The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders

Stephen R. Barnett*

Table of Contents[1]

* Elizabeth J. Boalt Professor of Law Emeritus, University of California, Berkeley. I thank Stephen Burbank for comments on a draft, Florence McKnight (as always) and Vanessa Sobrero for research assistance, and Patrick Schiltz, Stephen Bundy, Tim Reagan, and James Ishida for other vital assistance. My greatest debt runs to the federal public defenders who spoke with me for this Article; I thank and salute them.

1. For additional, updated, and related information, please see the Website Appendix at http://www.law.berkeley.edu/bark.html.

I. Introduction

A. The FRAP 32.1 Proceeding

The battle over "FRAP 32.1," the proposed federal rule of appellate procedure[2] that would bar federal courts from prohibiting or restricting citation

---

2. *See* FED. R. APP. P. 32.1 (proposed new rule), *available at* http://www.uscourts.gov/rules/newrules.html. In its final form, as approved by the U.S. Judicial Conference on September 20, 2005, the proposed Rule 32.1 reads:

> 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:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
>
> (ii) issued on or after January 1, 2007.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or

of their unpublished[3] opinions,[4] has become an epic of federal court rulemaking—in the words of Professor Patrick Schiltz, "the most controversial issue in the history of the judicial rule-making process."[5] The public-comment phase of the Rule 32.1 rulemaking proceeding, conducted by the Appellate Rules Advisory Committee of the United States Judicial Conference (Advisory Committee), took place from August 2003 to February 2004.[6] The result was an extraordinary 513 written comments,

---

> 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.

See U.S. Judicial Conference, Preliminary Report, Judicial Conference Actions 9 (Sept. 20, 2005) *available at* www.uscourts.gov/rules/newrules.html. The Judicial Conference approved the rule on condition that it would apply only to unpublished opinions issued on or after January 1, 2007. *Id.*; *see also* Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 3 (May 6, 2005, *revised* Oct. 7, 2005) [hereinafter Alito 2005 Memorandum Revised], *available at* http://www.uscourts.gov/rules/Reports/AP5-2005.pdf; Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 2 (May 6, 2005) [hereinafter Alito 2005 Memorandum], *available at* http://www.uscourts.gov/rules/Reports/AP5-2005.pdf. After approval by the Judicial Conference, the proposed rule was transmitted to the Supreme Court on November 29, 2005, with a recommendation that it be approved; the Supreme Court has until May 1, 2006, to act; if the Court approves the rule and Congress does not block it, the rule will take effect on December 1, 2006. 28 U.S.C §§ 2071–2077 (2000); *see also* http://www.uscourts.gov/rules. For a definitive account of the FRAP 32.1 rulemaking proceeding, as well as a superb history and analysis of the controversy over unpublished opinions in the federal courts, see Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm und Drang *Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005).

3. "Unpublished" is of course a misnomer, and increasingly so; the opinions are posted online by the courts issuing them and they appear not only in electronic form in databases such as Westlaw and LEXIS, but also in traditional print in West's *Federal Appendix*. The word functions usefully, however, as a term of art, denoting opinions that the issuing court designates as "unpublished." *See, e.g.*, 8TH CIR. R. 28A(i) ("Unpublished decisions are decisions which a court designates for unpublished status."); *see also* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 473 n.2 (2003) (describing "unpublished" opinions).

4. The term "opinions" is shorthand for what the proposed Rule 32.1 calls "judicial opinions, orders, judgments, or other written dispositions." *Supra* note 2.

5. Tony Mauro, *Should Judges Make More Rulings Available As Precedent? How an Obscure Proposal Is Dividing the Federal Bench*, LEGAL TIMES, Apr. 12, 2004, at 1 (quoting Professor Schiltz, reporter for the Advisory Committee).

6. *See* Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee, to Judge David F. Levi, Chair, Standing Committee 42–127 (May 14, 2004) [hereinafter Alito 2004 Memorandum], *available at* http://www.uscourts.gov/rules/Reports/AP5-2004.pdf (describing comments).

overwhelmingly opposed to the proposed rule.[7] This landslide notwithstanding, the Advisory Committee, at its meeting of April 2004, voted six to one to approve Rule 32.1.[8]

The proposed rule then went before the Judicial Conference's Standing Committee on Rules and Practice ("Standing Committee"). That committee, at its meeting of June 2004, sent the proposed rule back to the Advisory Committee for further study.[9] This action was explained as reflecting not the Standing Committee's judgment on the merits of the proposal, but rather the committee's concern about "the strong opposition to the proposed rule expressed by many commentators, especially federal judges," and its desire to do everything feasible to address the opponents' claims.[10] It was thought that some of those claims could be tested empirically. Because nine federal circuits now permit citation[11] of their unpublished opinions (the "citable" circuits), while the other four circuits do not (the "no-citation" circuits), it was suggested that research could focus on the citable circuits to see whether adverse consequences predicted to result from citability have in fact come to pass where citation is allowed.[12]

The Advisory Committee accordingly set in motion a project of empirical research, conducted in tandem by the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts (AO).[13] The call for further

---

7. *See id.* at 1–2 (discussing unusual characteristics of the comments). The comments—entirely public, of course—are available on CD-ROM from the Administrative Office of the U.S. Courts (AO) and online at http://www.secretjustice.org/public_comments_re_frap_32_1.htm. There were also statements and testimony from fourteen witnesses at a public hearing. Transcript of Hearing Before Advisory Committee on Appellate Rules (Apr. 13, 2004) [hereinafter Hearing Transcript].

8. One member who was absent informed the committee later that he would have voted against the proposed rule. Minutes of Spring 2004 Meeting of Advisory Committee 9 (Apr. 13–14, 2004) [hereinafter Spring 2004 Advisory Committee Minutes]; Schiltz, *supra* note 2, at 1449–52 (describing the process).

9. Minutes of June 2004 Meeting of Standing Committee 8–11 (June 17–18, 2004) [hereinafter June 2004 Standing Committee Minutes].

10. *Id.* at 10–11.

11. Throughout this Article, "citation" of unpublished opinions refers only to citation in unrelated cases, as distinct from citing the same case for purposes such as res judicata, double jeopardy, factual reference, or appeal. No American court prohibits citation of unpublished opinions for related-case purposes. *See, e.g.*, 9TH CIR. R. 36-3(b)(i), (ii) (2003) (allowing citation for such purposes). This Article therefore will usually omit the omnipresent qualifier, "except for related cases."

12. *See, e.g.*, June 2004 Standing Committee Minutes, *supra* note 9, at 10 ("Researchers, for example, could examine the courts that allow citations to see whether disposition times have lengthened or the number of judgment orders [without opinions] has increased").

13. Spring 2004 Advisory Committee Minutes, *supra* note 8, at 11.

study might have been a face-saving surrender; as one observer thought, "[T]he political forces were so strong that it was decided, 'Well, let's hold it up and let's do a study.'"[14] Or the research, however motivated, might have produced an inconclusive result, as research often does.[15] Rather amazingly, neither outcome ensued. The research by the AO and the FJC was not only sound and thorough in design (if needlessly complex),[16] but was also decisive in its conclusions and was even completed promptly, in time for consideration by the Advisory Committee in April, and the Standing Committee in June, of 2005. The research results are summarized in Professor Schiltz's Article in this Symposium,[17] and also briefly in this Article.[18] Suffice it to say here that what might have been a strategic evasion, or at best an inconclusive foray into the academic wilds of survey research, proved to be a turning point in the FRAP 32.1 proceeding, and something of a triumph of empirical research as applied to an issue of public policy.

Fortified by the research results, the Advisory Committee in April 2005 once more approved the proposed rule, seven to two.[19] The weary rule then trudged back to the Standing Committee for that committee's meeting of June 2005. At that session the Standing Committee, after hearing an extensive account of the FJC and AO research,[20] approved Rule 32.1 unanimously.[21] The proposed rule then went before the Judicial Conference at that body's meeting

---

14. *Citation of Unpublished Opinions: The Appellate Judges Speak*, 74 FORDHAM L. REV. 1, 13 (2005) (Judge Edward R. Becker); *see also* Stephen B. Burbank, *The Politics of the Federal Judiciary: Tiered Appellate Decisionmaking*, 89 JUDICATURE 20, 22 (2005) ("[C]alls for more study can mask unalterable substantive disagreement and/or the desire to conduct a private burial.").

15. One of the prospective FJC researchers warned the Advisory Committee of such obstacles. *See* June 2004 Standing Committee Minutes, *supra* note 9, at 11 ("Mr. Cecil . . . cautioned . . . that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.").

16. *See infra* note 194 and accompanying text (discussing the design of the studies).

17. Schiltz, *supra* note 2, at 1452–55.

18. *Infra* Part IV.

19. Minutes of Spring 2005 Meeting of Advisory Committee 17 (Apr. 2005) [hereinafter Spring 2005 Advisory Committee Minutes]; Schiltz, *supra* note 2, at 1457.

20. This was presented primarily by Judge Samuel A. Alito, Jr., Chair of the Advisory Committee. Minutes of Committee on Rules of Practice and Procedure 8–11 (June 15–16, 2005).

21. *See id.* at 10 (recording vote). One Standing Committee member said he was initially inclined against the proposal, especially in the face of fierce opposition from many of the judges who had written and testified earlier on the proposed rule; however, after reading the FJC's report, he was convinced that the empirical information supported the proposal, and he now favored it. *Id.* at 8.

of September 20, 2005. The Judicial Conference approved the rule, though adding the condition that the rule would apply "only to judicial dispositions entered on or after January 1, 2007."[22] Rule 32.1 was in a package of rule amendments submitted to the Supreme Court by the Judicial Conference on November 29, 2005. If the rule change receives approval by the Supreme Court and acquiescence by Congress, it will go into effect December 1, 2006.[23]

B. Rule 32.1 and the Rulemaking Process

The United States Judicial Conference, instructed by the Rules Enabling Act to "prescribe and publish the procedures" for amending the rules of practice and procedure, has adopted the familiar technique of notice-and-comment rulemaking.[24] The required procedures for considering the proposed Rule 32.1 accordingly included: (a) circulation of the proposed rule changes "to the bench and bar, and to the public generally," with publication "as wide as practicable"; (b) "a period of at least six months" after publication for public comments; (c) public hearings (unless waived) on all proposed rule changes; and (d) each proposed rule change "accompanied by a separate report of the comments received."[25]

In the context of "judicial" rulemaking—rulemaking for courts—the notice-and-comment technique has some special characteristics, casting into relief both advantages and disadvantages of the technique. On the one hand, the procedure is broadly inclusive, at least in a formal sense. Not only must publication of the proposal be "as wide as practicable" and be held open for at least six months,[26] but notice-and-comment has been called the most

---

22. *Supra* note 2; Preliminary Report, Judicial Conference Actions 9 (Sept. 20, 2005). The Conference approved proposed new Appellate Rule 32.1, with the condition against retroactivity, and agreed to transmit the proposed rule to the Supreme Court "for its consideration with a recommendation that the rule be adopted by the Court and transmitted to Congress in accordance with the law."

23. 28 U.S.C. §§ 2071–2077 (2000).

24. 28 U.S.C. § 2073(a)(1) (2000). *See generally* 28 U.S.C. § 331 (2000) (granting power to the Judicial Conference to recommend rules to the Supreme Court); 28 U.S.C. §§ 2071–2077 (2000) (governing judiciary and judicial practice); *Federal Rulemaking: The Rulemaking Process: Judicial Conference Procedures* 1, 3–7 (June 12, 2005), http://www.uscourts.gov/rules/procedurejc.htm [hereinafter *Judicial Conference Rulemaking Procedures*]. *Cf.* Administrative Procedure Act, 5 U.S.C. § 553 (2000) (prescribing similar procedure for agency rulemaking).

25. *Judicial Conference Rulemaking Procedures*, *supra* note 24, at 3–7.

26. *Id.*

"democratic" of rulemaking procedures because it is "open to all."[27] The proceeding on proposed Rule 32.1 indeed was open, attracting some 513 comments (plus fourteen statements made at the hearing). These comments were not only numerous but sometimes extensive,[28] and they often were well argued, thoroughly imagined, deeply felt, and quite possibly persuasive to many.[29] As Professor Schiltz puts it, "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."[30] Moreover, the notice-and-comment procedure normally is combined with a hearing, as it was for Rule 32.1,[31] thus capturing elements of personal expression, the right of petition, mutual confrontation, cross-examination, and oral argument.[32]

On the other hand, notice-and-comment, as applied to judicial rulemaking, has three possible drawbacks, all of which were evident in the FRAP 32.1 proceeding. These are problems involving the number of comments filed, their form and content, and the means of selecting the commenters. The problems of number and content were nicely combined in one remark by Judge David F. Levi, Chair of the Standing Committee; he observed glumly that "the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other."[33] Professor Schiltz, as reporter for the Advisory Committee, more fully observed that the comments on FRAP 32.1 were "highly

---

27. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 66 (1969) ("Rule-making procedure which allows all interested parties to participate is democratic procedure."), *quoted in* Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 427 n.55 (2005), *available at* http://ssrn.com/abstract=595181; *see also* Cuellar, *supra*, at 413 (stating that an agency "receives comments from those who decide they have sufficient resources and interest to send them").

28. Judge Alex Kozinski appears to have taken the palm with a submission of twenty-two pages (not counting attachments). Judge Alex Kozinski, Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1, at 22 (Jan. 16, 2004), *available at* http://www.secretjustice.org/public_comments_re_frap_32_1.htm [hereinafter Index]. My reply to Judge Kozinski ran twenty-one pages. Comments of Stephen R. Barnett, Feb. 17, 2004, *in* Hearing Transcript, *supra* note 8, tab 5. Both were subsequently published. Judge Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FEDERAL LAWYER, June 2004, at 36; Stephen R. Barnett, *In Support of Proposed Federal Rule of Appellate Procedure 32.1: A Reply to Judge Alex Kozinski*, FEDERAL LAWYER, Nov./Dec. 2004, at 32.

29. The first person a lawyer persuades, of course, is herself.

30. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 30 (2005).

31. Hearing Transcript, *supra* note 7; *see* Judicial Conference Rulemaking Procedures, *supra* note 24, at 3–4 (discussing the procedure for a public hearing).

32. Hearing Transcript, *supra* note 7, *passim*.

33. June 2004 Standing Committee Minutes, *supra* note 9, at 9.

unusual in several respects"—(a) an "extraordinarily large" number of comments were filed; (b) they came mostly from "just one circuit" (the Ninth); (c) the "vast majority" of them (about 90%) opposed the rule; and (d) the comments were "extremely repetitive," including many "identical or nearly identical copies of each other."[34]

Selection of the commenters raised various questions. Those who file comments in this type of proceeding may be subject not only to obvious self-selection, but also to various kinds of commanded or organized selection. A possible example of command selection—to which I will return[35]—was the filing of comments on Rule 32.1 by sixty-two federal public defenders (that is, attorneys in federal public defender offices) in the Ninth Circuit, all sixty-two of them opposing the proposed rule.[36] Professor Schiltz found it "obvious that there had been an organized campaign to generate comments opposing Rule 32.1, as many of those comments repeated—sometimes word-for-word—the same basic 'talking points' that had been distributed by opponents of the rule."[37]

Some have disparaged such "organized campaign[s] to generate comments."[38] Professor Stephen B. Burbank, for example, observes that "the effort to derail [Rule 32.1] ha[d] all the markings of an interest group lobbying campaign," as "opponents of the proposed rule, led by Judge [Alex] Kozinski, organized a massive letter-writing campaign in an effort to defeat it."[39] Judge A. Wallace Tashima of the Ninth Circuit, in his public comment on Rule 32.1, also reported that "a letter-writing campaign was mounted among the lawyers in the Ninth Circuit to oppose the new rule," and that the campaign subsequently "shifted to the judges of the Ninth Circuit."[40] First-hand evidence supports Judge Tashima's report about Ninth Circuit judges,[41] and a campaign among

---

34. Memorandum from Patrick J. Schiltz, to Advisory Committee on Appellate Rules 1–2 (Mar. 18, 2004) [hereinafter Schiltz 2004 Memorandum], *available at* http://www.nonpublication.com/schiltz.pdf.

35. *Infra* Part III.E.

36. For a list of the sixty-two defenders, see Website Appendix, *supra* note 1.

37. Schiltz, *supra* note 2, at 1451.

38. *Id.*

39. Burbank, *supra* note 14, at 5–6.

40. Judge A. Wallace Tashima, Public Comment 03-AP-288, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 6, 2004), *available at* Index, *supra* note 28.

41. *See* Judge Stephen Reinhardt, Public Comment 03-AP-402, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 9, 2004), *available at* Index, *supra* note 28 ("By my count, approximately thirty of our active and senior judges have written in opposition to the rule. . . . [I]t is my understanding that . . . there are another five or ten who plan on doing so.").

lawyers peeked through some otherwise well-covered tracks of Judge Kozinski.[42]

Whatever one thinks of these campaigns, in the case of Rule 32.1 the organizers certainly succeeded in getting out the vote—at least in the Ninth Circuit—and they produced landslides on what one might have thought were closely contested issues.[43] Of the total of some 513 comments filed, approximately 90% (462) opposed the rule and 10% (51) supported it. The Ninth Circuit alone—that is, judges, lawyers, and others situated there—accounted for some 75% of the comments, or about 385. Of these, some 96% (370) opposed the rule and 4% (15) supported it, a margin of seventeen to one. On the Ninth Circuit Court of Appeals itself—the Ninth Circuit!—an eerie harmony prevailed: Thirty-eight judges wrote against the rule and only one (Judge Tashima) for it,[44] while eight judges stayed silent.[45]

One may ask what is wrong with these campaigns or these results. In a democracy, on an issue given over to a democratic rulemaking process,[46] what is wrong with "an organized campaign to generate comments," or a "massive letter-writing campaign"? These are efforts to produce a majority, and isn't that what democracy is all about?[47]

---

42. *See* Public Comment 03-AP-017, Proposed Federal Rule of Appellate Procedure 32.1, at 3 (Nov. 26, 2003), *available at* Index, *supra* note 28 (attaching page from a weblog that presents opposition view of Rule 32.1 and adding, "If you'd like to be heard on these points, and want your voice to make a difference, Ninth Circuit Court of Appeals Judge Alex Kozinski is interested in this issue and you can get more information if you contact him" (followed by Judge Kozinski's e-mail address)); Public Comment 03-AP-471, Proposed Federal Rule of Appellate Procedure 32.1, at 5 (Feb. 13, 2004), *available at* Index, *supra* note 28 (opposing rule and bearing notation: "cc: Hon. Alex Kozinski"); Public Comment 03-AP-455, Proposed Federal Rule of Appellate Procedure 32.1, at 3 (Feb. 16, 2004), *available at* Index, *supra* note 28 (bearing a classic stenographer's gaffe: "bcc: Alex Kozinski").

43. *See* AP-288, *supra* note 40 (Judge Tashima) ("[J]udges of the Ninth Circuit are closely split on the issue.").; Judge Sidney R. Thomas, Public Comment 03-AP-398, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 6, 2004), *available at* Index, *supra* note 28 ("As the Committee can doubtless discern from the number of thoughtful letters it has received from my colleagues, it is a controversial issue with the Court closely divided.").

44. AP-288, *supra* note 40 (Judge Tashima).

45. For the list of the eight judges who did not comment, see Website Appendix, *supra* note 1.

46. *See* DAVIS, *supra* note 27 (discussing democratic aspects of the rulemaking procedures); Cuellar, *supra* note 27 (arguing that members of the lay public play a major role in filing comments in agency rulemaking proceedings).

47. *Cf.* Roy T. Englert, Jr., *In Favor of Friends: Courts Find Gold in Those Amicus Briefs*, LEGAL TIMES Aug. 25, 2003, at 50 ("The fact that a party solicits amicus briefs is a curious objection: Who, in petitioning any branch of the government for redress, doesn't legitimately want as many (and diverse) friends as he or she can find?").

One might answer first that these are judges (or committees dominated by judges), and judges, of all rulemakers, should be moved by reasoned arguments instead of the number or identity of the persons making the arguments.[48] Second, judges have a special status not only as rulemakers, but also as commenters. Judges as commenters carry special weight in Judicial Conference proceedings not only because of their personal status, but also because they effectively own and run the institution.[49] Given this power and status, the judges should not need artificially collected stacks of comments as well. A third reason for discounting multiple and repetitive letters in judicial rulemakings may be that it looks bad for judges to solicit such comments, especially from lawyers who practice before them.[50] Fourth, such stacks of comments are unlikely, after all, to provide an accurate reflection of public opinion. As Professor Mariano-Florentino Cuellar writes:

> Notice and comment is not just the domain of banks, utilities, political parties, and their lawyers. . . . It's true the public sometimes evinces a considerable demand for taking part in regulatory proceedings by sending in hundreds, thousands, or hundreds of thousands of comments to regulatory agencies. But participating members of the public almost certainly don't reflect the distribution of public opinion.[51]

There are reasons for this disjuncture between comments and public opinion—reasons such as an inertial bias, or even a "tradition" opposed to

---

48. *See* Schiltz, *supra* note 30, at 79 ("The merits matter more, and politics matter less, in the REA [Rules Enabling Act] process than in the typical legislative or administrative process."). But a similar claim for the rationality of ordinary notice-and-comment proceedings has been made with respect to commenters—or comment solicitors—who are not judges. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) ("As a result of the reasoned-decisionmaking requirement that accompanies it, notice-and-comment rulemaking fosters logical and thorough consideration of policy . . . .").

49. June 2004 Standing Committee Minutes, *supra* note 9, at 10–11. One committee member was struck by "how strongly a number of judges feel about the issue"; others cited the "great sensitivity of the issue among circuit judges"; one added that, despite "powerful arguments" favoring the proposed amendment, "it would be a mistake institutionally to go forward with a rule that has generated so much opposition"; others endorsed the need for "institutional restraint." *Id.*

50. *Cf.* Stephen B. Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005) ("I am less sanguine . . . about such [off-record] communications between judges who are not members of the rulemaking committees and nonjudge members of those committees, particularly if the members practice before the judges who are lobbying them.").

51. Cuellar, *supra* note 27, at 473.

new rules.[52] In all, there is much to be said for turning a critical eye on organizing or lobbying efforts by judges in judicial rulemaking proceedings.

Despite these considerations, and despite the Standing Committee's frustration with the "daunting" and duplicative comments,[53] the committee bent over backwards to accommodate the judges opposed to Rule 32.1. One committee member was struck by "how strongly a number of judges feel about the issue," while other members cited "the great sensitivity of the issue among circuit judges."[54] It was apparently out of such collegial deference, in part, that the committee's chair declared that "[i]t would not be advisable to seek Judicial Conference approval of the proposed new rule at this time without supporting empirical data."[55] The committee thus effectively gave the opponents of the rule a prima facie case, requiring that the proponents produce empirical evidence supporting the rule. This was a tall order. It is striking that the Federal Judicial Center and the Administrative Office of the courts did come up with empirical studies that passed the test, at least to the extent of producing favorable votes in both the Advisory and Standing Committees (unanimous in the latter case).[56]

In sum, the notice-and-comment procedure is subject to what Professor Burbank calls "strategic behavior."[57] Rulemakers, he suggests, "need to confront both the potential and the limits of strategic behavior intended to defeat a proposal,"[58] as they were required to do in the FRAP 32.1 proceeding. So it will be wise for us, while being informed and enlightened by the voluminous comments filed in that proceeding, to look below the surface for other evidence of public opinion. As in the case of Sherlock Holmes and the dog that did not bark,[59] we may learn more from what the comments *do not* say.

---

52. *See, e.g.*, Hearing Transcript, *supra* note 7, at 121 (quoting Judge Levi, chair of the Standing Committee, who observed that FRAP 32.1 might not be as unusual as it may seem: "It's quite typical in these rules matters that the overwhelming letters, particularly on a controversial matter, will be opposed. There's almost a tradition of that.").

53. *See supra* note 33 and accompanying text (quoting the chair of the Standing Committee at the June 2004 meeting, at which he observed that the number of comments was "daunting" even though many of the comments seemed to copy each other).

54. June 2004 Standing Committee Minutes, *supra* note 9, at 10.

55. *Id.*

56. *Supra* text accompanying notes 6–22.

57. Burbank, *supra* note 14, at 20.

58. *Id.*

59. A. Conan Doyle, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 383, 400 (1938).

C. A Natural Experiment

Proposed Rule 32.1 offers a natural experiment. The rule would require four federal circuits—the Second, Seventh, Ninth, and Federal—to do what the other nine circuits already do: allow citation of their unpublished opinions.[60] We thus have real-life, contemporaneous experience in the nine citable circuits with which to compare the likely effects of Rule 32.1. We can look at the nine citable circuits to see what their experience in allowing citation has been, and whether that experience bears out the fears of citability expressed by the judges and lawyers who oppose Rule 32.1.

We can see, for example, whether lawyers in the citable circuits have to spend significantly more time on research because unpublished opinions are citable;[61] whether judges in those circuits have to spend vastly more time perfecting their unpublished opinions in order to make them presentable for citation;[62] whether those judges alternatively—or in addition—are dispensing with opinions entirely and issuing only one-line judgment orders;[63] whether unpublished opinions declared to be citable only for "persuasive" value nonetheless acquire precedential value;[64] whether case-disposition times are longer when unpublished opinions can be cited;[65] whether poor litigants suffer from unequal access to unpublished opinions;[66] and whether other adverse effects follow from making unpublished opinions citable. If such effects do follow, we would expect to see some evidence of those effects in the circuits

---

60. The Second, Seventh, Ninth, and Federal Circuits prohibit any citation of their unpublished opinions (except, of course, for factual or related-case uses such as res judicata or appeal). *See* 2D CIR. R. 0.23 (statements accompanying court's summary orders "shall not be cited or otherwise used in unrelated cases before this or any other court"); 7TH CIR. R. 53(b)(2)(iv) (unpublished orders "shall not be cited or used as precedent" in any federal court within the circuit); 9TH CIR. R. 36-3(b) (unpublished dispositions "may not be cited to or by the courts of this circuit," except in related cases or in a petition for rehearing seeking to show a conflict); FED. CIR. R. 47.6(b) (opinion or order designated as nonprecedential "must not be employed or cited as precedent").

61. *See infra* note 98 and accompanying text (quoting a public defender expressing concern over increased research time).

62. *See infra* note 99 and accompanying text (quoting a public defender predicting that judges would have an increased workload).

63. *See infra* note 100 and accompanying text (quoting a public defender suggesting that judges will issue one-line judgments).

64. *See infra* note 101 and accompanying text (quoting a public defender opining that unpublished opinions will have not only persuasive, but also precedential, weight).

65. *See infra* note 102 and accompanying text (quoting an attorney who fears that disposition times will increase).

66. *See infra* note 103 and accompanying text (quoting a public defender stating that poor litigants do not have access to databases that provide unpublished opinions).

where unpublished opinions are citable. We would expect judges and lawyers from citable circuits to have voiced their woes with the system, detailing the adverse effects they suffer from citability and essentially urging the Advisory Committee in a gesture of collegial rapport: "Look what has happened to us; don't do it to them!"

What we get is very different. In the entire stack of 513-plus comments on Rule 32.1, there are virtually no such reports—virtually no complaints from lawyers or judges based on actual experience with citability. This is the number-one dog that did not bark. As Judge Frank H. Easterbrook observed, "What *would* matter are adverse effects and adverse reactions from the bar or judges of the nine circuits (and twenty-one states) that now allow citation to unpublished orders. And from that quarter, no protest has been heard."[67]

To test this claim of silence, I will report in this Article on two groups, in circuits where citation is permitted, from whom one would have expected to hear about adverse effects of citation if such effects were perceived. These groups are (a) federal circuit judges, and (b) federal public defenders (that is, attorneys in federal public defender offices, whatever their rank or title). But how to ascertain the views of each group? In the case of federal circuit judges, ten such jurists in citable circuits filed comments in the FRAP 32.1 rulemaking proceeding.[68] Although that is not a large sample, we can examine the ten comments and see whether any of them report adverse effects of citability.[69]

---

67. Judge Frank H. Easterbrook, Public Comment 03-AP-367, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 13, 2004), *available at* Index, *supra* note 28.

68. *Infra* notes 75–86 and accompanying text. Under Rule 32.1, a circuit could allow citation of unpublished cases for their "precedential" value ("binding" or not), for only their "persuasive" value, or for something in-between—just as the nine citable circuits do today. This interpretation of Rule 32.1 is implicit in the Advisory Committee's statement: "Rule 32.1 . . . says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinion of another court. The one and only issue addressed by Rule 32.1 is the citation of judicial dispositions . . . ." Memorandum from Judge Samuel A. Alito, Jr., to Judge Anthony J. Scirica 30 (May 22, 2003). Actually, the Advisory Committee fails to make its intention clear. The Committee Note states: "[T]he circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of 'unpublished' opinions for their persuasive value." Schiltz 2004 Memorandum, *supra* note 34, at 31. But the Note never mentions that the circuits have differed even more dramatically in the effects they have given to unpublished opinions as between "persuasive" and "precedential" value. *Compare* 5TH CIR. R. 28(A)(i) (stating that unpublished opinions issued on or after January 1, 1966 are "not precedent" but "may . . . be persuasive") *with* D.C. CIR. R. 28(c)(12)(B) ("[M]ay be cited as precedent"). Still, the committee's intent must be that Rule 32.1 would allow an individual circuit to permit citation of its unpublished opinions as precedent—as the D.C. Circuit and others now do—and not just for persuasive value.

69. *Infra* notes 75–86 and accompanying text. Under Rule 32.1 a circuit not only could not "prohibit" citation of unpublished opinions, but also could not "restrict" such citation, with a "restrict[ion]" apparently including any negative or discouraging words, such as a warning that

In the case of the federal defenders, while as many as 62 federal defenders in the Ninth Circuit filed comments in the Rule 32.1 proceeding, the number who commented from citable circuits was—perhaps amazingly—only three. Some different way to ascertain the views of the federal defenders was therefore needed. As will appear, I chose to interview, by telephone, a randomly selected sample consisting of thirty-six of these federal defenders.

II. Federal Circuit Judges in the Nine Circuits Where Citation Is Allowed

If making unpublished opinions citable had any of the baleful effects predicted by opponents of Rule 32.1,[70] one would expect those effects to be observed and reported, perhaps first of all, by federal circuit judges in the circuits where citation is allowed. These judges are both producers and consumers of the permitted citations. They could be expected, if citability was harmful, both to protest the existing rule in their circuits and to warn against extension of that rule to other circuits. The comments filed by federal circuit judges from the citable circuits, however, do neither of those things. The comments are notable, rather, in three respects: (1) their paucity; (2) their failure to report adverse reactions or effects from citability; and (3) their failure in some cases to mention, or apparently even to recognize, that their own circuit's rule already allows the citations in question. Once again, the dog did not bark.

The pool of federal circuit judges (both active and senior) in the nine citable circuits numbers about 157.[71] Of these, the judges who filed *any* comments on proposed Rule 32.1 numbered a grand total of ten[72]—or 6%. Those who filed *no* comments thus numbered 147—or 94%. These figures suggest that many circuit judges—including most, if not all, of the 147 who filed no comments on Rule 32.1—are at ease with that rule. Granted, federal

---

citation is "disfavored" or that it should not be done unless no published opinion would serve as well. *See supra* note 2 (setting forth the text of the rule); Spring 2005 Advisory Committee Minutes, *supra* note 19, at 2–18 (noting that some committee members reject a "discouraging version of Rule 32.1, regardless of how it was worded"). I used to think that circuits should be allowed to keep the warnings or discouragements that virtually all of them now have. *Infra* notes 81–82 (Judge Bright); Barnett, *supra* note 3, at 490–97. I have since come around to the committee's view—in the interest of circuit uniformity and a clean break with the past practice, and in recognition that the discouraging words are mostly cosmetic and probably have little or no impact anyway. (Circuit choice would still reign on what "effect" to give to citation of an unpublished opinion—"persuasive" only, "precedential," or something else.).

70. *Infra* Parts III.B–D.

71. *See* 385 F.3d 7–14 (2004) (listing 157 federal circuit judges in citable circuits).

72. *Infra* text accompanying notes 75–82.

circuit judges are busy people and have other things to do than write comments in rulemaking proceedings. But on an issue that cuts as close to home as this one does, it seems fair to assume that a substantial number of judges would speak up if dissatisfied. If federal circuit judges felt injured or threatened by a rule allowing citation of unpublished opinions, it seems likely that more than 6% of them—10 out of 157—would say so.

Moreover, perusal of the ten comments filed indicates that the judges who did file comments were not complaining either—at least not about the existing citability in their circuits. Two of the ten, Senior Judge Edward R. Becker of the Third Circuit[73] and Judge David M. Ebel of the Tenth,[74] squarely favored Rule 32.1. A third, Chief Judge Michael Boudin of the First Circuit, reported that his circuit had adopted a local rule that "disfavors but effectively permits the citation of unpublished opinions in any case where it is likely to matter," a rule that "correspond[s] in most but not in all respects" to proposed FRAP 32.1.[75] This appears to put Chief Judge Boudin—and the First Circuit as a whole—basically in the camp favorable to Rule 32.1.[76]

Another three of the ten judges said they opposed Rule 32.1, but their explanations failed to fit that position. Each of these judges approved the existing local rule in his own circuit allowing citation; they opposed Rule 32.1, it appears, only on the (unsupported) assumption that Rule 32.1 would go further than the local rule and hence would destroy that rule. Taking this position were Judge M. Blane Michael of the Fourth Circuit,[77] Judge Boyce F.

---

73. Judge Becker, testifying at the committee's hearing, stated that citation of unpublished opinions "has never created any problem for us" (in the Third Circuit) and has "often been useful in a number of respects." Hearing Transcript, *supra* note 7, at 236.

74. *See* Judge David M. Ebel, Public Comment 03-AP-010, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Oct. 9, 2003), *available at* Index, *supra* note 28 (noting that he had "no problem" with the proposed rule, which he found "helpful," and was writing only to head off any possible future amendment that "might require that unpublished dispositions . . . carry precedential weight").

75. Chief Judge Michael Boudin, Public Comment 03-AP-192, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 21, 2004), *available at* Index, *supra* note 28.

76. The Advisory Committee disagrees. The Committee Note of Spring 2004, reporting on the comments filed on Rule 32.1, lists Judge Boudin among "commentators who oppose" the proposed rule. Schiltz 2004 Memorandum, *supra* note 34, at 63. The Note acknowledges that Judge Boudin "did not expressly oppose Rule 32.1," but points to his statement that almost all First Circuit judges "believe that restricting citation to situations in which no published opinion adequately addresses the issue is 'a reasonable local limitation.'" *Id.* at 63; AP-192, *supra* note 75, at 1. It is not clear why this "reasonable local limitation" becomes the tail that wags the dog and turns the First Circuit against the basic rule of citability that it has adopted.

77. *See* Judge M. Blane Michael, Public Comment 03-AP-401, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 9, 2004), *available at* Index, *supra* note 28 (noting that the Fourth Circuit's citation rule "allows only limited use of unpublished opinions"). The rule says

Martin, Jr., of the Sixth,[78] and Senior Judge Myron H. Bright of the Eighth.[79] Judge Bright's testimony was especially interesting because he has sat on many

---

that the court itself will not cite an unpublished disposition absent "unusual circumstances," that citation by counsel is "disfavored," but that it may be done if counsel believes the opinion has "precedential value" and that no published opinion would serve as well. 4TH CIR. R.36(c). Judge Michael also feared that adoption of Rule 32.1 "would mean the end of our local rule, which is working very well." AP-401, *supra*, at 1.

Judge Michael did not explain why the local rule would perish. Presumably he had in mind that Rule 32.1 would allow citation beyond the "limited" and "disfavored" uses permitted by the local rule. But because the Fourth Circuit rule already allows citation for "precedential" as well as persuasive value, and because a lawyer is unlikely to cite an unpublished opinion if he believes a published opinion would serve as well, it is hard to see why Rule 32.1 would destroy the existing practice. It is notable that Judge Carl E. Stewart of the Fifth Circuit, who sits on the Advisory Committee, told the committee that while the Fifth Circuit has one of the most liberal citation rules, is one of the largest circuits, and has the highest or second-highest per-judge caseload, the Fifth Circuit "has had absolutely no problem living with a rule similar to Rule 32.1." Spring 2005 Advisory Committee Minutes, *supra* note 19, at 16. No reason appears why a rule so tolerable to the Fifth Circuit should be so disastrous for the Fourth.

78. *See* Judge Boyce F. Martin, Jr., Public Comment 03-AP-269, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 5, 2004), *available at* Index, *supra* note 28 (speaking of the Sixth Circuit much as Judge Michael did of the Fourth, *supra* note 77, and praising the Sixth Circuit's rule as the "optimum compromise"). Judge Martin viewed the Sixth Circuit's rule as meaning that "an opinion can be unpublished [sic] but it will not be given precedential value." *Id.* Sixth Circuit Rule 28(g) in fact states that citation, while "disfavored," is allowed for "precedential" value, provided that no published opinion would serve as well. 6TH CIR. R. 28(g). Judge Martin evidently saw Rule 32.1 as overriding his circuit's "optimum compromise"; but, again, it is not clear why this would happen. Rule 32.1, like the Fourth Circuit's Rule 36(c), *supra* note 77, would permit a circuit to make its unpublished opinions citable only for "persuasive" value—which would be more restrictive than the Sixth Circuit's present position of allowing citation for "precedential" value.

79. Judge Bright, having opposed Rule 32.1 in his written comment, addressed at the hearing the Eighth Circuit's rule, 8TH CIR. R. 28(A)(1), that allows citation for "persuasive" value. Hearing Transcript, *supra* note 7, at 14–15; Judge Myron H. Bright, Public Comment 03-AP-047, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Dec. 15, 2003), *available at* Index, *supra* note 28. Judge Bright acknowledged candidly that Rule 28(A)(1) "hasn't caused any problems." Hearing Transcript, *supra* note 7, at 15. He then was questioned by the committee chair, Judge Alito, as follows:

> JUDGE ALITO: Let me ask you a question . . . that draws on your unique experience of having sat with so many circuits. . . . You've sat with circuits that prohibit the citation of unpublished opinions, circuits that have no prohibition, circuits that limit the citation to certain circumstances . . . .
>
> I wondered if you have noticed any effect that these local rules have had on either the work of the lawyers or the work of the judges . . . .
>
> JUDGE BRIGHT: I have to say in all honesty there really doesn't seem to be any difference . . . .

Id. For additional testimony of Judge Bright, see *infra* note 80.

circuits and he sought to reconcile apparently inconsistent views that he had taken on Rule 32.1.[80]

The remaining four commenting judges from the citable circuits also opposed Rule 32.1, but also on spongy grounds. They foresaw harmful effects of citability under Rule 32.1 for their circuits, but without mentioning that their circuits already allowed citation. Such were the comments of Judge Stanley F. Birch, Jr., of the Eleventh Circuit,[81] Senior Judge Thomas F. Reavley of the Fifth,[82] Senior Judge Ruggero J. Aldisert of the Third,[83] and Chief Judge James B. Loken of the Eighth.[84]

---

80. Judge Bright went on to say, however, that he did see a difference in that "Rule 32.1 trumps the advice that we give not to cite unpublished opinions. . . . Right now every one of the circuits has a warning—we don't want to hear unpublished opinions but you can cite it if really it's persuasive . . . ." Hearing Transcript, *supra* note 7, at 15, 21. Without that warning, Judge Bright continued, "there's no longer to be the deterrence." *Id.* at 21.

It is true that almost all the circuits that allow citation qualify their permission with such a "warning." The Advisory Committee could have dealt with this fact by stating that warnings would still be permitted under Rule 32.1 as long as they did not constitute "prohibitions." The committee instead apparently intends its rule to bar any warning as a prohibited "restrict[ion]" on citation. Spring 2005 Advisory Committee Minutes, *supra* note 19, at 14–18. This leaves the difference noted by Judge Bright—and apparently of concern to Judge Michael and Judge Martin as well—whereby Rule 32.1 would "trump" the advice now given. *Supra* notes 77–79. It is only speculation, however, to assume that removal of these warnings would make a difference. *See supra* note 77 (stating the view of Judge Stewart).

81. *See* Judge Stanley F. Birch, Jr., Public Comment 03-AP-496, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 17, 2004), *available at* Index, *supra* note 28 (asserting that the proposed rule is a "terrible idea").

82. Judge Thomas F. Reavley, Public Comment 03-AP-170, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 21, 2004), *available at* Index, *supra* note 28.

83. Judge Ruggero J. Aldisert, Public Comment 03-AP-293, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 30, 2004), *available at* Index, *supra* note 28.

84. Chief Judge James B. Loken, Public Comment 03-AP-499, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 23, 2004), *available at* Index, *supra* note 28. Chief Judge Loken wrote that he had "polled" the Eighth Circuit judges on proposed Rule 32.1 and that ten of the 13 responding judges opposed adoption of the rule. They did so, he reported, "for the reasons stated by the judges of the Second Circuit" and the Federal Circuit, respectively, in letters to the committee from the chief judges of those circuits. *Id.* Chief Judge Loken's letter seems an odd "comment." *Id.* Chief Judge Loken did not disclose how he himself had voted in his poll (or if he did vote), nor any other view of his own concerning Rule 32.1; nor did he identify the other voting judges, nor how they voted. *Id.* (The Loken letter may seem similar to that of Chief Judge Boudin, but Chief Judge Boudin was reporting an actual rule change by his circuit. AP-192, *supra* note 75, and accompanying text).

At all events, the Loken letter cannot be considered a report of ill effects from citability. For the letter relies—exclusively, and in a single sentence—on the views expressed by the Second and Federal Circuits. Those are no-citation circuits; the Eighth is not. Views held by judges of the Second and Federal circuits thus cannot be based on real-world experience with citation, as views from the Eighth Circuit can be. Moreover, the Loken letter follows the path of Judges Birch, Reavley, and Aldisert in failing to mention the local rule—here, that of the Eighth

In sum, of the 157 circuit judges in circuits where citation is allowed—judges who might have been expected to file comments opposing Rule 32.1 if their experience with citability was distasteful—only ten filed comments at all. Two of the ten favored the proposed rule; one reported adoption of a new local rule tantamount to Rule 32.1; and the other seven either favored their existing circuit rule allowing citation but unaccountably found that rule threatened, or did not mention that rule. No circuit judge having experience with a rule allowing citation—and no judge of any kind among all 513 commenters—opposed Rule 32.1 on the basis of such experience. Once again, the dog did not bark.

III. Federal Public Defenders in the Ninth Circuit and the Citable Circuits

A. Federal Public Defenders in the Ninth Circuit: Comments Filed on FRAP 32.1

The other group to be considered is federal public defenders (or "federal defenders," or just "defenders"), by which I mean attorneys working in federal public defender offices, whatever their rank or title.[85] There are presently about 1,077 federal defenders in the United States.[86] The geographic distribution of the defenders who filed comments on Rule 32.1 is striking. From defenders located in the Ninth Circuit, sixty-two comments were filed—all sixty-two opposing the rule.[87] From defenders located in the entire remainder of the United States, six comments were filed. Three of these came from other no-citation circuits, the Second and Seventh—all three opposing Rule 32.1.[88] The

---

Circuit—that already allows citation.

85. When the attorney in question is *the* Federal Public Defender for a district, initial caps are used.

86. *See* Administrative Office of the U.S. Courts, Office of Defender Services, U.S. Federal Defender and Appointed Counsel Program, Theodore J. Lidz, Assistant Director, at 21 [hereinafter Lidz Paper] (stating that there are 74 Federal Public Defenders and 1,003 assistant federal public defenders) (on file with the Washington and Lee Law Review).

87. Website Appendix, *supra* note 1. The number of federal defenders in the Ninth Circuit is approximately 283. Telephone Interview with Theodore J. Lidz, Assistant Director, Office of Defender Services, Administrative Office of U.S. Courts (Sept. 20, 2005) [hereinafter Lidz Interview]. The sixty-two who filed comments on Rule 32.1 thus represent about twenty-two percent of the defenders in the circuit. Of the sixty-two, thirty-three are located in federal public defender offices in California and the others in all other states in the circuit except Arizona. (The Federal Public Defender for Arizona said the reason for Arizona's nonparticipation may have been that the office was undergoing a leadership transition. Telephone Interview with Jon Sands, Federal Public Defender for Arizona (Jan. 2, 2005)).

88. Public Comment 03-AP-428, Proposed Federal Rule of Appellate Procedure 32.1

other three came from citable circuits—the Eighth (District of Iowa)[89] and the Fourth (one each from the Eastern District of Virginia[90] and the Eastern District of North Carolina).[91]

Because the professional characteristics of federal public defenders and the nature of the work they do—government-paid representation of indigent criminal defendants under federal law—are essentially the same in every circuit,[92] public defenders make excellent control groups for intercircuit comparisons. In this case, given the sixty-two commenting defenders from the Ninth Circuit who unanimously opposed Rule 32.1, one naturally wonders about the federal defenders from other circuits, especially the nine circuits that permit citation. What views do these lawyers hold regarding the existing rules in their circuits that allow citation of unpublished opinions? To what extent, if any, do they share the anti-citation views of their colleagues in the Ninth Circuit? One finds no answers to these questions in the comments filed by the citable-circuit defenders. Not only do those comments number only three,[93] but

---

(Feb. 13, 2004), *available at* Index, *supra* note 28; Public Comment 03-AP-438, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 16, 2004), *available at* Index, *supra* note 28; Public Comment 03-AP-433, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 15, 2004), *available at* Index, *supra* note 28.

89. Public Comment 03-AP-418, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 16, 2004), *available at* Index, *supra* note 28. The Federal Public Defender for Iowa, in opposing Rule 32.1, described the Eighth Circuit's citation rule as prohibiting citation "with limited exceptions." *Id.* at 1. He did not say what those exceptions were—they allow citation for "persuasive" value when no published opinion would serve as well, 8TH CIR. R 28(A)(i)—nor did he explain why Rule 32.1, which also allows citation for persuasive value, would be significantly different. AP-418, *supra*.

90. Public Comment 03-AP-439, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 16, 2004), *available at* Index, *supra* note 28. The Federal Public Defender for the Eastern District of Virginia, after expounding on various ill effects that would occur "[i]f unpublished dispositions *could* be cited", concluded by pointing to the Fourth Circuit's rule allowing citation for "persuasive" value. *Id.* at 1. He stated: "[M]y lawyers' experience with the Fourth Circuit's local rule on the use of unpublished opinions has been that the rule works quite well." *Id.* at 3. He did not explain why Rule 32.1, which also allows citation for persuasive value, would not also work well. *Id.*

91. Public Comment 03-AP-375, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 13, 2004), *available at* Index, *supra* note 28. The Federal Public Defender for the Eastern District of North Carolina, whose comment contained passages identical to some in the previous letter (AP-439, *supra* note 90), provided four pages describing effects that assertedly would follow "if unpublished dispositions *could* be cited," without mentioning that the existing Fourth Circuit rule permits citation. *Id.* at 2.

92. *See* 18 U.S.C. § 3006A (establishing guidelines for the representation of defendants); Lidz Paper, *supra* note 86, at 1 (stating that the Criminal Justice Act "was enacted to provide a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in federal criminal proceedings").

93. *Supra* notes 89–91.

even those three pay scant attention to the existing citability rules in the defenders' own circuits.[94] Thus, some way was needed to reach the large and silent population of federal defenders in the citable circuits.

B. Federal Public Defenders in the Citable Circuits: Interviews for This Study

To reach that population, I conducted a survey of federal public defenders in each of the nine circuits that permit citation of unpublished opinions. Through telephone calls to federal defenders' offices in cities located in each of those circuits (a total of thirty-two cities), I conducted interviews with thirty-six randomly selected defenders.[95] Summaries of these interviews, redacted here to delete attorneys' names and cities, appear below and comprise the core of this Article.[96]

---

94. *Id.* One comment from a no-citation circuit that arguably does attend to those rules is AP-333, from the Federal Public Defender for Northern New York and Vermont (both in the Second Circuit), who previously had served in federal defender offices in Alabama (Eleventh Circuit) and Texas (Fifth Circuit). "From those experiences," this defender opines that "allowing citation to unpublished dispositions is not a good practice." Public Comment 03-AP-333, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 3, 2004), *available at* Index, *supra* note 28. Among other reasons, he states that such cases are "typically case-specific and fact-bound" and "tend to be less well written than those reported." *Id. But see infra* Defender I-B, Defender XI-C, Defender XI-D (interviewing defenders who said that unpublished opinions are helpful when fact patterns are in point); Part III.C.4, & 8 (reporting that defenders are generally satisfied with citability in Fifth and Eleventh circuits).

95. My method was to telephone a federal public defender's office in each selected city (selected generally as the major cities in each circuit), identify myself to the person answering the phone, and ask to speak with "an attorney who handles appeals." I would then either be transferred to a lawyer in the appellate section of the office or be told that each attorney handled his own appeals, in which case I would ask to speak with such an attorney. In either case, a new attorney would come on the line. I would identify myself to that attorney and explain that I was conducting a survey about federal defenders' views on unpublished opinions in light of proposed Rule 32.1 and the position taken in FRAP comments by federal defenders in the Ninth Circuit.

In a few cases, the answering attorney would volunteer that a colleague knew more about the subject than he did and would transfer me to that colleague, in which case I might end up using two interviews from the same office. No attorney declined to speak with me. In three cases, however, the interviews aborted. One interview was interrupted and never completed after the *Booker* and *Fanfan* cases came down; in a second case the attorney asked me to send him my questions by e-mail, which I did, but I received no reply; and a third attorney had second thoughts after his interview and asked me not to use it, a request I honored. Three other attorneys who were interviewed asked that I not disclose their name or the city in which they work, requests that I have honored. *Infra* note 98.

96. The deleted names and cities are available in the Website Appendix, *supra* note 1 (save for three attorneys who asked that their names and cities not be disclosed). My original

As background for the interviews, let me set out the chief arguments against Rule 32.1 that are made in comments filed by the federal public defenders from the Ninth Circuit. We then can compare the harms of citability, as predicted by opponents of the rule, with the facts of citability as perceived in the citable circuits. The threats laid out in the Ninth Circuit comments include the following (illustrated with representative quotations):

* The federal courts would have imposed on them, as citable law, judicial opinions not good enough to serve that purpose. "In my experience, unpublished opinions suffer from shoddy analysis and missed issues. These opinions are often obviously written by law clerks and many times have glaring mistakes in them."[97]

* Lawyers would face an onerous new burden of research in order to deal with all the unpublished cases that would become citable. "Since unpublished opinions greatly outnumber published opinions, this would exponentially increase the amount of time spent on legal research."[98]

* Making the unpublished opinions citable would force judges to do either or both of two undesirable things. On the one hand, "judges would have to spend much more time on the cases in which unpublished opinions are issued because they presumably would want to create a much better product if it is something that could be cited."[99]

* On the other hand, judges would do the opposite and not issue opinions at all, but only one-line dispositions. "A rule that allows unpublished opinions to be cited as precedent will result in unpublished opinions saying little more than 'affirmed.'"[100]

* The line cannot be held at citation for persuasive value. "Although the rule change is not meant to give precedential weight to unpublished dispositions, such results will be impossible to avoid."[101]

---

notes on the interviews are available in hard copy on request.

97. Public Comment 03-AP-175, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 16, 2004), *available at* Index, *supra* note 28. *See also* Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 26, 2004), *available at* Index, *supra* note 28 (quoting Judge Alex Kozinski's well-known remark: "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.").

98. Public Comment 03-AP-172, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 26, 2004), *available at* Index, *supra* note 28.

99. *Id.*

100. Public Comment 03-AP-165, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Jan. 22, 2004), *available at* Index, *supra* note 28.

101. AP-333, *supra* note 94, at 1.

* Citability will cause delay. "I fear (and predict) that the speed with which appeals are concluded with memorandum dispositions will disappear."[102]

* There are issues of fairness for poor defendants. "Poor and pro se litigants and counsel in small firms do not have the access to computerized data bases that provide unpublished decisions."[103]

C. Summaries of Interviews of Federal Public Defenders in Citable Circuits

Following are summaries of the thirty-six interviews that I conducted, by telephone, with federal public defenders in the nine circuits where citation of unpublished opinions is allowed.[104] These interviews are the heart of this study—the "best evidence" of the views of citability held by appellate lawyers who work under that rule—and should be read in full. In the pages following the interviews, I note some points that seem to me to stand out.[105]

1. First Circuit

a. Defender I-A, January 14, 2005

1. The First Circuit rule [adopted December 2002] that permits citation of unpublished opinions permits it "only in limited circumstances," and Defender I-A can't remember citing one. "It would have to be very fact-specific" and "factually on all fours" with her case.

2. Unpublished opinions are not an issue that has raised much discussion or controversy in the First Circuit. "I am surprised that it's such a big issue" in the Ninth.

---

102. Public Comment 03-AP-413, Proposed Federal Rule of Appellate Procedure 32.1, at 2–3 (Feb. 15, 2004) *available at* Index, *supra* note 28.

103. Public Comment 03-AP-436, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 13, 2004), *available at* Index, *supra* note 28.

104. The persons interviewed are identified by Roman numeral and letter: e.g., "VI-A" for the first defender interviewed from the Sixth Circuit. This designation will be used to cite the interviews throughout the Article.

105. *Infra* Part III.D. The federal defenders interviewed were asked a bottom-line question: Whether they favored allowing citation of unpublished opinions or prohibiting such citation. The "votes" on this question, not always clear, were tabulated by classifying each interviewee as "Allow," "Prohibit," or "No Answer." So that the reader can see in advance how each interview was classified, the vote assigned to each is reported at the end of the summary of each interview.

3. Has she observed any changes since the First Circuit rule was changed? "No."

4. Does citability of the unpublished decisions impose a significantly greater research burden? She replies: "It depends on how you do your research. If you're using a computer, then [the cases] all come up. So I look at them" for persuasive value. "If the cases were not citable, I would not change my research methods." She also researches cases in other circuits, and "I wouldn't change that, either." She supposes, though, that "if you limited your research to published opinions, you would decrease your research burden." But she sees "no impact on the way I practice" if citation were prohibited.

5. Does citability cause the court to issue one-line dispositions instead of citable opinions? The First Circuit does not hand down many one-line dispositions, though it does issue some "fairly short" opinions "based on well-established principles." If, however, "the judges say that a citation rule would lead them to issue one-line dispositions," she "would be troubled"; she thinks it is "useful to have some kind of record of the court's rationale," and she might even argue that not having such a record infringed upon a defendant's constitutional right to further review. So if citability would result in one-liners, she would be opposed to it.

6. At bottom, citability "has not been a problem" in the First Circuit.

7. Vote: No answer.

b. Defender I-B, January 29, 2005

1. Since the First Circuit rule change allowing citation, Defender I-B has cited "a few" unpublished cases, where "the factual pattern [has been] in point." As a criminal defense lawyer he is "looking for a needle in a haystack," and the more cases, the better. He has "never understood why they have unpublished cases in the first place." When I tell him about the unanimous opposition to the proposed rule in the Ninth Circuit, he is rather incredulous. "Why have opinions if they can't be cited?" he asks. "The implications are troubling. This is federal tax money—do your job."

2. Defender I-B asks me what the arguments are against citation. I mention the argument based on the asserted burden of additional research. He replies: "Don't they [the cases] come up in LEXIS?" For him, "this is not an issue." I ask, "Does citability require significant additional time on research?" He answers, "No. We do a lot of research anyhow, and the more cases that are available, the better."

3. I mention the asserted danger of one-line dispositions. He says the First Circuit "occasionally" rules without oral argument, and very briefly; but he does not think this is because of citability; rather, it is because the cases are "straightforward."

4. The reason the federal public defenders in the Ninth Circuit argue against citability, he suggests, is because the unpublished cases in the Ninth Circuit are "better for the defense" than in other circuits.

5. Is he aware of any ill effects of citability in the First Circuit? He says it "depends what you mean by ill effects," but he's not aware of any.

6. Vote: Allow.

2. Third Circuit

a. Defender III-A, January 7, 2005

1. Unpublished opinions in the Third Circuit now are citable; but they definitely are "not precedential," and the court regularly ignores or dismisses them. "We cite them," but rarely. Most unpublished opinions rule against defendants, so there are not that many that the Defender's office wants to cite. Judge Edward Becker has made it clear, however, that the opinions may be cited.

2. Does researching unpublished opinions add much to research time? "No. They come up on Westlaw." True, there are more cases now, but the unpublished ones are "shorter" and "quicker."

3. What about the argument that if opinions are citable, judges will have to spend more time on them? He thinks that would be a good result. Many of the opinions at present "are not carefully reasoned," even though citable, and if they can be improved, he is for it. If they could not be cited, even less effort would be put into them.

4. Is there a risk that courts will issue one-line dispositions instead? Under Judge Edward Becker as chief judge, the Third Circuit stopped issuing one-line judgment orders.

5. Does he observe any ill effects from citability? No.

6. When I tell him that the federal public defenders in the Ninth Circuit have filed comments unanimously opposing citability, he responds, "Really?" He goes on to speculate that "the Ninth Circuit is just different," having "so many panels," being so much greater in scale, and being "unable even to hold a proper en banc," whereas the Third Circuit is much smaller. Asked whether he favors citability or not, Defender III-A concludes that "it really makes no difference to me," and "little to the court," he surmises.

7. Vote: No Answer.

b. Defender III-B, January 12, 2005

1. She cites unpublished opinions of the Third Circuit "maybe once a year"—"only when desperate." I tell her about opposition to citation by federal defenders in the Ninth Circuit, and she responds, "Really?" She says: "I should think that public defenders would want to cite these opinions." She thinks that "on balance . . . they help the defendants, a little."

2. Is there an excessive research burden? "Well the cases are all on Westlaw. It's quicker to read just the precedential opinions," so it does increase the research time "a good bit." On the other hand, the unpublished cases "come up naturally" in doing research.

3. The availability of the unpublished opinions now on Westlaw "offends the purist in me: If they're not precedential, don't make them available; or else make them precedential." On the other hand, she is a public defender, and her clients are "more likely to need" to cite them.

4. Does she see any ill effects from citability in her circuit? Only that the question of the weight to be given a cited case "distracts" from the real issues in the case.

5. Bottom line: "I don't see any ill effects" of citability. "I'm comfortable with the way it is now."

6. Vote: Allow.

c. Defender III-C, January 7, 2005

1. He cannot recall citing an unpublished opinion. When I tell him the federal defenders in the Ninth Circuit are vehemently opposed to citability, he responds, "Really?" He adds: "It can't be that big of a deal, or I would have heard about it." There is "no angst about it here."

2. Research burden: The non-precedential opinions "show up on Westlaw, and we'll look at them. The burden is not that great." Also, citability "would assist everyone in promoting uniformity of decisions."

3. One-line dispositions: It used to be that the Third Circuit used one-line "judgment orders," but Chief Judge Edward Becker changed that, and opinions now are better and "more in depth." In this respect it is a "good thing" that the opinions are citable.

4. Does he observe, or know of, any ill effects from citability? "Off the top of my head, no."

5. Vote: Allow

d. Defender III-D, January 10, 2005

1. Defender III-D cites a non-precedential opinion in one out of eight or ten briefs. He feels "frustrated" that other circuits issue unpublished opinions that cannot be cited in the Third Circuit.

2. Does he research the non-precedential opinions of the Third Circuit? "Yes. They come up on LEXIS, in the same data bank as the published opinions. Research is not a problem; it's all online."

3. Is there a risk that the court would move to one-line dispositions instead? He "cannot imagine" that the Third Circuit would do that.

4. I tell him the federal defenders in the Ninth Circuit, at least those commenting on FRAP 32.1, strongly oppose citability. He finds this "understandable" in the Ninth, though it would not be in the Third. Why? Because the defenders in the Ninth Circuit "are more likely to get a better decision if it can be left unpublished." The defenders probably "fear that the judges won't have the same nerve" if the opinions can be cited.

5. Would he favor or oppose a ban on citation of unpublished opinions? He would oppose it.

6. Vote: Allow.

3. Fourth Circuit

a. Defender IV-A, January 10, 2005

1. "From where we sit, it serves our clients not to have very many published decisions." She and her colleagues would prefer that Fourth Circuit opinions not be published or cited. "The less citation to Fourth Circuit opinions, the better."

2. Where citation of unpublished opinions is allowed, however, she and her colleagues would prefer that the opinions be binding precedent.

3. Do you research the unpublished opinions of the Fourth Circuit? "Oh yes, definitely." The extent of this research depends on "how diligent the prosecutor is."

4. I tell her about the fears expressed by federal public defenders in the Ninth Circuit concerning a greatly increased research burden. She replies: "That does not ring true. We do thorough research regardless." But assuming that in the Ninth Circuit they can cite only published opinions and they do not

research unpublished ones, "it would be less time-consuming; no question." She has never thought about that, however, "because we have computers." "We are used to it; you know you have to go looking for the unpublished opinions." The lesser degree of work may be "fairly significant" in the Ninth Circuit, though.

5. What about the argument that judges will have to spend more time to make the opinions presentable? "That seems to be true. The workload will increase dramatically if the opinions are citable," she says. But she could equally argue that "that would not be a bad thing," she says.

6. One-paragraph dispositions are common in the Fourth Circuit, she says. Often it is "disheartening," as the opinion gives you "not a clue" as to the reasons for the decision.

7. Would she prefer a ban on citation of unpublished opinions? Yes. "We'd fare better" if the opinions were uncitable. The circuit then presumably would publish more. And the public interest is satisfied by the availability of the opinions. But if banning citation would make the circuit publish more, then she would prefer the present system.

8. Vote: Prohibit.

b. Defender IV-B, January 11, 2005

1. Unpublished opinions of the Fourth Circuit are cited by their office "not that often," but "sometimes." "It's nice to be able to cite something."

2. Is there a significant burden of additional research? "It's all done by computer anyway"; the unpublished cases "pop up with the published ones, so it's not necessarily more work." The required research takes "not that much longer." They "have not found it to be a problem."

3. What about the argument that courts will have to spend more time improving their unpublished opinions? He replies that most of the opinions of the Fourth Circuit are "not weak"; they are "pretty clean," even if turned out by court staff. So he "can't support" that theory. "I hate to go against the grain and not support my colleagues [in the Ninth Circuit], but I have to give my honest feelings."

4. What about the threat of one-line dispositions? One-line or other "really brief" opinions from the Fourth Circuit are "the exception, not the rule."

5. Therefore, he thinks citability has "not too much effect on how we practice here." I tell him about opposition in Ninth Circuit. His reply: "Really? That's interesting."

6. Does he see any ill effects of making the opinions citable? "Only that the government can cite them, too."

7. Does he favor citability? In his view "it doesn't make a whole lot of difference," since courts in any event discount the cases as being unpublished.

8. Vote: No answer.

c. Defender IV-C, January 11, 2005

1. They "hardly ever see" one-line orders from the Fourth Circuit; rather, they complain that the Fourth Circuit issues too many unpublished opinions.

2. Is there a significant increase in research time? "There may be some merit" to this argument; "it would logically follow that there's more work to do" (when unpublished cases are citable). "But we now have computers, so it's not like it used to be," and he would say the increase in research time is "minimal."

3. Vote: No answer.

d. Defender IV-D, January 11, 2005

1. She thinks "there shouldn't be unpublished opinions in the first place. It undermines the case law. If a case is out there, you should be able to cite it."

2. Research burden? Now she can do it with Westlaw. "If too many unpublished cases come up," she can "just narrow the search to exclude unpublished opinions." "Research isn't what it used to be."

3. She cannot remember seeing a one-line opinion from the Fourth Circuit. The shortest ones she sees are a page or so, which are often not much use, "because they don't give facts."

4. Does she see any ill effects from citability? "Can't think of any." "My main complaint is that they have unpublished opinions in the first place." She would not favor a rule banning citation. "You should be able to cite to what's out there. It's a matter of sunshine, of transparency."

5. Vote: Allow.

e. Defender IV-E, January 11, 2005

1. In the Fourth Circuit, when you cite an unpublished opinion you have to attach a copy, notify the court, and satisfy other procedural requirements. He would estimate that one out of twenty briefs produced by his office cites an

unpublished opinion. I tell him about opposition in the Ninth Circuit, and he responds with a surprised Southern, "Sure enough?" He says, "I want to use anything that helps," and asks, "What's the argument against it?"

2. I mention the research argument and ask if he researches the unpublished opinions. Answer: an emphatic "yes." He adds: "I look for anything in my favor. As an advocate, I always use anything I can."

3. I mention the threat of one-liners; he dismisses this as "just an excuse."

4. "Look, we have reasonable judges," who want to reach the right result. They will consider these opinions if they "shed a little light." The unpublished opinions "are never dispositive, but they are helpful in an appropriate case."

5. Would he favor a rule banning citation? No.

6. Vote: Allow.

4. Fifth Circuit

a. Defender V-A, January 13, 2005

1. Now that Fifth Circuit opinions are online [since July 2003], his office cites them in maybe one out of twenty to thirty briefs.

2. Research burden? He does not think the unpublished opinions "add any burden at all." ("I hate to sink my colleagues in the Ninth Circuit.") It used to be a burden, when the opinions were not available online, but now, "I don't really find it to be a burden." "You're not really looking for them; they just come up." "The *Booker* case will require far more work from us than unpublished opinions ever could."

3. Yes, there are a lot of very brief decisions from the Fifth Circuit.

4. "The fundamentally objectionable thing," in his view, is that "you can't tell a court about what it has written."

5. Vote: Allow.

b. Defender V-B, January 14, 2005

1. In his office they cite unpublished opinions "all the time." They are "all online," and it is "very common" to cite them.

2. Research? He does not see "any added burden." "Whenever I research any issue, I go into LEXIS and research all states and all federal jurisdictions." "The people complaining in the Ninth Circuit must be scared of computer research." The claim of an undue research burden is, "pardon my language, bullshit."

3. One-line dispositions? The Fifth Circuit does it "only for pro se litigants, not for attorneys." He has "never" had a one-line opinion; always there is some explanation, even if only a paragraph or two.

4. "Admittedly, it hurts people who are pro se and don't have the right to counsel." For federal public defenders' offices, though, LEXIS is free, and Westlaw cheap. He "doesn't buy" harm to the poor, given that LEXIS, Westlaw, and other electronic resources are available even in the Fifth Circuit law library. "And people in jail are screwed anyway."

5. Vote: No answer.

c. Defender V-C, January 14, 2005

1. They cite unpublished opinions "occasionally," maybe in one out of twenty briefs. He favors citability. I tell him about opposition in the Ninth Circuit, and he says: "I think that's short-sighted. Let the opinions be out there; there may be inconsistent decisions between panels, for example." "You don't have to cite them. There's no ethical requirement that you cite them, since the opinions are not precedential." "But if it helps you, it helps you." "I don't want to get in a fight with my [Ninth Circuit] colleagues," but he favors citability. If one panel of the court of appeals has done something, "another panel should consider it."

2. Research burden? The burden of researching unpublished opinions is no more than that of researching decisions from other circuits. He estimates that unpublished opinions are cited by his office in 5% of cases. The time saved if these cases could not be cited would be "maybe one half of that," or 2.5%. Either way, he and his colleagues still would look at the unpublished opinions for their reasoning.

3. One-line dispositions? "We already have a tremendous number of per curiam opinions." But he does not think that is due to citability.

4. He supports proposed Rule 32.1. "No one complains" about the system in the Fifth Circuit.

5. Unfairness to solo practitioners? They often are "not aware" of unpublished opinions. Is citability therefore unfair to criminal defendants? He says no. "You go on the merits. If an opinion is there, it's there."

6. There are seventeen lawyers in his office. LEXIS is "absolutely free," Westlaw is $150 per month—same rate as for judges.

7. Vote: Allow.

d. Defender V-D, January 13, 2005

1. They do cite unpublished opinions. There used to be "a problem of access," before the opinions were online; but now they have "equal access and computer-aided research," so he sees "no problem with the way the Fifth Circuit administers its unpublished opinions now."

2. He does not see a problem with citability "if it's understood that the cases are not precedential, and that lawyers can argue against them." That has been his experience in the Fifth Circuit: "The judges are open to revisiting a question, or just ignoring an unpublished opinion, so if you have an unpublished opinion against you, you are not necessarily out of luck." "I find it helpful to see what the courts have done in other cases," he adds.

3. Research burden? "With computer-aided techniques, the research burden is not that heavy"; he has not "found it heavy." There was a problem of "unequal access," between them and the U.S. Attorney; but now that problem has been solved [by putting the opinions online], everywhere but in the Eleventh Circuit.[106]

4. Does citability produce one-line dispositions? He has not observed that. He has heard Fifth Circuit judges say they are "committed to providing reasoning," and in his view they do "shy away from one-liners." They used one-liners more when the opinions were precedential (before January 1, 1996), not just "persuasive" as they are today in the Fifth Circuit. The court does make an effort to provide reasons "understandable to the parties."

5. One problem he does have is with the standards for publication. But he "sees no ill effects" of citability, and he favors a rule allowing citation.

6. What does he think of the 62-out-of-62 vote of federal defenders in the Ninth Circuit? A long silence. Then, "very interesting"; "maybe something else is going on there"; "they are entitled to their opinion."

7. Vote: Allow.

e. Defender V-E, January 14, 2005

1. He does not cite unpublished opinions. He does think they should be citable, but would prefer that there not be two classes of opinions at all.

---

106. Since this interview, all unpublished Eleventh Circuit opinions issued on or after April 18, 2005, have been made available online, at http://www.ca11.uscourts.gov/opinions/indexunpub.php.

2. Is researching the opinions a significant burden, as claimed in the Ninth Circuit? "No. If the research is done by LEXIS or Westlaw, it is operationally not a burden for us."

3. One-liners: Does he think they are related to citability? He cannot reach that conclusion because "there were one-liners before cases were citable."

4. Equality: He does worry about "the pro se homeless guy" who has no access to law, or "the lawyer who has to pay his Westlaw bill."

5. Which rule would he prefer? He would prefer "that there not be two classes of decisions," but short of that, he thinks the opinions should be citable, though he does "worry about the man in the street."

6. Vote: Allow.

5. Sixth Circuit

a. Defender VI-A, January 6, 2005

1. The Sixth Circuit rule allows citation of unpublished opinions, with the opinion "attached," and he does cite them, maybe once in every ten briefs.

2. Is there a significant burden of research in dealing with these opinions? No; "they pop up on Westlaw." Recently the circuit has put them online at its web page, so he is reading more of them, and skipping them sometimes.

3. Does the Sixth Circuit issue one-line dispositions? "Very rarely."

4. Would he favor or not favor a rule requiring citability? He "would generally favor" it. "It irks me that the court can decide a case without precedential value."

5. Can he think of any other ill effects from citability? No; such effects "are not experienced in the Sixth Circuit." The issue is "not a huge deal" there; it does not come up at their conferences, for example.

6. Vote: Allow.

b. Defender VI-B, January 6, 2005

1. Yes, he has "attached" unpublished opinions, but rarely—not in the past two years. The opinions used to be hard to get hold of, but not any more; "we are in the electronic age," and that problem is "minimized."

2. Does having to research these opinions impose a significant burden of research? "Well, I spend a lot of time on Westlaw, and they are just part of the search. You read the case and don't think about whether it's published or not."

3. What does he think of the argument that the opinions are not good enough to be citable? "That is not the case."

4. Does he favor being able to cite the opinions? "Well, I've never known anything different."

5. Does he observe any bad effects from the opinions' being citable? "No, not really."

6. Vote: Allow.

c. Defender VI-C, January 6, 2005

1. They cite unpublished cases "once in every five briefs, probably."

2. "I kind of like being able to use these cases." In the Sixth Circuit, an unpublished opinion can conflict with a published one, and the court in a published opinion does not have to follow an unpublished one, even though the rule says it's "precedential." Citation of the unpublished opinions helps.

3. "I've never understood how they decide what opinions to publish. There's no rhyme or reason" to it. And you do not get en banc rehearing in the Sixth Circuit based on conflict between published and unpublished opinions, so the unpublished opinion suffers. "It's so unfair."

4. Research burden? He would do the research anyway, even if he could not cite the opinions. "[T]he cases just pop up on Westlaw."

5. Vote: Allow.

d. Defender VI-D, January 6, 2005

1. He does cite unpublished opinions of the Sixth Circuit, but "not very frequently"—probably less than one in three years.

   a. "It's a pain to do so." You have to attach the opinion, drop a footnote about it, "sprinkle holy water on it," and so forth. But he does not see the problem: "You do it where it will help." "Why have the opinions at all, if they're not citable? If it's a court decision, it should have some weight."

   b. "I would think the court would have an interest in developing a body of law—to provide guidance, promote public confidence in the process, provide openness, give the public assurance that precedent will be followed, engender public trust."

2. "The panel shouldn't have control over whether an opinion is published or not"; it allows them to act "at whim." He asks whether there are "any guidelines that courts must follow" in deciding whether to publish.

3. Research burden? "I come back to, Why even put it in writing if I can't cite it?" He finds "no crushing burden on the parties . . . but maybe because of my deficiencies as a researcher." One-liners? The Sixth Circuit "rarely" decides cases by one-line dispositions.

4. Does he know of any other ill effects from citability in the Sixth Circuit? "No."

5. I tell him about unanimous opposition in comments filed by Ninth Circuit defenders. He is surprised: "The Ninth, of all circuits!"

6. Vote: Allow.

e. Defender VI-E, January 7, 2005

1. In his office they cite unpublished opinions, but rarely—every ten briefs, or less often. You have to attach a copy of the opinion, and it "carries no weight."

2. Research burden? Happily, they have "research lawyers" to do the briefs.

3. Does he observe any ill effects from citability? "No—there's no downside to it; you don't have to cite them."

4. Would he favor citability, or not? "I'd favor it the way it is now."

5. Vote: Allow.

f. Defender VI-F, January 7, 2005

1. He complains (as others have) that under Sixth Circuit procedure you have to "attach" the unpublished opinion you are citing, so the briefs "have appendices loaded with opinions." This makes little sense, as law clerks can download the opinions easily from Westlaw, LEXIS, and other electronic sources.

2. He cannot figure out "what drives an opinion to publication." Recently he had a habeas case he thought was worthy of Supreme Court review, but it came down unpublished, probably killing its chances. There is "no rhyme or reason to it"; this is a feeling "very broadly shared," he says.

3. Should unpublished opinions be citable? "Absolutely, unquestionably." They are "almost as accessible" as "published" opinions, and he has "no problem with making them citable." "Why have the opinion in the first place?

So what if it's bad prose?" Publication allows for "development of the law"; non-publication "has detrimental impact." "If an opinion is there, why isn't it published?"

4. I tell him about the position taken by federal defenders in the Ninth Circuit; he is surprised, and asks what their reasons are.

a. I mention the asserted burden of researching the unpublished opinions. He says: "We do it anyway." In using LEXIS or Westlaw he "never puts in a limitation to published opinions." It is "not a big burden."

b. I note the argument that courts will move to one-line opinions. He says, "That's a lazy way out; if that's so, why are you a judge?" One-liners in the Sixth Circuit are "rarest of rare"; but sometime there are half-page or one-page orders, which are "sufficient to inform the parties," he says.

5. Should the unpublished opinions be citable? His reply: "Very much so. So what if it's poor prose?" But he notes that most Sixth Circuit opinions in fact are "written quite well." "Are they masterpieces? No. But let it all come out."

6. I ask his reaction to the 62-out-of-62 opposition by federal public defenders in the Ninth Circuit in the FRAP 32.1 proceeding. He is surprised, says, "it sounds like marching orders."

7. Vote: Allow.

6. Eighth Circuit

a. Defender VIII-A, January 5, 2005

1. He cites unpublished opinions "maybe twice in twelve briefs." Under the Eighth Circuit rule citation is "not favored," but is "fine" to do; "you don't get in trouble." "If facts are on all fours, why not cite" the case? "Why change the rule? It is working fine. Why wouldn't we want to cite whatever is out there on point?"

2. I tell him about the position of the Ninth Circuit defenders and particularly the asserted burden of additional research. He replies: "I don't view it that way." He does "an undifferentiated search" in Westlaw "to see what there is to use." I ask whether this increases the research burden: "Not enough to support the conclusion" of the Ninth Circuit public defenders, he says.

3. Effect of citability on quality of opinions: The unpublished opinions of the Eighth Circuit sometimes have "terse and concise legal analysis," and they are "generally not as long" as the published opinions, but in general they are "not so bad," he says.

4. Does he see any ill effects from citability? "No." To the contrary, "we are secure in knowing we can cite what there is"; there is "greater uniformity and security in being able to cite the cases." It is rare that he is "not outraged by what the police or the lower courts have done," so in his view "there are few cases in which there's nothing there."

5. Vote: Allow.

b. Defender VIII-B, January 5, 2005

1. She considers that citation for persuasive value is "really disfavored" under the Eighth Circuit rule and does not do it herself. Unpublished cases generally "are not favorable to the defense," she says.

2. Research burden: The cases "pop up in Westlaw." Sometimes she tries to exclude them. On the whole "it does add to the research burden," she says, but then, "yes and no."

3. Effect on quality of opinions: Generally she sides with Judge Kozinski: "If the court's reasoning is shoddy, it's embarrassing to have it be a precedent, and she doesn't want it to be citable." On the other hand, if the opinions were citable, they might not be so shoddy, and that would be "wonderful." It is a question of chicken-and-egg.

4. It "irks me" that opinions cannot be cited. She agrees with Judge Arnold that "precedent should mean something." It is a clash of principle and practicality.

5. Citation of unpublished opinions in the Eighth Circuit "doesn't happen a lot; it's fairly rare." Would she prefer a rule that banned it? Yes.

6. Vote: Prohibit.

c. Defender VIII-C, January 6, 2005

1. He understands that in the Eighth Circuit "we are not supposed to" cite unpublished opinions, and he cannot recall when he has cited one.

2. Do the unpublished opinions require, or would they require, additional research? No, because he and his colleagues "always read" the unpublished opinions as they come out; and "Westlaw will pull them up anyway."

3. Quality of opinions: I tell him about the argument that unpublished opinions, if citable, will drain judicial resources away from published opinions. He concedes that unpublished opinions in the Eighth Circuit are "pretty brief," and if they could be cited "judges might have to put more effort into them." This is "a possible downside" of citability, he says.

4. But he would like ability to cite the opinions. He favors citability, and is not in favor of a ban as in the Ninth Circuit. "Why have opinions, if they can't be cited," he asks.

5. Vote: Allow.

d. Defender VIII-D, January 10, 2005

1. "We can cite unpublished opinions under the Eighth Circuit rule," but it happens just "occasionally." And "you don't see unpublished cases cited much in Eighth Circuit opinions," he adds.

2. Do you research the unpublished cases? "Oh, yes, absolutely." Westlaw "brings up both published and unpublished opinions," and "whenever I'm searching, I look through both. I would do that even if the rule prohibited citation." So he does not worry about additional research.

3. What about the claim that judges have to spend more time making the opinions presentable for citation? "You'd have to ask the judges." He doubts, however, that any judges would admit that their opinions are not presentable, even though not citable. I tell him about Judge Kozinski's "bad sausage" claim;[107] he is surprised.

4. One-line dispositions? The Eighth Circuit "almost never" does that.

5. In his view, the present Eighth Circuit rule "works just fine." The court is not required to follow the unpublished cases, even though they are citable. The cases are "in the public domain" and should be citable. He would favor the Eighth Circuit rule.

6. I tell him about the unanimous opposition in comments by the Ninth Circuit federal defenders. He responds, "Really? That kind of surprises me," as the Ninth Circuit is "generally pretty good" for criminal defendants (relatively speaking).

7. For the Eighth Circuit, he sees no problem with the existing rule. The Eighth Circuit rule, after all, significantly limits citability. Comparing it with the Ninth Circuit rule, he would "favor our [Eighth Circuit] rule." He sees "nothing to be afraid of." "It's a case, it's been decided, it applied the law. If the decision was bad, explain why. It is [citable] under the Eighth Circuit rule only when no published case will do as well." We are talking only about "a small class of cases," in which "we need help." And "that's what we do; we practice law."

8. Vote: Allow.

---

107. *See supra* note 97.

e. Defender VIII-E, January 21, 2005

1. "I hardly ever cite them," and the U.S. Attorney does not either; the unseating of the late Judge Arnold's *Anastasoff* decision[108] "conditions us away from them."

2. Research burden: "I do read them; they don't say very much."

3. Unpublished opinions are "not an issue in the Eighth Circuit," especially now, in the face of *Booker*.[109]

4. Would he favor a rule that allows citation, or a prohibition? "I would go with Judge Arnold."

5. Vote: Allow.

7. Tenth Circuit

a. Defender X-A, January 2, 2005

1. He cites unpublished opinions "maybe three to four times a year," out of twenty-five to thirty briefs. "Sometimes they're discussed even in oral argument; but the court won't necessarily follow an unpublished opinion," because it is only persuasive, not precedential.

2. He questions how decisions to publish are made. The Tenth Circuit sometimes puts out as unpublished an opinion that should be published. This hurts his clients, on balance, and lets bad rulings get by.

3. Research: He reads all the circuit's unpublished opinions; you can do that in the Tenth Circuit, but not in the Ninth, he assumes. In research, "the cases come up on Westlaw," so the "burden doesn't bother" him. Defenders and Government both cite the opinions, so "it's more work for both sides."

4. He does not like the existence of unpublished opinions. If opinions are unpublished, "judges are more willing to compromise their legal analysis" and "hide the ball"; on balance, this is bad for defendants. Allowing citation goes to "erase the distinction" between published and unpublished, and thus makes defendants better off.

5. Would he prefer banning citation? He "kind of likes the way the rule is now" in the Tenth Circuit. It is "an appropriate compromise."

6. Vote: Allow.

---

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

109. United States v. Booker, 125 S.Ct. 738 (2005).

b. Defender X-B, January 5, 2005

1. They do not do it much, but they do cite unpublished opinions "if to our benefit." "The Government seems to do it more," because "it helps the Government more."

2. Research: She thinks the unpublished opinions "probably" increase the time she spends on research, but she cannot say by how much.

3. One-line dispositions: There are none in the Tenth Circuit.

4. On balance, she would prefer that the opinions not be citable.

5. Vote: Prohibit.

c. Defender X-C, January 5, 2005

1. "We do cite them"—maybe in "every three briefs," and generally "only if recent." Under their rule this is done for persuasive value, when they cannot find a published opinion that serves as well.

2. I ask what she thinks of the burden of additional research feared by defenders in the Ninth Circuit. She is surprised. "Westlaw will bring it up," so this claim is "not true," in her opinion.

3. Does she favor citability? Yes. "The court will pay attention to [the opinion] anyway," even if it is not published, "so it's better to be able to take it on."

4. I tell her about the unanimous opposition to FRAP 32.1 in comments by defenders in the Ninth Circuit. She is very surprised. She repeats, "Many oppose?," and I say, "All oppose."

5. Vote: Allow.

d. Defender X-D, January 2, 2005

1. She "definitely" does cite unpublished opinions; she does so "routinely" under the Tenth Circuit rule—maybe in every four to five briefs. She has "never been spanked" for going beyond the limits of the rule.

2. What about the argument that you have to spend more time doing research? She reacts quite negatively: "That doesn't bother me at all. I always do the research; that's part of my job."

3. I tell her that federal defenders in the Ninth Circuit are 62-out-of-62 against the proposed rule. She is amazed: "In the Tenth Circuit nothing would be unanimous like that," she says. I suggest there may have been

some orders from supervisors involved, and she says, "In the Tenth Circuit, even the supervisors wouldn't be unanimous like that."

4. Does she favor citability? She has "mixed feelings." On the one hand, "this is the computer age, and it's almost silly to say that there's such a thing as an unpublished opinion." On other hand, "I don't like to be hosed by a bad precedent." On balance, she likes the Tenth Circuit's rule allowing citation: "I can live with the Tenth Circuit's rule," but "it doesn't matter that much to us; it's not a big deal."

5.Vote: Allow.

8. Eleventh Circuit

a. Defender XI-A, March 17, 2004, and January 14, 2005

1. The unpublished opinions of the Eleventh Circuit may be cited for "persuasive" value, but [as of March 2004] still are not online in Westlaw or elsewhere.[110] So it is "fairly rare" for the opinions to be cited; he cites them in maybe 5% of his cases. It is done more by the Government, since they have all the opinions. (Defenders in this office "have stopped trying to keep up" and "just ignore" the stack of printed-on-paper unpublished opinions, "which is a little scary, because there may be something out there.")

2. Research? It is "too daunting" to try to research them, since they're not available electronically. So if unpublished opinions were not citable, it would make "no difference" to them at present (as of March 2004), since they ignore them anyway.

3. He sees no dire effects of citability now, and does not have an opinion as to whether citability is a good thing.

4. Vote: No Answer.

b. Defender XI-B, March 15, 2004, and January 13, 2005

1. The opinions are still not online in the Eleventh Circuit, but he cites them, maybe once in every five to ten briefs.

2. Does citability of the opinions increase the amount of research required? No. The opinions "come up in Westlaw and other computerized data bases," so "it's not a question of having to read through all the unpublished

110. *But see supra* note 106 (pointing to the recent online availability of the Eleventh Circuit's unpublished opinions).

ones." A search "will produce only ten to fifteen to twenty unpublished opinions." Is this a significant burden? "No; I have never considered it as a problem. Maybe it is if you're writing a treatise, but for the practitioner it's not much of an issue." If he could not cite the unpublished opinions, that would reduce his research time "a little bit," but probably if he found an unpublished case in point he'd read it anyway.

3. What about the concern that the judges would have to do too much work in order to make the opinions presentable? "Only the judges know how much work they have." But in the Eleventh Circuit, the unpublished opinions are "not throwaways." They are "pretty good."

4. Would the court issue one-line dispositions instead? "Eleventh Circuit opinions are not one-liners." True, there are some "pretty short, one- or two-paragraph opinions, but sometimes that's because we present one-issue briefs." The Eleventh Circuit judges "view themselves as fairly scholarly" and decide cases that way.

5. I tell him about the 62-out-of-62 vote in the Ninth Circuit against citability. He says: "Well, the Ninth Circuit is more defense-oriented than the Eleventh, and maybe what happens there is the reverse of what happens in the Eleventh: defense attorneys want opinions uncitable because they are more likely to favor the defense. If I were in the Ninth Circuit, I would sign on to those letters, too."

6. Does he see any ill effects from citability? "Only in the Ninth, where more pro-defense opinions might get protected" if they remained uncitable, but not in the Eleventh. Similarly, whether he prefers a rule against citation would depend on which circuit he was in, the Eleventh or the Ninth.

7. Vote: No answer.

c. Defender XI-C, March 15, 2004, and January 13, 2005

1. Unpublished opinions of the Eleventh Circuit are not yet all online, and are not all in Westlaw, but she cites them in one out of three or four briefs, she estimates. They "can be helpful when right in point." "You have to look for whatever you can find."

2. How much time would she save if the opinions could not be cited? She "wouldn't save so much, because the opinions come up anyway in Westlaw searches." And she would research the cases anyway, citable or not. So "having unpublished opinions citable is not much of a research burden," to the extent that they are accessible in Westlaw. After consulting colleagues she reported further (in March 2004) that "it would not be particularly

onerous" to have all the Eleventh Circuit opinions citable. "It's part of the research we do."

3. What about the argument that judges would have to spend too much time making their unpublished opinions presentable? She says unpublished opinions of the Eleventh Circuit often are short on analysis (despite being citable).

4. One-line dispositions? She thinks these are fewer in the Eleventh Circuit than in the past—that the court tries more than in the past to give reasons for its decisions. She concedes that if unpublished opinions were not citable, the court might give even more reasons. And if the court had to "publish" more opinions, it might issue more per curiams.

5. Vote: No answer.

d. Defender XI-D, January 12, 2005

1. He cites unpublished opinions "at least twice a year." He "take[s] advantage of the opinions in practice, cite[s] them when helpful."

2. Is there an increased research burden? "None. So far as finding the opinions is concerned, [most of them] are available in Westlaw and just pop up with published opinions. So there is no additional time." And once he finds a relevant opinion, he treats it the same as published opinions, so there is "no additional time" required.

3. I ask if he thinks courts have to spend too much time on the unpublished opinions since they are citable. He gives the Eleventh Circuit "a pat on the back": They are "not eloquent, but they put out a relatively decent opinion in almost all cases."

4. One-line dispositions? They are "very rare" in the Eleventh Circuit. In his years there, he cannot think of one. The shortest opinion has been "a paragraph or two."

5. I tell him about unanimous opposition from federal defenders in Ninth Circuit. He laughs and says he does not know what the position of his office would be, as an office.

6. Does he see any ill effects from citability? "Can't think of any."

7. Would he favor a ban on citation? With Eleventh Circuit opinions not yet online, having them citable favors the Government, which has a "brief tank," with all opinions in one place, and gets the benefit of easier access. But the Government is not using them in everyday practice, so he has seen no harm.

8. Vote: No answer.

9. D.C. Circuit

a. Defender DC-A, January 21, 2005

1. The D.C. Circuit adopted its rule allowing citability as of January 1, 2002. Defender DC-A sees "no difference" since the rule was changed. He does not know of any unpublished case their office has cited; they do not do it "regularly." He does not think the D.C. Circuit a representative circuit for my purposes, either in numbers or content of cases.

2. Do they research the unpublished opinions? Yes, but "it's much easier here than elsewhere," since there is only one district and "not very many" unpublished opinions.

3. Are there one-line dispositions in the D.C. Circuit? "Very few."

4. In sum, he sees "no impact since the rule changed; it's not an issue for us."

5. As a former clerk in the Ninth Circuit, he "would agree with my colleagues there that the [proposed rule] is probably a bad thing" because "the unpublished opinions get less attention" from the judges.

6. Vote: Prohibit.

D. Salient Points from Interviews

From the foregoing summaries of the thirty-six interviews, a number of points seem to me to stand out.

1. Impact of the Proposed Rule

In contrast to the fears expressed by the Ninth Circuit federal defenders, citability is "not a huge deal"[111] in the circuits in which it exists. It does not come up at conferences in the Sixth Circuit[112] and has not occasioned much discussion or controversy in the First Circuit.[113] "I am surprised that it's such a big issue" in the Ninth Circuit, said one defender from the First Circuit.[114] Unpublished opinions are "not an issue in the Eighth Circuit,"[115] and "[n]o

111. Defender VI-A.
112. Defender IV-B.
113. Defender I-A.
114. *Id.*
115. Defender VIII-E.

one complains about the system in the Fifth Circuit."[116] A number of defenders expressed satisfaction with the existing arrangement of limited citability under their current circuit rule. "I can live with the Tenth Circuit's rule";[117] the present Eighth Circuit rule "works just fine";[118] and so on. The only arguable difficulty arising from citability seems to have resulted from the Eleventh Circuit's delay in putting its unpublished opinions online,[119] which it finally did in April 2005.[120] Apart from that, in all thirty-six interviews not one defender indicated that citation of unpublished opinions was a problem or an issue in his circuit.

2. Frequency of Citation

So far as the amount and frequency of citation are concerned, unpublished cases are cited in all the citable jurisdictions. The frequency of citation varies widely, both between and within circuits. Estimates included one citation in eight-to-ten briefs in the Third Circuit[121] and one in five briefs in the Fifth (where citation appears to be the most common).[122] Whatever the frequency, no defender in any circuit suggested that there was too much citation of unpublished opinions in his or her circuit.

3. Research Burden

The most striking finding of this survey involves the key claim of rule opponents that citability of unpublished opinions would produce a heavy burden of additional research for attorneys.[123] The survey rejects that claim.

---

116. Defender V-C.

117. Defender X-D.

118. Defender VIII-D.

119. *See, e.g.*, Defender XI-A (saying it was "too daunting" to try to research unpublished opinions because they were not available electronically at the time).

120. *Supra* note 106.

121. Defender III-D.

122. Defender V-B.

123. *See, e.g.*, AP-172, *supra* note 98, at 1 (claiming that time spent on research would "exponentially increase"); Public Comment 03-AP-240, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 2, 2004), *available at* Index, *supra* note 28 (claiming that the research burden would be "vastly expanded"); Public Comment 03-AP-390, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 13, 2004), *available at* Index, *supra* note 28 ("a huge increase"); Public Comment 03-AP-385, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 13, 2004), *available at* Index, *supra* note 28 ("[c]ombing through a five-fold

Asked if they regularly research unpublished opinions, virtually all the defenders from citable circuits stated—many of them emphatically—that they do. No one complained of the burden or said it was excessive (or even noticeable, before I pointed it out). Numerous defenders emphasized the role of computers and the resulting fact that "legal research isn't what it used to be."[124] Many explained that in conducting research the unpublished cases "just pop up on Westlaw," along with the published cases.[125] Hence, any additional research burden is insignificant or "minimal," the defenders widely agreed.[126] One figured the additional burden to be 2.5% of his time.[127] One defender suggested that "the people complaining in the Ninth Circuit must be scared of computer research."[128]

A few defenders did say, hypothetically, that if they were prohibited from citing unpublished cases, and if they did not research them anyhow (as all who were asked said they would), then, "logically," their research time would be less than it is now.[129] Virtually all those defenders added, however, that in their own practice they felt no significant burden based on researching unpublished cases. A few defenders thought there was, or "probably" was, an increase in their research time, and one called it "a good bit"; he quickly added, though, that "the cases come up naturally."[130] One defender did opine that the lesser burden might be "fairly significant" for the Ninth Circuit.[131]

Set out in the footnote are nutshell observations, excerpted from the interview summaries, encapsulating all the statements by the interviewed defenders on the question of research burden.[132] A reading of either these

---

increase.").

124. *E.g.*, Defender IV-C.

125. *E.g.*, Defender III-A.

126. *E.g.*, Defender IV-C.

127. Defender V-C.

128. Defender V-B.

129. Defenders IV-A & IV-C.

130. Defender III-B.

131. Defender IV-A.

132. *See* Defender I-A (supposing a ban on citation of unpublished opinions would "decrease . . . research burden," but seeing "no impact on the way I practice"); Defender I-B (observing that citability does not require significant additional research time: "Don't [the cases] come up in LEXIS?" "[W]e do a lot of research anyhow, and the more cases that are available, the better." "The implications are troubling. This is federal tax money—do your job."); *see* Defender III-A (stating that the unpublished opinions do not add much to research time because "they come up on Westlaw"); Defender III-B (noting that although it does increase research time "a good bit," the cases "come up naturally" in doing research; "I should think public defenders would want to cite these opinions"); Defender III-C (noting that the opinions "show up on Westlaw . . . . The burden is not that great"); Defender III-D ("Research is not a

problem; it's all online."); Defender IV-A (stating that the fear of an increased research burden "does not ring true. We do thorough research regardless." Assuming that in the Ninth Circuit they do not research unpublished cases, "it would be less time-consuming; no question." But "we have computers." The lesser degree of work may be "fairly significant" in the Ninth Circuit, though.); Defender IV-B ("It's all done by computer anyway"; "it's not necessarily more work"; "we have not found it to be a problem."); Defender IV-C ("[I]t would logically follow that there's more work to do"; "[b]ut we now have computers, so it's not like it used to be"; increase in research time is "minimal."); Defender IV-D ("Now [we] can do it with Westlaw." "Research isn't what it used to be."); Defender IV-E ("As an advocate, I always use whatever I can."); Defender V-A (noting that unpublished opinions don't "add any burden at all." They used to, before computers, but now, "I don't really find it to be a burden." Cases "just come up."); Defender V-B (failing to see "any added burden." The people complaining in the Ninth Circuit "must be scared of computer research." The claim of an undue research burden is "bullshit."); Defender V-C (stating that researching unpublished opinions produces no more burden than researching cases from other circuits. He estimates unpublished opinions are cited in five percent of cases; the time saved by banning citation might be half of that, but they would look at the cases regardless); Defender V-D (noting that with computer-aided techniques, the research burden is "not that heavy"); Defender V-E (stating that the research burden is not significant: "If the research is done by LEXIS or Westlaw, it is operationally not a burden for us"); Defender VI-A (explaining that researching unpublished opinions causes no significant burden because the cases "pop up on Westlaw"); Defender VI-B ("[T]hey are just part of the search."); Defender VI-C (explaining that he would do the research anyway, even if he could not cite the cases; they "just pop up on Westlaw"); Defender VI-D ("[W]hy even put [the case] in writing, if I can't cite it?" There is "no crushing burden on the parties."); Defender VI-E (noting that the office has "research lawyers" to handle appeals, so he cannot say whether the research burden would increase); Defender VI-F ("We do it [research] anyway." "[N]ot a big burden." He never limits electronic searches to published opinions.); Defender VIII-A ("I don't view it that way" [like Ninth Circuit defenders]. Any increase in research burden is "[n]ot enough to support the conclusion" of the Ninth Circuit federal defenders.); Defender VIII-B ("[I]t does add to research burden," but "yes and no."); Defender VIII-C (stating that no additional research is required; they "always read" the unpublished opinions as they come out, and "Westlaw will pull them up anyway"); Defender VIII-D (explaining that Westlaw brings up both classes of opinions, published and unpublished; he looks through both, and "would do that even if the rule prohibited citation." So he does not fear additional research.); Defender VIII-E ("I do read them; they don't say very much."); Defender X-A ("[T]he cases come up on Westlaw," so the "burden doesn't bother" him. "[I]t's more work for both sides."); Defender X-B (noting that unpublished opinions "probably" increase time she spends on research, but she cannot say by how much); Defender X-C ("Westlaw will bring it up," so alleged burden is "not true."); Defender X-D (asserting that the research burden "doesn't bother me at all. I always do the research; that's part of my job."); Defender XI-A (explaining that the additional cases would make "no difference" to them in the Eleventh Circuit, since Eleventh Circuit opinions at that time were not yet online. It's "too daunting" to research cases not online.); Defender XI-B (stating that allowing citation to unpublished opinions would not increase required research time. Cases come up in Westlaw, so "it's not a question of having to read through all the unpublished ones." "[N]ever considered it a problem."); Defender XI-C ("[N]ot much of a research burden," to the extent that cases are accessible in Westlaw. She "wouldn't save so much" time if cases were not citable; she'd research them anyway.); Defender XI-D ("[N]o additional time" required. Cases "just pop up with the published opinions."); Defender DC-A (explaining that in the D.C. Circuit there are "not very many" unpublished opinions, so it is "easier . . . than elsewhere").

capsules or the full summaries makes it clear, in my view: (a) that the federal public defenders in the nine citable circuits willingly and regularly research unpublished opinions; (b) that they do so largely with the aid of computers, rather than by old-style research; (c) that they do not find that task to add any significant time to their research, and (d) that they view such research as an integral part of their job in representing their clients.

4. Impact on Opinion Quality

While they naturally could not say first-hand whether citability forces judges to spend more time on their opinions,[133] the defenders were split on the quality of the unpublished opinions in their circuits. Many praised that quality[134]—and did so without suggesting, as the Ninth Circuit defenders would have it, that if the opinions are that good, then the judges must be spending too much time on them.[135] A few defenders thought less of the unpublished opinions.[136] But they did not necessarily think it followed that citation should be prohibited; they were divided on whether more judicial time invested in the unpublished opinions would be a good or a bad thing.[137] Only one defender expressed agreement with Judge Kozinski that "shoddy" reasoning is "embarrassing to have [as] . . . precedent" and therefore should not be citable; even this defender quickly added, however, that if the opinions were citable they might not be so shoddy, which would be "wonderful."[138]

One defender opined, without explanation, that the judges' workload "will increase dramatically if the opinions are citable," though adding that that "would not be a bad thing."[139] Only one defender agreed with the Ninth Circuit

---

133. *See* Defender VIII-D ("You'd have to ask the judges."); Defender XI-B ("Only judges know . . . .").

134. *See* Defender VI-B (denying that opinions are not good enough to cite); Defender VIII-A ("[N]ot so bad."); Defender XI-D ("[P]retty good"); Defender XI-D (noting that the Eleventh Circuit deserves "a pat on back"); Defender IV-B ("[P]retty clean.").

135. *Supra* note 99 and accompanying text (arguing that judges would have to spend more time on unpublished opinions).

136. *E.g.*, Defender XI-C (noting that unpublished opinions are often short on analysis).

137. *See* Defender VIII-C (noting that although he favors citability, the claim on judicial resources represents "a possible downside"); Defender III-A (responding that more time would be a "good result," and worries that less time would result in less effort); Defender IV-A (opining that the workload will "increase dramatically" with citability, but she could equally argue this would not be a bad thing).

138. Defender VIII-B.

139. Defender IV-A.

view that more judges' time spent on unpublished opinions would not be a good thing, but rather a "possible downside" of citability.[140]

5. One-line Dispositions

Has it proven true that judges react to citability of unpublished opinions by replacing those opinions, to some extent, with one-line dispositions? The defenders generally defended their own circuits against the one-liner charge,[141] and in any event did not attribute one-line dispositions to citability.[142] They reported seeing substantial resistance to one-line dispositions and no evidence that those dispositions had grown at all, much less grown as a result of citability.[143]

At bottom, the idea that judges would react to citability by denying litigants any opinions at all appears to have little support in the citable circuits—as well as being inconsistent, as at least one judge[144] and one federal defender[145] suggested, with doing one's job as a judge.

6. Precedential vs. Persuasive

Although Rule 32.1 would allow a circuit to limit citability of its unpublished opinions to citation for "persuasive" value,[146] one Ninth Circuit

---

140. Defender VIII-C.

141. *See* Defender XI-B (defending the Eleventh Circuit); Defender XI-C (same); Defender XI-D (same); Defender VI-A (defending the Sixth Circuit); Defender IV-B (defending the Fourth Circuit); Defender V-D (defending the Fifth Circuit).

142. *See* Defender I-A; Defender IV-D (complaining about a one-line disposition he encountered in the Eleventh Circuit, without suggesting this was typical of the Eleventh Circuit or related to citability); *see also* AO Study, *infra* notes 190–91, at 1 (finding no correlation between one-line dispositions and changes in the citability rule).

143. *See* Hearing Transcript, *supra* note 7, at 4 (testimony of former Chief Judge Edward Becker) (noting that his Third Circuit had ended one-line dispositions); Defender XI-B (noting that the Eleventh Circuit uses either no one-line dispositions or fewer than in the past); Defender XI-C (same); Defender XI-D (same); Defender VI-A (stating one-line dispositions very rare in Sixth Circuit); Defender IV-B ("[T]he exception, not the rule."); Defender V-D ("[Fifth Circuit] committed to providing reasoning.").

144. *See* Hearing Transcript, *supra* note 7, at 5 (Judge Becker) ("We owe more to our colleagues at the bar, we owe more to our profession.").

145. *See* Defender VI-F ("That's a lazy way out; if that's so, why are you a judge?"); *see also* Defender IV-E (seeing the threat of one-line dispositions as "just an excuse").

146. *See* Alito 2005 Memorandum, *supra* note 2, at 3 ("[Rule 32.1] says nothing about what effect a court must give to one of its unpublished opinions.").

defender argues that citation as "precedent" will inevitably follow, "whether or not the new rule expressly states as much."[147] None of the thirty-six defenders who were interviewed reported any such experience under an existing citability rule.[148] Indeed, at least three defenders complained that the opinions were not citable for precedential value.[149]

7. Delay and Other Adverse Effects

Not one of the thirty-six defenders mentioned delay, or slower dispositions, as a consequence of citability. Almost no one, when asked whether they saw any adverse effects from their existing circuit rule allowing citation, answered in the affirmative.[150]

8. Ninth Circuit Strategy

A number of defenders from citable circuits registered surprise when told about the uniformly anti-citation position of their counterparts in the Ninth Circuit. Their typical reaction was one word: "Really?"[151] A few of the defenders, however, came up—independently—with a common explanation, one not mentioned in any of the sixty-two comments filed in the FRAP 32.1 proceeding by defenders from the Ninth Circuit. The explanation was strategic. As one Eleventh Circuit defender put it: "The Ninth Circuit is more defense-oriented than the Eleventh, and maybe . . . defense attorneys want opinions uncitable because they are more likely to favor the defense. If I were in the Ninth Circuit, I would sign on to those letters, too."[152]

---

147. Public Comment 03-AP-413, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 15, 2004), *available at* Index, *supra* note 28.

148. *See, e.g.*, Defender V-D (explaining his experience in the Fifth Circuit has been that it is understood that the cases are not precedential, and that lawyers can argue against them).

149. *See* Defender IV-A (preferring that unpublished opinions be binding precedent); Defender VI-A ("It irks that the court can decide cases without precedential value."); Defender VI-D ("If it's a court decision, it should have some weight.").

150. *But see* Defender III-B (suggesting the weight to be given a cited case distracts from the real issues in the case); *but see also* Defender IV-B (joking that "the government can cite them, too").

151. Defender IV-B; *see also* Defender IV-E (recording a Southern defender's response: "Sure enough?").

152. Defender XI-B; *see* Defender III-B (Ninth Circuit defenders "fear that the judges won't have the same nerve" if the opinion can be cited.). A federal public defender in the Ninth Circuit—promised anonymity—explained to me: "Sometimes justice is done in unpublished opinions." Consistent with this theory is a published e-mail from a Ninth Circuit judge to a

9. Fairness

Many Ninth Circuit defenders argued in their FRAP 32.1 comments that citability of unpublished opinions is unfair to criminal defendants who are poor and therefore lack access to electronic databases such as LEXIS and Westlaw.[153] Some defenders from citable circuits stressed in reply that federal public defender offices—whose mission, of course, is to represent indigents[154]—have full access to both LEXIS and Westlaw.[155] One defender reasoned, "Admittedly, it hurts people who are pro se and don't have the right to counsel."[156] But because LEXIS and Westlaw "are available even in the Fifth Circuit law library, I don't buy the harm to the poor."[157] To be sure, "that doesn't help someone who's incarcerated, but people in jail are screwed anyway," he said.[158] One defender thought the opinions should be citable notwithstanding that he "worr[ied] about the pro se homeless guy," or the "lawyer who has to pay his Westlaw bill."[159] Another defender stated, "You go on the merits. If an opinion is there, it's there. . . . If it helps you, it helps you."[160]

10. Bottom Line: Citable or Not?

For this survey, as reported earlier, I initiated thirty-nine interviews and completed thirty-six—a high response rate of 92%. In each interview, I tried to get a bottom-line answer to the question, "Do you prefer allowing or prohibiting citation of unpublished opinions?" Given the vicissitudes of informal interviews—especially when the persons interviewed are lawyers—I

---

scholar, stating: "Some unpublished cases are covert efforts by rogue judges to smuggle a 'just' result past the en banc watchers and the Supremes." E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (April 27, 1999) (*quoted in* Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDIS. L.J. 67, 73 n.23 (2004)).

153. *E.g.*, Public Comment 03-AP-248, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Jan. 23, 2004), *available at* Index, *supra* note 28 ("Most indigent litigants do not have access to the computerized databases that provide unpublished opinions.").

154. *See supra* notes 85–86 (noting that public defenders are appointed and compensated to "represent defendants financially unable to retain counsel in federal criminal proceedings").

155. Public Comment 03-AP-446, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Feb. 13, 2004), *available at* Index, *supra* note 28.

156. Defender V-B.

157. Defender V-B.

158. Defender V-B.

159. Defender V-E.

160. Defender V-C.

did not always succeed. What I have, then, is a vote count with a rather large category of "no answer" responses. The votes of the thirty-six defenders aligned themselves as follows:

- Allow citation: 23 (64%);
- Prohibit citation: 4 (11%);
- No Answer: 9 (25%).

The sample used in this survey was a random one,[161] and its size appears sufficient.[162] The method of informal interviews makes it possible not just to count the votes, but also to weigh in each case the intensity, factual detail, and reasoning embodied in the defender's response. In this case, for example, the summaries disclose that of the nine responses recorded as "No Answer," at least six leaned distinctly in favor of citability.[163] The defenders' overall preference for citability thus appears overwhelming. Readers can make their own judgment based on the summaries.

E. Notice-and-Comment Rulemaking Revisited: Marching Orders and Letterheads

The interview responses of the citable-circuit defenders, in comparison with the FRAP 32.1 comments of the Ninth Circuit defenders, call for revisiting the subject of notice-and-comment rulemaking procedure.[164] One

---

161. The selection of defenders for interviewing turned on the happenstance of which office they worked in and who was called to the telephone. While I did choose the cities to call, it is not likely that different defenders' offices in different cities or districts would have systematically differing views about citation of unpublished opinions. In any event, I was aware of no such differing views. *See, e.g.*, RONALD CZAJA & JOHNNY BLAIR, DESIGNING SURVEYS: A GUIDE TO DECISIONS AND PROCEDURES 126 (2005) (defining random samples).

162. To judge the sample's size, the thirty-six interviews conducted with federal public defenders in citable circuits must be compared with the total population of such defenders in those circuits. The nation's total population of federal defenders (both Defenders and Assistant Defenders) numbers about 1,077. Lidz Interview, *supra* note 87. Of this number, defenders in no-citation circuits—the Second, Seventh, and Ninth (the Federal Circuit has no defenders)—number, respectively, about 68, 56, and 283, for a total of about 407. *Id.* That leaves about 670 defenders in the nine citable circuits. The sample of 36 defenders in citable circuits who were interviewed in this survey thus represents about five percent of the relevant population of 670. Several aspects of this survey—such as the high response rate and the ease in identifying the relevant population—tend to reduce the needed sample size. *See* CZAJA & BLAIR, *supra* note 161, at 142 ("Sample size is a function of a number of things."). The size here appears sufficient in any event: "In most sample surveys, . . . the size of the sample is less than 5% of the total population." *Id.* at 143.

163. Defenders III-A, IV-B, IV-C, XI-B, XI-C, and XI-D.

164. *See supra* notes 24–59 and accompanying text (discussing the various advantages and disadvantages associated with notice-and-comment rulemaking).

naturally wonders why the responses from the two groups of defenders are so radically different: 62–0 opposing the rule among the Ninth Circuit defenders, 23–4–9 favoring the rule among the citable-circuit defenders. One likely answer is that the Ninth Circuit defenders have no experience with citation of unpublished opinions and naturally fear the unknown,[165] while the citable-circuit defenders are familiar with citability and know it holds no horrors. It seems unlikely, however, that this difference would run so deep as to produce unanimity among sixty-two able, independent, dedicated criminal lawyers, lawyers devoted to representing their clients and accustomed to challenging authority on a daily basis. Surely one would expect to find at least a few mavericks among the sixty-two federal defenders from the Ninth Circuit—or at least one, like Judge Tashima among the Ninth Circuit judges.[166]

A further answer is possible. When told of the 62-0 vote among the Ninth Circuit defenders, a Sixth Circuit defender suggested, "Sounds like marching orders."[167] Indeed it does. While the citable-circuit defenders appeared in almost all the interviews to be giving their sincere personal and individual opinions, some of the Ninth Circuit defenders, in preparing and filing their FRAP 32.1 comments, may have been obeying office policy.[168] Few other elections, at least outside of Central Asia, would produce a margin as monolithic as sixty-two to zero on an issue as contested as this one.[169]

Further evidence supporting the "marching orders" theory may be found in the stationery on which the Ninth Circuit defenders submitted their FRAP 32.1 comments. Of the sixty-two comments from defenders in the Ninth Circuit, forty-two were written on official letterheads of federal public defender offices.

---

165. *See, e.g.*, Judge Frank H. Easterbrook, Public Comment 03-AP-367, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 13, 2004), *available at* Index, *supra* note 28 ("Better the devil you know than the devil you don't.").

166. Judge A. Wallace Tashima, AP-288, *supra* note 40, at 1.

167. Defender VI-F.

168. The Federal Public Defender who sets the office policy may take that policy, in turn, from the Ninth Circuit judges. This process need not involve lobbying efforts applied to Federal Public Defenders by Ninth Circuit judges. It would be enough that the position of Ninth Circuit judges on Rule 32.1, and the intensity with which that position was held, were well known; that the federal defenders in the Ninth Circuit practice before the judges of the Ninth Circuit; that they presumably would like to maximize their chances of winning their appeals; and that many of the defenders harbor aspirations of promotion—or at least reappointment—within the Public Defender's office, or of promotion to the ranks of federal magistrates or judges or to other positions for which references from Ninth Circuit judges could be crucial.

169. The suggestion by the Federal Public Defender for Arizona that the absence of any of his attorneys from the FRAP 32.1 comments may have been due to a transition in office leadership, *supra* note 87, may suggest that in the Ninth Circuit the decision whether to comment indeed was made by the office, not the individual attorney.

Another eighteen comments were filed on the form provided by the Administrative Office of the Courts for submitting rulemaking comments by e-mail.[170] The remaining two comments were written on personal letterheads.[171] Use of the office letterhead would seem to imply, absent contrary indication, that the letter's author is commenting as an official, not as a private person. Use of the AO's e-mail form would seem to carry no such presumption; precisely for that reason, though, this form would benefit from an explicit statement as to whether the letter speaks for the person or the office. And personal letterheads would seem to imply, absent contrary indication, that the author writes as a private individual.

In the FRAP 32.1 proceeding, explicit indications of authorial role by Ninth Circuit federal defenders were rare. Of the sixty-two comments by such defenders, only five carried such indications.[172] All five of those stated that the views expressed were personal—though four of them were written nonetheless on Federal Public Defender office letterheads,[173] while the fifth was written on the AO form.[174] Two comments were written on personal letterheads, implying that their views were personal.[175]

Thus it seems that at least thirty-seven of the comments—the forty-two written on office letterheads, less the five that carried "personal" stipulations—should be read as expressing, at least to some extent, views of the Public Defender's office distinct from those of the commenting attorney as an individual. And it further seems fair to suggest that the defenders submitting those comments were doing so in response to office policy.

---

170. The address used with the AO form was: Rules_Support@ao.uscourts.com.

171. Public Comment 03-AP-162, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 22, 2004), *available at* Index, *supra* note 28; Public Comment 03-AP-171, Proposed Federal Rule of Appellate Procedure 32.1 (Jan. 23, 2004), *available at* Index, *supra* note 28.

172. Public Comment 03-AP-312, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 9, 2004) ("I write from these various perspectives, but solely in my personal capacity."); Public Comment 03-AP-124, Proposed Federal Rule of Appellate Procedure 32.1, at 1, (Jan. 6, 2004) ("The views that I express in this letter are personal and are not the views of the organization."); Public Comment 03-AP-355, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 12, 2004) ("I am writing in my personal capacity"); Public Comment 03-AP-390, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (opinions in this letter "do not necessarily reflect the opinions of the law firm [sic] with which I am associated" (writer is chief of capital habeas unit in federal public defender's office)); Public Comment 03-AP-384, Proposed Federal Rule of Appellate Procedure 32.1 (Feb. 13, 2004) ("I am writing in my personal capacity). All are available at Index, *supra* note 28.

173. AP-312, *supra* note 172; AP-124, *supra* note 172; AP-384, *supra* note 172; AP-390, *supra* note 172.

174. AP-355, *supra* note 172.

175. AP-162, *supra* note 171; AP-171, *supra* note 171.

It is an interesting question whether a public defender's office may appropriately have a policy that dictates to office attorneys the position they must take on a rulemaking issue such as FRAP 32.1.[176] On the one hand, citation of unpublished opinions does affect the office generally; so the office chief may have a legitimate interest in making policy decisions for the office on such matters, and in having no recorded dissents. On the other hand, there is the individual defender's duty of zealous representation of her client. The defender may feel that this duty calls for citing an unpublished case on particular facts where it may help the client—as several of the defenders interviewed said they did feel[177]—and may further feel that this duty to clients calls for the adoption of Rule 32.1, so that the defender will have the ability to cite an unpublished case when the client's need arises.[178] Moreover, there are benefits to be obtained by the bar, the public, and the rulemakers in not being denied the thoughtful views of sixty-two intelligent, knowledgeable, and otherwise-independent lawyers.

Regardless of whether a command-and-control policy on rulemaking comments by federal defenders is appropriate, it would seem that when such a policy exists, it ought to be disclosed. In an analogous context the Supreme Court has required disclosure.[179] In the absence of such disclosure, the profession, the public, and the rulemakers cannot know whose judgment the comment represents. The comments thus should state whether they represent office policy or the personal views of the writer. If the comments are written on an office letterhead without such a disclosure, they should be presumed to represent office policy only.[180]

---

176. *But see, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (determining that a public school teacher may not constitutionally be dismissed for writing a letter to a newspaper criticizing school board policies).

177. *See* Defender III-B (noting that her clients are "more likely to need" to cite the unpublished opinions); Defender XI-D (quoting the Eleventh Circuit defender stating that he "takes advantage of the opinions in practice [and] cites them when helpful").

178. *Cf.* Legal Services Corp. v. Velasquez, 531 U.S. 533, 545 (2001) (finding that a congressional ban on use of Legal Services Corp. funds to challenge welfare laws violates First Amendment as an attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts").

179. *Cf.* SUP. CT. R. 37.6 (requiring that amicus curiae briefs for nongovernmental entities disclose whether they were authored, in whole or in part, by counsel for a party, and identify anyone who made a "monetary contribution" to the preparation for or submission of the brief).

180. The five (of sixty two) filings on Rule 32.1 by Ninth Circuit defenders that did carry a stipulation of personal-or-official business struck an apparent contrast with filings on Rule 32.1 by three Justice Department officials, one from central Justice and two serving as Assistant U.S. attorneys, who filed comments opposing Rule 32.1. Public Comment 03-AP-164, Proposed Federal Rule of Appellate Procedure 32.1, at 2 (Jan. 21, 2004), *available at* Index, *supra* note 28, Public Comment 03-AP-330, Proposed Federal Rule of Appellate Procedure 32.1, at 1 (Feb. 9, 2004), *available at* Index, *supra* note 28; Public Comment 03-AP-322, Proposed Federal

Drafting such a rule might not be easy, but the Judicial Conference, and other federal agencies should consider doing so (with notice and comment, of course). The rule might simply require public officials who file comments in rulemaking proceedings to disclose whether the views they express are official or personal.[181]

IV. This Study in Context with the FJC and AO Studies

The empirical research conducted by the Federal Judicial Center and the Administrative Office of the Courts in response to the 2004 "remand" from the Standing Committee[182] has produced two studies, both received in 2005 by the Advisory Committee and the Standing Committee.[183] Without trying to summarize those studies fully, I will endeavor briefly to put them into context with this study.[184]

A. The AO Study of Case Disposition Times and Summary Dispositions

The Administrative Office of the U.S. Courts (AO) sought to test the claim that citability increases case disposition times, a major argument made against Rule 32.1.[185] To do this, the AO compared the median disposition times in citable circuits for two years before and after each circuit's dropping of its no-citation rule.[186] The results showed "little or no evidence that the adoption of a

---

Rule of Appellate Procedure 32.1, at 1 (Feb. 8, 2004), *available at* Index, *supra* note 28. None of these three used their office letterheads, and two explicitly stated, in addition, that they were expressing only their personal views.

181. *Cf.* Cuellar, *supra* note 27, at 25 (explaining that the limitation of his project is that "it does not directly differentiate between comments from individual members of the public who chose to send in comments with little prodding from organized interests . . . and those whose comment was generated as a result of interest group organizing"). The need for differentiation is greater here, where the second class of comments may be the result of not just "interest group organizing" but flat-out command by an employer.

182. *Supra* notes 9–18 and accompanying text.

183. *See* Alito 2005 Memorandum, *supra* note 2, at 8–13 (describing empirical research done at request of advisory committee).

184. This study was conceived and performed independently of the FJC and AO studies. The interviews for this study were essentially completed in January 2005, before I saw (or heard about) any results of the FJC or AO study.

185. Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, to Advisory Committee on Appellate Rules (Feb. 24, 2005) [hereinafter AO Study] (on file with the Washington and Lee Law Review); Alito 2005 Memorandum, *supra* note 2, at 12–13.

186. AO Study, *supra* note 185.

permissive citation policy impacts the median disposition time in either direction."[187]

The present study of course uses a different methodology: not "hard" data from the judicial system, but informal interviews with federal public defenders. Nonetheless, there is some mutual reinforcement of results. Where the AO study fails to find any numerical support for the claim about disposition times, the present study finds no verbal support: None of the thirty-six interviews produces a single statement that citability contributes to judicial delay.

The AO study also sought to determine the effect of citability on one-line dispositions. To this end, the AO examined the number of cases disposed of by "summary" orders—that is, opinions issued without signature or comment—before and after each circuit's switch to citability.[188] Again the data failed to support the claim. The AO found "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions."[189] The present study agrees, inasmuch as none of the thirty-six defenders said anything to support any of the many complaints asserting increases in one-line dispositions due to citability.[190]

B. The FJC Study: Judges and Lawyers

The Federal Judicial Center (FJC) did a survey of all 257 sitting circuit judges.[191] (The survey questions differed somewhat depending on whether the judge sat in a citable or a no-citation circuit.[192]) Again the results contradicted

---

187. *Id.*

188. *Id.* at 1–2.

189. *Id.*

190. *See supra* Part III.D.5 (discussing the interviewees' denial that one-line dispositions are a problem in citable circuits).

191. TIM REAGAN, FED. JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS 1 (June 1, 2005) [hereinafter FJC Study].

192. *Id.* 1–2. The methodology of the FJC study, while basically sound, is needlessly complex and confusing. FJC unnecessarily divides the circuits into three categories instead of two. *Id.* For FJC there are: (1) "restrictive" circuits (the Second, Seventh, Ninth, and Federal), which prohibit citation of their unpublished opinions; (2) "discouraging" circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh), which discourage citation but permit it in limited circumstances; and (3) "permissive" circuits (the Third, Fifth, and District of Columbia), which "more freely" permit citation. *Id.* at 3–4. The trouble is that no clear line exists between what are called the "discouraging" and "permissive" circuits. The "permissive" Third Circuit, for example, while it has no restriction on citation of unpublished opinions by lawyers, has a "tradition" by which the court itself does not cite those opinions. 3D CIR. I.O.P. 5.7. Surely it is "discouraging" that no matter how close in point and significant the case you cite is, the court will not cite it. The "permissive" D.C. Circuit also has many discouraging words, Barnett, *supra*

key premises of the arguments against Rule 32.1. For example, the judges in citable circuits "do not think the number of unpublished opinions that they author, the length of their unpublished opinions, or the time it takes them to draft unpublished opinions would change if the rules on citing unpublished opinions were to change."[193] Further, judges in citable circuits told the FJC that citations to unpublished opinions "create only a small amount of additional work" for them.[194]

The FJC study resembles the present study in using surveys, but the FJC questioned judges, while I interviewed public defenders. These defenders could appraise only by inference the effects that citability might be having on their circuits' opinions, whether unpublished or published. The defenders generally agreed with the judges, however, in seeing no ill effects of citability.[195]

The FJC also surveyed lawyers, in particular a random sample of federal appellate attorneys.[196] The results, as deftly summarized by Professor Schlitz,

> gave no more comfort to opponents of Rule 32.1 than the FJC's survey of judges. Attorneys made it clear that they already researched unpublished opinions—even in circuits in which they cannot cite them—and that they frequently run across unpublished opinions that they would like to cite . . . . Attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would not have an "appreciable impact" on their workloads . . . . In every circuit—save the Ninth—the number of attorneys who predicted that Rule 32.1 would have a positive impact

---

note 3, at 475 n.15, while it and the Fifth Circuit both prohibit citation of unpublished opinions decided before a given date—also not particularly "permissive." *Id.* at 474 n.10, 475 n.15 (noting the D.C. Circuit's citation rules).

There is thus no basis for drawing the line where FJC does and creating three categories of circuits, rather than two, which then have to be dealt with separately throughout the FJC's report. It would have been better to recognize just two categories, the (four) circuits that "prohibit" citation and the (nine) circuits that allow it. But because the FJC study is over-inclusive rather than under-inclusive and does take account of all the circuit categories, no substantive harm is done to the results of these very useful studies.

193. FJC Study, *supra* note 191, at 3.

194. *Id.* The FJC also focused on two circuits (the First and D.C.) that had recently switched from a no-citation rule to a rule allowing citation. *Id.* at 11–13. The judges in these circuits reported that "attorneys are now citing unpublished opinions more often, but this has not had an impact on their work." *Id.* at 12. By comparison, two federal public defenders interviewed for the present study, from the First and D.C. circuits, respectively, were asked if they had observed any changes since their circuits had changed their citation policy. Both likewise said no. Defender I-A & Defender DC-A.

195. *See, e.g.*, Defender III-B ("I don't see any ill effects [of citability].").

196. FJC Study, *supra* note 191, at 15 (explaining how sample was chosen).

> outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact.[197]

Thus, the FJC study and this study both asked lawyers about the increased burdens, if any, resulting from citability. And the lawyers in both cases reported no appreciable impact on their workloads. This was true despite the difference between the methods of the two studies. There is a major difference, of course, between informal interviews and written questionnaires. In addition, the lawyers questioned in the two studies differed. The FJC used a complete cross-section of appellate attorneys, while this study questioned only federal defenders, and only in citable circuits at that. This difference gave the "burden" questions different meanings: The federal defenders in citable circuits reported on a research burden that they already carried. The attorneys questioned by the FJC, to the extent they were located in no-citation circuits, were being asked to predict the future. While both approaches have value, the present study's approach, though more limited in numbers, is more focused in questioning only lawyers who have actual, present experience with citability.

C. The Bottom Line Revisited

Finally, the FJC posed an "open-ended question" asking "what impact would you expect such a rule [permitting citation of unpublished opinions] to have?"[198] Although the lawyers were not asked explicitly whether they would support or oppose Rule 32.1, their position "was often apparent from their answers,"[199] the FJC said. From the 298 lawyers who answered this question, the FJC inferred these results:

- Supportive of Rule 32.1: 162 (54%);
- Opposed: 61 (20%);
- Neutral: 75 (25%).[200]

The FJC's question resembles my "bottom line" interview query asking whether the federal defender favored "allowing" or "prohibiting" citation of unpublished opinions. Recall that my results were:

- Allow citation: 23 (64%);

---

197. Schiltz, *supra* note 2, at 1456.

198. FJC Study, *supra* note 191, at 18.

199. *Id.*

200. *Id.*; *see also id.* at 50 (Exhibit V) (depicting the attitudes of the circuits towards the proposed rule in graph form).

- Prohibit citation: 4 (11%);
- No Answer: 9 (25%).[201]

These bottom-line results of the two studies, obtained independently and through different techniques, seem significantly similar.

V. Conclusion

The case against allowing citation of unpublished opinions rests overwhelmingly on claims of unhappy effects that assertedly will follow: judges' time will be further burdened and dockets slowed, lawyers' research time will be vastly increased, opinions will give way to one-line dispositions, indigents will suffer, and so on. This Article tests those claims by looking at two groups for whom unpublished opinions *are* citable, to see whether or to what extent the predicted ill effects have in fact occurred.

The first group consists of federal circuit judges in the nine "citable" circuits. Some of these judges filed comments in the rulemaking proceeding on Rule 32.1, and their positions may be seen in their comments. There are, however, some 157 circuit judges in the nine citable circuits,[202] and the number who filed any comments on Rule 32.1 was ten.[203] This figure alone tends to belie any claim of discontent among judges in citable circuits. Of the ten circuit judges who did file comments, moreover, three favored Rule 32.1, while the positions of the other seven were debatable or ambiguous.[204] None of these ten circuit judges—and none of all the 513 judges, lawyers, and others who filed comments in the Rule 32.1 proceeding—pointed to adverse effects that were not just predicted, but allegedly had resulted, from citability. The dog did not bark.

The other group consists of federal public defenders, divided geographically between the Ninth Circuit on the one hand, the nine citable circuits on the other. From the Ninth Circuit—a no-citation circuit, of course—the number of comments filed by federal defenders in the Rule 32.1 proceeding was sixty-two.[205] All sixty-two of these comments opposed the rule, based on the usual predictions of adverse effects from

---

201. *See supra* Part III.D.10 (setting out the "bottom line" statistics).

202. *See* 385 F.3d 7–14 (2004) (listing 157 federal circuit judges as of 2004 in the 1st, 3d, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. circuits).

203. *Supra* pp. 15–18.

204. *Supra* Part II.

205. *See* Index, *supra* note 28.

citability. As a control group for these sixty-two defenders, one would have liked to find comparable filings in the Rule 32.1 proceeding by defenders in citable circuits. The total number of comments filed in that proceeding by federal defenders in citable circuits, however, was a remarkable three.[206] This figure again suggests no great discontent with citability. The three comments, moreover, were ambiguous. Some other way was needed, then, to obtain the views of federal public defenders on the ill effects, if any, of citability—to see whether federal defenders in citable circuits agreed with their colleagues in the no-citation Ninth.

To obtain those views, I interviewed, by telephone, a random sample of 36 federal public defenders, spread through all nine of the citable circuits. I asked each defender questions such as those addressed by the sixty-two Ninth Circuit defenders in their comments in the Rule 32.1 proceeding. I replaced questions about the future, however, with questions of existing fact. I thus asked questions such as whether citability of unpublished opinions increases research time, whether it burdens judges and causes delay, whether it promotes one-line dispositions, and—at bottom—whether the defenders preferred their existing system, in which citation was allowed, or a system such as that of the Ninth Circuit, in which citation was prohibited.[207]

These thirty-six interviews are the heart of this Article. Readers are urged to read the interview summaries in full and reach their own judgment about whether citability, in real life, produces the fearful results predicted by its opponents. In my view, the answer is clearly no. This conclusion flows from the bottom-line vote, in which sixty-seven percent of the interviewees favored citability, and eleven percent opposed it.[208] It applies to the key question of research, in which virtually all thirty-six of the federal defenders interviewed embraced the citation of unpublished opinions. "That doesn't bother me at all. I always do the research; that's part of my job," as one of them put it.[209] And it applies to the lawyer's duty to her client, as noted by the defender who remarked, "as an advocate, I always use anything I can."[210] In sum, the interviews with thirty-six federal

---

206. *Supra* notes 89–91.

207. Summaries of all the interviews are provided, *see supra* pp. 23–45; my methodology is described, *see supra* notes 95–96; and the names and cities of all thirty-six of the interviewees (save for three who asked that these data not be disclosed) are provided at a website associated with this Article, *supra* note 94.

208. *Supra* Part III.D.10.

209. Defender X-D.

210. Defender IV-E.

defenders in citable circuits, far from showing harm done by the citation of unpublished opinions, vindicate that practice as a vital part of a lawyer's service to her client.[211] The dog did not bark.

211. The question remains, Why do the federal defenders in citable circuits who were interviewed for this Article seem so different from the Ninth Circuit defenders who commented on proposed Rule 32.1? Both groups comprise attorneys in federal public defender offices drawn from similar social and economic backgrounds, educated and compensated the same way, and doing the same work. What explains the radical difference between them on the question of citing unpublished opinions? One possible explanation was put simply by Judge Easterbrook: "Better the devil you know than the devil you don't." AP-367, *supra* note 67. Another possible explanation is "marching orders" for Ninth Circuit defenders with respect to comments they filed on Rule 32.1. *Supra* at 1543. Could there also be relevant social, cultural, or political differences between the Ninth and other circuits?