cusp of reality.<sup>82</sup>

In addition, 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 thoughtful analysis of the relevant precedents.”<sup>83</sup> Time, of course, is precisely what courts who issue unpublished opinions say they do not have.

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<sup>84</sup>—something that the Supreme Court, on review, labeled “remarkable and unusual.”<sup>85</sup> Other examples abound. For example, in *United States v. Rivera-Sanchez*,<sup>86</sup> the Ninth Circuit described how twenty 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.

More evidence of the unreliability of these designations can be found in the many unpublished decisions that have been reviewed by the Supreme Court.<sup>87</sup> The fact that the Supreme Court decides to review a case does not

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81. Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755, 773 (2003) (attached to Letter from Richard B. Cappalli, Professor of Law, The James E. Beasley Sch. of Law, Temple Univ., to Advisory Comm. on Appellate Rules (Feb. 4, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-435.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-435.pdf)) (Comment 03-AP-435).

82. Letter from Michael N. Loeb, Fulcher, Hagler, Reed, Hanks & Harper, LLP, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 4 (Feb. 16, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-454.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-454.pdf) (Comment 03-AP-454).

83. Cappalli, *supra* note 81, at 768.

84. See *Edge Broad. Co. v. United States*, No. 90-2668, 1992 WL 35795 (4th Cir. Feb. 27, 1992), *rev’d*, 509 U.S. 419 (1993).

85. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993).

86. 222 F.3d 1057, 1062-63 (9th Cir. 2000).

87. A recent example is *Muhammad v. Close*, 540 U.S. 749 (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”—

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. Finally, it must be remembered that 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.

Interestingly, 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.<sup>88</sup> For example, the background of judges plays a role. The more experience that a judge has had with an area of law in practice, the less likely the judge is to publish opinions in that area<sup>89</sup> (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).

#### 4. Removing “Market” Constraints

Even if, despite all of this evidence, it remains unclear whether unpublished opinions offer much of value, Rule 32.1 has a major advantage over no-citation rules: It lets the “market” determine the value of unpublished opinions. 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 twenty-six-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. Opponents of Rule 32.1 cannot have it both ways. Either (a) unpublished opinions contain something of value, in which case parties should be able to cite them, or (b) unpublished opinions contain nothing of value, in which case parties will not cite them.

Under no-citation rules, judges make this decision; they decide *ex ante* whether an opinion is so worthless that it should not be published (or cited). If they are wrong in their assessment, the “market” cannot correct them because there is no “market.” Citation is banned. Under Rule 32.1, the “market” makes this decision. Citation is not banned. Unpublished

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because the opinion took what the Supreme Court regarded as the wrong side of a circuit split. *Id.* at 754.

88. See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71 (2001); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 *Judicature* 307 (1990).

89. See Merritt & Brudney, *supra* note 88, at 95-96.

opinions will be cited if they are valuable, and they will not be cited if they are not valuable.

### 5. Costs Imposed by No-Citation Rules

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

#### a. *Arbitrariness and Injustice*

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. *Lack of Accountability*

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 without being 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 even 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.”<sup>90</sup>

#### c. *Lack of Transparency*

No-citation rules undermine confidence in the judicial system. 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.” And, 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,

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90. Ripple Letter, *supra* note 77, at 2.

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 that 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.<sup>91</sup>

#### d. *Unequal Treatment*

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.”<sup>92</sup> Large institutional litigants—and the big firms that represent them—disproportionately receive careful attention to their briefs, an 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.

#### e. *Avoidable Mistakes*

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.”<sup>93</sup> Every judge has had the experience of finding that an initial decision just “won’t write,” and thus every judge knows that it is manifestly untrue that reasoning and writing can be separated. One judge put it this way:

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91. E-mail from Frank H. Easterbrook, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 1-2 (Feb. 13, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-367.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-367.pdf) [hereinafter Easterbrook Letter] (Comment 03-AP-367).

92. Letter from Beverly B. Mann to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 4 (Feb. 15, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-408.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-408.pdf) (Comment 03-AP-408).

93. Cappalli, *supra* note 81, at 785.

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.<sup>94</sup>

f. *Inconsistent Local Rules*

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. The suggestion of some opponents of Rule 32.1 that the Advisory 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 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. 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.

g. *First Amendment*

Opponents of Rule 32.1 have also been too quick to dismiss the First Amendment problems posed by no-citation rules. No-citation rules offend First Amendment values—if not the First Amendment itself<sup>95</sup>—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

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94. Ripple Letter, *supra* note 77, at 2.

95. Several judges, lawyers, and law professors have argued that no-citation rules violate the First Amendment. *See, e.g.*, Richard S. Arnold, *The Federal Courts: Causes of Discontent*, 56 SMU L. Rev. 767, 778 (2003); David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1161-66 (2002); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 297-300 (2001); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. Rev. 705, 780-83 (2004); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 Colum. L. Rev. 1202, 1227-30 (2003); Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, *Litigation*, Summer 2004, at 33.

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*<sup>96</sup> 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 [Legal Services Corporation] 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.<sup>97</sup>

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 thirty-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. Costs Imposed by Rule 32.1

Commentators offer a “parade of horrors” that they claim will be suffered by judges, attorneys, and parties if Rule 32.1 is approved. Many of the “horrors” in this parade are the same “horrors” 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. The predictions regarding Rule 32.1 are no more reliable.

##### a. *Experience of Permissive Courts*

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.

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96. 531 U.S. 533 (2001).

97. *Id.* at 544-45.

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. 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 orders. 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.<sup>98</sup>

b. *No Increase in Judicial Workloads*

Several points can be made regarding the argument that Rule 32.1 would dramatically increase the workload of judges.

First, there is no evidence that this has occurred in jurisdictions that have abandoned or liberalized no-citation rules. One reason why liberalizing no-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.”<sup>99</sup>

Second, judges already have available to them options that would reduce their workloads far more than no-citation rules. 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 seventy or eighty drafts of a published 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

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98. Easterbrook Letter, *supra* note 91 at 1.

99. *Id.* at 2.

discursive, endless federal appellate opinion.”<sup>100</sup> 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.

Much the same could be said about the drafting of 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 ten or twelve 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 the problems with unpublished opinions. Judges would not need no-citation rules if they would confine themselves to issuing (i) full precedential opinions in cases that warrant such treatment or (ii) 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.”<sup>101</sup> Judges have only themselves to blame.

Third, if abolishing no-citation rules had the impact on judges’ workloads 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.<sup>102</sup>

As courts have uniformly gotten busier, 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.

Fourth, Rule 32.1 would, in some respects, reduce the workload of judges, because no-citation rules require judges and litigants to treat as

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100. Cappalli, *supra* note 81, at 789.

101. E-mail from Andrew M. Siegel, Professor of Law, Univ. of S.C. Sch. of Law, to Advisory Comm. on Appellate Rules 1 (Jan. 30, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-219.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-219.pdf) (Comment 03-AP-219).

102. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473, 497 (2003) (attached to Letter from Stephen R. Barnett, Elizabeth J. Boalt Prof. of Law Emeritus, Univ. of Cal., Berkeley, to Advisory Comm. on Appellate Rules (Jan. 6, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-032.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-032.pdf)) (Comment 03-AP-032).

issues of first impression questions that have already been addressed many times by the circuit. Take, for example, *United States v. Rivera-Sanchez*,<sup>103</sup> in which the Ninth Circuit admitted that various panels had issued at least twenty 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.<sup>104</sup>

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 twenty-one 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 twenty times as an issue of first impression. No-citation rules keep issues "in play"—and thus encourage litigation—much longer than necessary.

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103. 222 F.3d 1057 (9th Cir. 2000).

104. *Id.* at 1062-63 (citations omitted).

*c. No Increase in Summary Dispositions*

Regarding the argument that Rule 32.1 would result in more one-line dispositions: 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. 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.<sup>105</sup>

*d. No Misleading of Courts*

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: 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.

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

Moreover, district courts have non-binding authorities cited to them every day. For example, a district court in Oregon may have a decision of

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105. Letter from S.M. Oliva, President, Citizens for Voluntary Trade, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 2 (Feb. 16, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-414.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-414.pdf) (Comment 03-AP-414).

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.

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.

*e. No Burden on Attorneys or Parties*

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: 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. The American Bar Association (“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 on the federal appellate courts to “[p]ermit citation to relevant unpublished opinions.”<sup>106</sup> 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.”<sup>107</sup> Rule 32.1 is supported by such national organizations as the ABA,<sup>108</sup> the American College of Trial Lawyers,<sup>109</sup> and the American Academy of Appellate Lawyers;<sup>110</sup> by bar organizations

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106. Am. Bar Ass’n, Sections of Litig., Criminal Justice, Tort and Ins. Practice, and Senior Lawyers Div., Report to the House of Delegates (2001) (Resolution No. 01A115).

107. Letter from Philip Allen Lacovara, Mayer, Brown, Rowe & Maw LLP, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 3 (Oct. 28, 2003), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-016.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-016.pdf) (Comment 03-AP-016).

108. See Hearing Transcript, *supra* note 38, at 85-95 (testimony of Judah Best on behalf of the American Bar Association).

109. See *id.* at 208-29 (testimony of William T. Hangley on behalf of American College of Trial Lawyers); see also William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002).

110. See Letter from Kenneth C. Bass, III, President, Am. Acad. of Appellate Lawyers, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules (Nov. 11, 2002) (on file with author).

in New York<sup>111</sup> and Michigan;<sup>112</sup> and by such public-interest organizations as Public Citizen Litigation Group<sup>113</sup> and Trial Lawyers for Public Justice.<sup>114</sup> 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.

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

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.

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111. See Letter from Thomas H. Moreland, Chair, Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., to Peter G. McCabe, Sec'y, Committee on Rules of Practice & Procedure (Feb. 12, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-464.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-464.pdf) (Comment 03-AP-464); E-mail from Jean E. Nelson, Comm. on Courts of Appellate Jurisdiction, N.Y. State Bar Ass'n, to Advisory Committee on Appellate Rules (Jan. 12, 2004, 12:38 PM EST), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-097.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-097.pdf) (Comment 03-AP-097).

112. See E-mail from Joseph G. Scoville, Chair, Comm. on U.S. Courts, State Bar of Mich., to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure 5 (Feb. 5, 2004), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-394.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-394.pdf) (Comment 03-AP-394).

113. See Letter from Brian Wolfman, Pub. Citizen Litig. Group, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure, app. at 2 (Oct. 9, 2003), available at [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-008.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-008.pdf) (Comment 03-AP-008); Hearing Transcript, *supra* note 38, at 324-34 (testimony of Brian Wolfman on behalf of Public Citizen Litigation Group).

114. See Frankel Letter, *supra* note 74; Hearing Transcript, *supra* note 38, at 65-85 (testimony of Richard Frankel on behalf of Trial Lawyers for Public Justice).

## III. THE STUDIES

The Advisory Committee discussed these arguments at length at its April 2004 meeting.<sup>115</sup> Most of the members were more persuaded by the comments supporting Rule 32.1 than by the more numerous comments opposing it. Supporters of Rule 32.1 spoke about the issue as one of principle, and spoke in strong terms, calling no-citation rules “extreme” and “ludicrous.”<sup>116</sup> Supporters also dismissed the “parade of horrors” that had been raised by opponents of Rule 32.1 by pointing out that many federal and state jurisdictions had already liberalized their no-citation rules, and there was no evidence that those jurisdictions had experienced any of the “horrors.”<sup>117</sup>

In addition to debating the merits of Rule 32.1, the Advisory Committee discussed whether action on Rule 32.1 should be postponed and the FJC and AO invited to study some of the claims made by the commentators.<sup>118</sup> In the end, most members opposed a postponement, arguing that such a study would be difficult to conduct and would change few minds.<sup>119</sup> The Advisory Committee voted six to one to approve Rule 32.1.<sup>120</sup>

Rule 32.1 went before the Standing Committee in June 2004.<sup>121</sup> Members of the Standing Committee seemed favorably disposed toward Rule 32.1, but they nevertheless decided to return the proposed rule to the Advisory Committee for further study.<sup>122</sup> Standing Committee members noted that some of the claims of those commentators—such as the claim that liberalizing no-citation rules would result in longer disposition times—could be tested empirically, and members said that, before voting on Rule 32.1, they wanted to make certain that every reasonable step was taken to gather information.<sup>123</sup>

Over the next year, both the FJC and AO collected data relevant to the arguments that had been made for and against Rule 32.1. The FJC agreed to survey circuit judges and appellate attorneys about such topics as the likely impact of liberalizing citation rules on the workloads of judges.<sup>124</sup>

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115. See Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules 2-12 (Apr. 13-14, 2004), available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf>.

116. *Id.* at 8.

117. *See id.*

118. *See id.* at 8-9.

119. *See id.* at 9.

120. *See id.* A member who was unavoidably absent later informed the Advisory Committee that he would have voted against the proposed rule. *See id.*

121. See Minutes of Meeting of Committee on Rules of Practice and Procedure 8-11 (June 17-18, 2004), available at <http://www.uscourts.gov/rules/Minutes/june2004.pdf>.

122. *See id.* at 11.

123. *See id.* at 10-11.

124. The FJC also decided to study a sample of cases from each circuit to explore, among other things, how often unpublished opinions are cited compared to other non-binding sources. This aspect of its study reflected the general desire of the FJC to study the operation of the federal courts more than it reflected the particular questions raised by Rule 32.1, and thus I will not summarize this part of the FJC's findings in this Article. *See Reagan et al., supra* note 8, at 21-26.

For its part, the AO agreed to analyze data already in its possession to determine whether liberalizing or abolishing no-citation rules causes either an increase in case-disposition times or an increase in the percentage of cases disposed of by one-line judgment orders.

#### A. *FJC Study*

The FJC sent surveys to all 257 circuit judges (active and senior) and to attorneys who had appeared in a random sample of fully-briefed federal appellate cases.<sup>125</sup> The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a restrictive circuit, a discouraging circuit, or a permissive circuit. Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules.<sup>126</sup> The response rate for both judges<sup>127</sup> and attorneys<sup>128</sup> was very high.

##### 1. Survey of Judges

The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions in at least some circumstances—that is, the six discouraging and three permissive circuits—whether changing their rules to bar the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change.<sup>129</sup> Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to discourage the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said that such a change would have no impact.<sup>130</sup> As noted above, opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them “citable”) or decrease in length (as judges make them “uncitable”). The responses of the judges in the nine circuits that now permit citation provided no support for these contentions.

The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a “permissive” rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits—that is, judges who have some experience with the citation of unpublished opinions—replied that it would not (contrary to the predictions of Rule

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125. *See id.* at 1-2.

126. *See id.*

127. *See id.* at 3, 29 tbl.A.

128. *See id.* at 15, 44 tbl.P.

129. *See id.* at 4-5, 30 tbl.B, 31 tbl.C.

130. *See id.* at 5-6, 32 tbl.D, 33 tbl.E.

32.1's opponents).<sup>131</sup> A large majority of the judges in the four restrictive circuits—that is, judges who do not have experience with the citation of unpublished opinions—predicted a change, but, interestingly, they did not agree about the likely direction of the change.<sup>132</sup> For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase.<sup>133</sup> In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.<sup>134</sup>

The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions—a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a “very small,” “small,” or “moderate” increase.<sup>135</sup> Only a small minority agreed with the argument of Rule 32.1's opponents that the proposed rule would result in a “great” or “very great” increase in the time devoted to preparing unpublished opinions.<sup>136</sup>

The responses from the judges in the four restrictive circuits were more mixed,<sup>137</sup> but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges—eight of thirteen—predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a “great” or “very great” increase.<sup>138</sup> Likewise, half of the judges in the Federal Circuit—seven of fourteen—predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a “moderate” increase. Only three Federal Circuit judges predicted a “great” or “very great” increase.<sup>139</sup> The Second Circuit was split almost in thirds: Seven judges predicted no impact or a decrease, six judges predicted a “very small,” “small,” or “moderate” increase, and six judges predicted a “great” or “very great” increase.<sup>140</sup> Even in the Ninth Circuit, seventeen of forty-three judges predicted no impact or a decrease—almost as many as the twenty who predicted a “great” or “very great” increase.<sup>141</sup>

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131. *See id.* at 7, 35 tbl.G.

132. *See id.* at 7-8, 35 tbl.G.

133. *See id.* at 35 tbl.G.

134. *See id.*

135. *See id.* at 8-9, 36 tbl.H.

136. *See id.*

137. *See id.*

138. *See id.* at 36 tbl.H.

139. *See id.*

140. *See id.*

141. *See id.*

The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any “special characteristics” of their particular circuits.<sup>142</sup> A majority of Seventh Circuit judges said “no.”<sup>143</sup> A majority of Second, Ninth, and Federal Circuit judges said “yes.”<sup>144</sup> But in response to a request that they identify those “special characteristics,” few respondents were able to cite anything “special.” Rather, most cited concerns that would apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them.<sup>145</sup>

The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (fifty-seven)—including half of the judges in the permissive circuits—said that the citation of unpublished opinions in a brief creates only “a very small amount” of additional work. A large majority said that it creates either “a very small amount” (fifty-seven) or “a small amount” (twenty-eight). Only two judges—both in discouraging circuits—said that the citation of unpublished opinions creates “a great amount” or “a very great amount” of additional work.<sup>146</sup> (That, of course, is what opponents of Rule 32.1 contend.)

The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (sixty-eight) said “never” or “seldom”—the position of Rule 32.1’s opponents—but quite a large minority (fifty-five) said “occasionally,” “often,” or “very often.” Only a small minority (fourteen) agreed with the contention of some of Rule 32.1’s most ardent opponents that unpublished opinions are “never” helpful.<sup>147</sup>

The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit’s published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that view, as a majority of judges responded that unpublished opinions are “never” (nineteen) or “seldom” (sixty-seven) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (thirty-six) said that unpublished opinions are “occasionally,” “often,” or “very often” inconsistent with published precedent.<sup>148</sup>

Finally, the FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation

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142. *See id.* at 9-10.

143. *See id.* at 37 tbl.I.

144. *See id.*

145. *See id.* at 9-10, app. A.

146. *See id.* at 10, 38 tbl.J.

147. *See id.* at 10-11, 39 tbl.K.

148. *See id.* at 11, 40 tbl.L.

rules, the First Circuit changing from restrictive to discouraging,<sup>149</sup> and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002).<sup>150</sup> The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges—seven of eleven—said “somewhat” more often. (Three said “as often as before” and one said “much more often.”<sup>151</sup>) The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges—save one—said that the time they devote to preparing unpublished opinions had “remained unchanged.” Only one judge reported a “small increase” in work.<sup>152</sup> And all of the judges—save one—said that liberalizing their rule had caused “no appreciable change” in the difficulty of their work. Only one judge reported that the work had become more difficult, but even that judge said that the change had been “very small.”<sup>153</sup>

## 2. Survey of Attorneys

As noted, the FJC also surveyed the attorneys who had appeared in a random sample of fully-briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion of the forum circuit that they wanted to cite but could not, because of a no-citation rule. Over a third of attorneys (forty percent) said “yes.”<sup>154</sup> It was not surprising that the percentage of attorneys who said “yes” was highest in the restrictive circuits (fifty-one percent) and lowest in the permissive circuits (thirty-one percent). What was surprising was that almost a third of the attorneys in the permissive circuits responded “yes.” Given that the Third<sup>155</sup> and Fifth Circuits<sup>156</sup> impose no restriction on the citation of unpublished opinions—and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002<sup>157</sup>—the number

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149. See 1st Cir. R. 32.3(a)(2).

150. See D.C. Cir. R. 28(c)(1).

151. See Reagan et al., *supra* note 8, at 12, 41 tbl.M.

152. See *id.* at 12, 42 tbl.N.

153. See *id.* at 12-13, 43 tbl.O.

154. See *id.* at 15-16, 45 tbl.Q.

155. See 3d Cir. Internal Operating P. 5.7.

156. See 5th Cir. R. 47.5.4. The Fifth Circuit’s rule applies only to unpublished opinions issued on or after January 1, 1996.

157. See D.C. Cir. R. 28(c)(1).

of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than thirty-one percent.<sup>158</sup>

When pressed by the Advisory Committee to explain this anomaly, Dr. Tim Reagan—the lead author of the study—responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit’s local rules.<sup>159</sup>

The FJC also asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of another circuit that they wanted to cite but could not, because of a no-citation rule. Over a quarter of attorneys (twenty-seven percent) said yes.<sup>160</sup> Again, the affirmative responses were highest in the restrictive circuits (thirty-two percent).

The FJC asked attorneys, with respect to the particular appeal, whether they would have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (forty-eight percent) said that they would have cited at least one unpublished opinion of that circuit,<sup>161</sup> and about a third (thirty-two percent) said that they would have cited at least one unpublished opinion of another circuit.<sup>162</sup> Again, affirmative responses were highest in the restrictive circuits (fifty-nine percent and thirty-three percent, respectively), second highest in the discouraging circuits (forty-five percent and thirty-three percent), and lowest in the permissive circuits (thirty-nine percent and twenty-nine percent).

The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were “substantially less burdensome” (one point), “a little less burdensome” (two points), “no appreciable impact” (three points), “a little bit more burdensome” (four points), and “substantially more burdensome” (five points). The average “score” was 3.1.<sup>163</sup> In other words, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would not have an “appreciable impact” on their workloads—contradicting a major prediction of opponents of Rule 32.1.

Finally, the FJC asked attorneys to provide a narrative response to an open-ended question requesting them to predict the likely impact of Rule

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158. See Reagan et al., *supra* note 8, at 16.

159. See Draft Minutes of Spring 2005 Meeting of Advisory Committee on Appellate Rules 11 (Apr. 18, 2005) [hereinafter Spring 2005 Draft Minutes]. As of this writing, the draft minutes of the April 2005 meeting have not been approved by the Advisory Committee.

160. See Reagan et al., *supra* note 8, at 16, 46 tbl.R.

161. See *id.* at 16, 47 tbl.S.

162. See *id.* at 17, 48 tbl.T.

163. See *id.* at 17, 49 tbl.U.

32.1. If one assumes that an attorney who predicted a negative impact opposed Rule 32.1 and that an attorney who predicted a positive impact supported Rule 32.1, then fifty-four percent of attorneys favored the rule, twenty-five percent were neutral, and only twenty percent opposed it.<sup>164</sup> In every circuit—save the Ninth—the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact.<sup>165</sup> The difference was almost always at least two to one, often at least three to one, and, in a few circuits, over four to one. Only in the Ninth Circuit—the epicenter of opposition to Rule 32.1—did opponents outnumber supporters, and that was by only fifty percent to thirty-eight percent.<sup>166</sup>

### B. AO Study

As noted, the AO also did research for the Advisory Committee. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule.<sup>167</sup> The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year.<sup>168</sup> The AO focused on median case disposition times<sup>169</sup> and on the number of cases disposed of by one-line judgment orders (referred to by the AO as “summary dispositions”).

The AO reported that “[t]he data show[] little or no evidence that the adoption of a permissive citation policy impacts the median disposition time in either direction”<sup>170</sup> and “little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions.”<sup>171</sup> The data simply failed to support two of the key arguments made by opponents of Rule 32.1: that allowing citation of unpublished opinions will result in judges spending much more time drafting opinions and in courts disposing of many more cases by one-line orders.

### C. Impact of the Studies

The Advisory Committee discussed the FJC and AO studies at great length at its April 2005 meeting.<sup>172</sup> All members of the Advisory Committee agreed that the studies were well done and that they failed to support the main contentions of Rule 32.1’s opponents. The Advisory Committee disagreed only about the extent to which the studies went

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164. *See id.* at 18.

165. *See id.* at 18, 50 tbl.V.

166. *See id.* at 50 tbl.V.

167. *See* Rabiej Memorandum, *supra* note 9, at 1.

168. *See id.*

169. The AO looked at both the time from submission of the briefs to final judgment and the time from oral argument to final judgment. *See id.*

170. *Id.*

171. *Id.* at 2.

172. *See* Spring 2005 Draft Minutes, *supra* note 159, at 8-18.

further and actually refuted those contentions.<sup>173</sup> All in all, though, it was a bad day for supporters of no-citation rules. By the end of the meeting, all ten Committee members—including two members who had previously opposed Rule 32.1—agreed that the local rules of the circuits should be supplanted by a national rule that would require the circuits to permit the citation of unpublished opinions in at least some circumstances. The two former opponents of Rule 32.1 favored a discouraging version of a citation rule (rather than Rule 32.1's permissive version),<sup>174</sup> but the other eight Committee members (including the chair, who votes only in case of a tie) favored Rule 32.1. The Advisory Committee voted seven to two to approve Rule 32.1.<sup>175</sup>

The Standing Committee took up Rule 32.1 at its June 2005 meeting. Any misgivings that members of the Standing Committee had about Rule 32.1 appeared to have been dispelled by the FJC's and AO's studies. Rule 32.1 was approved unanimously.<sup>176</sup> In September 2005, the Judicial Conference approved Rule 32.1 on a divided vote after amending the rule so that it will apply only to unpublished opinions issued after the rule's effective date. Rule 32.1 now moves on to the Supreme Court and, if approved there, to Congress.

#### IV. THE ASSESSMENT

Rule 32.1 is the “comeback kid” of rules proposals. In 1998, the Advisory Committee voted unanimously to remove Rule 32.1 from its study agenda in light of the strong opposition of the chief judges.<sup>177</sup> Rule 32.1 was as dead as the proverbial doornail. Now, just seven years later, Rule 32.1 has been overwhelmingly approved by that same Advisory Committee<sup>178</sup> and unanimously approved by the Standing Committee.<sup>179</sup>

Like Rule 32.1's fortunes, my own views about the proposal have changed over time. I began as an opponent of Rule 32.1. I now believe that the rule should be approved. Describing the evolution of my own thinking may help to shed light on why a proposal that appeared hopeless only a few years ago now appears to be on the brink of becoming law.

##### A. *Earlier Opposition*

I was an agnostic on the merits of no-citation rules at the time I was appointed Reporter to the Advisory Committee. As a practitioner and then as a law professor, I had found unpublished opinions to be largely useless. I did not spend much time reading them, and, as best as I can recall, I had

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173. *See id.* at 12-13.

174. *See id.* at 13-14.

175. *See id.* at 18.

176. *See Key Judicial Panel Approves Rule Change Allowing Citation of Unpublished Opinions*, 73 U.S.L.W. 2761 (2005).

177. *See* Spring 1998 Minutes, *supra* note 34, at 29-30.

178. *See* Spring 2005 Draft Minutes, *supra* note 159, at 18.

179. *See supra* note 176 and accompanying text.

little occasion to want to cite them. I suppose that, had I given the matter much thought, I would have opposed no-citation rules on the general principle that no government official should be able to say to a citizen: “I forbid you, on pain of sanction that I will impose, to mention to me a public action that I took in my official capacity.” But I had not, in fact, given the matter much thought.

After I became Reporter, I argued consistently—albeit usually unsuccessfully—that the Advisory Committee should not devote time to the unpublished-opinions issue. I was motivated not by strong views about the merits of no-citation rules, but rather by what might be called “institutional” considerations. My reasoning was as follows:

The REA process<sup>180</sup>—that is, the process by which proposed amendments to the federal rules of practice and procedure are considered and approved—enjoys unique credibility with lawmakers, the bench, and the bar. Several factors account for that credibility, but one of the most important 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 as mundane as word limits on briefs filed in cross-appeals can attract strong arguments.<sup>181</sup> Generally, though, the advisory committees work hard to find common ground and build consensus. As a result, objections to proposed rules are usually neither very many nor very passionate.

On rare occasions, though, the advisory committees do take on controversial issues and push ahead over the strong opposition of substantial numbers of judges. But those rare occasions do not harm the credibility of the REA process because they have two things in common. First, the advisory committees are addressing truly serious problems, such as discovery abuse or confusion over the admissibility of expert testimony. These are problems worth the considerable time, effort, and political capital necessary to push through controversial proposals. Second, the advisory committees have a high level of confidence that, despite opposition, the proposals are correct on the merits.

Rule 32.1 is different from these other controversial proposals. Even assuming that it is correct on the merits—that is, even assuming that the arguments in favor of permitting citation are stronger than the arguments against it—Rule 32.1 simply does not address a problem that is serious enough to justify going toe-to-toe with much of the federal appellate bench. I agree with those opponents of Rule 32.1 who ask, in essence: “What’s the

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180. *See supra* note 12.

181. *See, e.g.*, Easterbrook Letter, *supra* note 91, at 3-4; Letter from Haldane Robert Mayer, Chief Judge, U.S. Court of Appeals for the Federal Circuit, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 3-4 (Jan. 6, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-086.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-086.pdf) (Comment 03-AP-086).

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?"

As far as I can tell, there is no evidence—even anecdotal—that no-citation rules cause substantial practical harm. Over the years, I have asked attorneys to identify for me cases in which the following were true: (1) the attorney had an unpublished opinion that he or she wanted to cite but could not; (2) the court likely did not learn of that unpublished opinion in any other way, such as through the court's own research; and (3) had the court learned of that unpublished opinion, the court likely would have decided the case differently. It is, admittedly, a question that calls for a great deal of speculation, but lawyers to whom I have posed the question have each been able to identify, at most, only a case or two in which being able to cite an unpublished opinion likely would have made a difference to the outcome.

The FJC has likewise been unable to find evidence that no-citation rules cause substantial practical harm. In responding to the FJC's survey, the judges on the three permissive and six discouraging circuits were clear that citations to unpublished opinions make little difference. Only seven of 123 judges said that citations to unpublished opinions are "often" or "very often" helpful; a majority said that such citations were "never" or "seldom" helpful.<sup>182</sup> And only three of 122 judges said that the unpublished opinions that are cited are "often" or "very often" inconsistent with the circuit's published opinions; by contrast, a large majority said that unpublished opinions "never" or "seldom" say something different from the published precedent.<sup>183</sup> In short, there is little evidence that no-citation rules create practical problems.

For that reason, I opposed Rule 32.1. Even assuming that the proposal was correct on the merits, I did not think that the proposed rule addressed a problem that was serious enough to justify pushing through a proposal opposed by a substantial number of judges and putting at risk the credibility enjoyed by the REA process.

### B. *Later Support*

My thinking has changed. One reason why my thinking has changed is that I have come to realize that, in assessing the importance of Rule 32.1, I was defining "importance" too narrowly. In particular, I was equating the practical impact of no-citation rules with the importance of no-citation rules. The practical impact of a rule is relevant in assessing its importance, but it is not determinative. A rule that has little practical consequence can nevertheless be very important. For example, a law that required every American to utter aloud a short prayer every day would have little practical impact, but, because such a law would offend so many fundamental civic values, few would dismiss the law as unimportant.

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182. See Reagan et al., *supra* note 8, at 39 tbl.K.

183. See *id.* at 11, 40 tbl.L.

As I have described elsewhere,<sup>184</sup> no-citation rules implicate a number of fundamental civic values, including freedom of speech, the accountability of federal judges, the transparency of judicial proceedings, equal justice, professional autonomy, and the rule of law. This is not the place to assess the importance of each of these principles or to gauge how much each of these principles is in fact offended by no-citation rules. For present purposes, I merely want to note that one reason I have changed my mind about Rule 32.1 is that I have come to realize that the proposed rule is more important than I originally thought.

Mostly, though, my position on Rule 32.1 has changed as I have been required to look closely at the merits of the proposal. In my capacity as Reporter, I had to read every word of every one of the 500-plus comments on Rule 32.1. I had to summarize and evaluate those comments for members of the Advisory Committee and then again for members of the Standing Committee. I had to work with the FJC and AO on the design of their studies. And I had to sit through many meetings—formal and informal—at which Rule 32.1 was discussed. The more that I have heard and thought about Rule 32.1, the more that I have become convinced that Rule 32.1 is correct on the merits. Four factors have been particularly persuasive for me: (1) my starting point; (2) the weakness and inconsistency of the arguments against Rule 32.1; (3) the FJC's and AO's studies; and (4) the fact that the worst-case scenario feared by opponents of Rule 32.1 is not, in my view, terribly frightening. I will explain each of these factors in turn.

### 1. Starting Points

One reason why Rule 32.1 is so controversial is that supporters and opponents of the proposed rule start from different first principles. They have different views of what is natural or normal and thus different views about who has “the burden of proof.”

Those who favor Rule 32.1 start from the premise that being able to cite things is the norm. Supporters have different reasons for this belief. For some, it may reflect the conviction that government officials (including judges) generally cannot bar citizens from speaking about the government. For others, it may reflect a conviction about the autonomy of attorneys or about the importance of transparency or about some other civic value. But the bottom line is that, for supporters of Rule 32.1, citation is the norm, and it is the opponents who have the burden of proof—who must come up with compelling reasons to justify no-citation rules.

The world looks different to those who oppose Rule 32.1. They start from the premise that a court of appeals should be free to handle its judicial business as it sees fit unless there are compelling reasons to deny it that freedom. It is not the job of the rules committees to interfere with the

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184. See Schiltz, *supra* note 5.

decisions that the circuits make about how to get their work done. This is especially important, according to opponents, in light of the substantial differences among the circuits and the fact that all circuits are struggling to handle growing caseloads with diminishing resources. For opponents, then, it is the supporters of Rule 32.1 who have the burden of proof—who must come up with compelling reasons to justify depriving courts of their autonomy.

Where one ends up regarding Rule 32.1 depends to a large extent on where one starts. As I have already suggested, my starting point is the same as the starting point of the supporters of Rule 32.1: I believe that citation is the norm, and that the burden is on opponents of Rule 32.1 to provide compelling reasons why circuits should be able to bar parties from citing unpublished opinions.

## 2. Weakness of Arguments Against Rule 32.1

The comments against Rule 32.1, although many in number, failed to meet this burden of proof.

Some of the arguments made in the comments were plainly incorrect. For example, the argument that Rule 32.1 exceeds the authority granted by 28 U.S.C. § 2072<sup>185</sup> has several problems, not the least of which is that the no-citation rules that Rule 32.1 seeks to abolish are themselves promulgated under Rule 47(a), which gives each court of appeals authority to “make and amend rules governing its practice.”<sup>186</sup> It is hard to imagine how a court of appeals could have power under Rule 47(a) to use its local rules to bar citation, but the Supreme Court could not have power under § 2072 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 made against Rule 32.1 were inconsistent. To cite one example, opponents argued both (a) that unpublished opinions contain nothing of value and (b) 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 argued both (a) that unpublished opinions often do not accurately describe the reasoning behind a decision and (b) 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 walked fine lines in trying to reconcile these and other tensions within their arguments, but I do not think that they always succeeded.

Still other arguments against Rule 32.1 suffered 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

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185. See Walker Letter, *supra* note 55, at 5-6.

186. Fed. R. App. P. 47(a).

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 dispositions *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?]<sup>187</sup>

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 ten-case string cite is a ten-case string cite, and no one reads all ten 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 will continue to use discretion if Rule 32.1 is approved.

What most struck me about the arguments against Rule 32.1, though, 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.<sup>188</sup>

This is a rather striking argument. The judges seem to be asserting not only that they have the right to treat similarly situated litigants differently,

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187. Liebeler Letter, *supra* note 4, app. at 1.

188. Coffey Letter, *supra* note 63, at 1.

but that they have the right not to be made to feel guilty about it. Normally, if a person is acting wrongly, and he feels guilty when his actions are called to his attention, the solution is for him to stop acting wrongly. Yet these judges seem to believe that, if they fail to provide equal justice, and they might feel guilty if their failure is pointed out to them, the solution is to prohibit parties from “throw[ing] back in [their] faces”—otherwise known as “citing”—their inconsistent actions. This argument implies that “say[ing] what we please and tak[ing] no responsibility” is exactly what judges 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 their unpublished opinions. And that, it seems to me, is one of the best arguments that can be made for Rule 32.1.

### 3. FJC and AO Studies

Any lingering doubts that I had about the merits of Rule 32.1 were put to rest by the FJC’s and AO’s studies. As I described above, judges who had experience with the citation of unpublished opinions—that is, judges in the six discouraging and three permissive circuits—overwhelmingly said that permitting such citation does not cause judges to spend substantially more time drafting unpublished opinions<sup>189</sup> and does not make their work substantially more difficult.<sup>190</sup> Only the judges in the four restrictive circuits—that is, the judges who have no actual experience with the citation of unpublished opinions—predicted doom, but those judges failed to cite any reason why the experience of their circuits should differ from the experience of the other nine circuits.<sup>191</sup> Lawyers, too, overwhelmingly supported Rule 32.1<sup>192</sup> and rejected the notion that the rule would be burdensome.<sup>193</sup> And the AO found no evidence that liberalizing a citation rule affects median case disposition times or the frequency of summary dispositions.<sup>194</sup>

### 4. The Worst-Case Scenario

One final consideration persuaded me that Rule 32.1 should be approved. Opponents of Rule 32.1 predict that, if unpublished opinions can be cited, judges will devote more time to writing them, so that they cannot be misused or misunderstood. Opponents claim that judges will compensate for this increased burden by issuing no opinions in an increasing number of

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189. See Reagan et al., *supra* note 8, at 4-5, 31 tbl.C; *id.* at 6, 33 tbl.E; *id.* at 8-9, 36 tbl.H; *id.* at 12, 42 tbl.N.

190. See *id.* at 10, 38 tbl.J; *id.* at 12-13, 43 tbl.O.

191. See *id.* at 9-10, app. A.

192. See *id.* at 18, 50 tbl.V.

193. See *id.* at 17, 49 tbl.U.

194. See Rabiej Memorandum, *supra* note 9, at 1-2.

cases. In those cases, parties will not receive any explanation for the appellate court's decision nor even any assurance that their arguments were heard and taken seriously. This will leave parties feeling cheated and erode their confidence in the judicial system. In the eyes of many of Rule 32.1's opponents, this increase in one-line judgment orders is the most serious harm that Rule 32.1 will inflict.

Putting aside the fact that the available evidence suggests that these predictions are wrong,<sup>195</sup> I certainly agree that an increase in one-line judgment orders would be bad for the judicial system. But I am not sure that it would be as devastating as Rule 32.1's opponents suggest. Consider two of the other arguments that have been made against 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, and are 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.

If one accepts these two arguments, then would not the ideal solution be to get rid of unpublished opinions altogether? Would it not be good if Rule 32.1 resulted in judges issuing (a) full, published, citable, precedential decisions in cases that warrant them and (b) one-line (or perhaps one-paragraph or one-page) orders in cases that do not? Would not a world of fewer and better opinions be preferable to a world of more and worse opinions? One leading opponent of Rule 32.1 likened unpublished opinions to "sausage [that is] not safe for human consumption."<sup>196</sup> Isn't the best way to deal with such "sausage" to stop making it?

The more I thought about the comments on Rule 32.1, the more I was 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 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

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195. *See id.* at 2.

196. Kozinski Letter, *supra* note 52, at 2.

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.<sup>197</sup>

Right now, federal judges 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 would regard that, at least in some respects, as an improvement over the current system.

To be clear, I am not advocating for an increase in one-line dispositions. I agree completely that, in an ideal world, no party would ever receive a one-line disposition. If Rule 32.1 indeed causes an increase in one-line dispositions, the judicial system will be harmed. But the issue is one of relative harms—of how the harm that might be caused by an increase (possibly quite modest) in one-line dispositions compares to the harm that is now being caused by no-citation rules.

This is an extremely difficult question, but it occurs to me that a few facts are at least relevant to the calculus. 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. American taxpayers—through their elected representatives—have given no indication that supplying a reasoned opinion to every litigant in every case is a priority for them. Finally, given what we have been told about unpublished opinions, I wonder just how preferable they are to one-line dispositions. Is an inaccurate explanation really better than no explanation at all?

#### CONCLUSION

For all of these reasons, I have become convinced that Rule 32.1 should be approved. What, then, of the institutional considerations that initially caused me to oppose Rule 32.1? What of my concern that approving Rule 32.1 over the opposition of so many judges will harm the credibility of the REA process? The answer, I think, is that the REA process has credibility not only because it strives to avoid controversy, but, even more importantly,

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197. Letter from Bennett Evan Cooper, Steptoe & Johnson LLP, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure 3 (Feb. 13, 2004), *available at* [http://www.secretjustice.org/pdf\\_files/Comments/03-AP-432.pdf](http://www.secretjustice.org/pdf_files/Comments/03-AP-432.pdf) (Comment 03-AP-432).

because it strives to be right. The merits matter more, and politics matter less, in the REA process than in the typical legislative or administrative process. When the case in favor of Rule 32.1 is so much stronger than the case against it, Rule 32.1's defeat would harm the credibility of the REA process far more than its approval.

APPENDIX: PROPOSED RULE 32.1 AND ADVISORY COMMITTEE NOTE  
PUBLISHED FOR COMMENT IN AUGUST 2003<sup>198</sup>

## 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).

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198. Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 30-39 (Aug. 2003).

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).