

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

DEVELOPMENTS AND PRACTICE NOTES

NO-CITATION RULES UNDER SIEGE: A BATTLEFIELD REPORT AND ANALYSIS

Stephen R. Barnett*

“The assault upon the citadel of no-citation rules is proceeding in these days apace.” Cardozo didn’t exactly say that,¹ but if he were here today, he might. “Unpublished”² judicial opinions and rules prohibiting their citation are under attack on several fronts. I report here on three of those venues:

* Elizabeth J. Boalt Professor of Law Emeritus, University of California, Berkeley. I am grateful to the several judges and numerous court officials who spoke to me for this Article; to Florence McKnight and Lauren McBrayer (Boalt ‘05) for superb research assistance; to Patrick Schiltz for magnanimous consultation; and to Jan Vetter for a helpful reading of the draft. No one but me is responsible for any of the views expressed here.

1. He said, of course, that the assault upon the “citadel of privity” was proceeding apace. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931) (Cardozo, C.J.).

2. The term “unpublished” has become a misnomer, inasmuch as the opinions in question are now posted online by the courts issuing them and are even published in traditional print in West’s *Federal Appendix*. See Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts under No-Citation Rules*, 4 J. App. Prac. & Process 1, 2-3 (2002). But the designation “unpublished” functions usefully as a term of art, denoting opinions that the issuing court labels “unpublished.” See e.g. 8th Cir. R. 28A(i) (2003) (“Unpublished decisions are decisions which a court designates for unpublished status”); *infra* n. 110.

(1) the federal circuit courts of appeals, (2) the states, and (3) the rulemaking process of the federal judiciary. Each has seen important developments recently. The federal rulemakers, for their part, currently are receiving public comments on a major proposed new rule, one that presents significant questions of drafting as well as of policy.

I. THE FEDERAL CIRCUITS

Among the individual federal circuit courts of appeals, the major news is from the First Circuit. Effective in December 2002, that court dropped its rule that allowed citation of unpublished opinions only in “related cases.”³ The First Circuit adopted instead a rule cautioning that “[c]itation of an unpublished opinion of this court is disfavored,” but allowing such citation “if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue.”⁴ Further, “[t]he court will consider such opinions for their persuasive value but not as binding precedent.”⁵

Grudging as the language may be, this move by the First Circuit, coming a year after a similar turnabout by the District of Columbia Circuit,⁶ means that nine of the thirteen circuits now allow citation of their unpublished opinions. The circuits permitting citation are the First,⁷ Third,⁸ Fourth,⁹ Fifth,¹⁰ Sixth,¹¹

3. 1st Cir. R. 36(b)(2)(F) (repealed Dec. 16, 2002). “Related cases” are those relevant under doctrines such as law of the case, *res judicata*, or collateral estoppel, or relevant for factual purposes such as showing double jeopardy or sanctionable conduct (or appealing from the opinion in question). *See e.g.* 9th Cir. R. 36-3(b)(i), (ii). So far as I know, every American court allows citation of unpublished opinions for related-case purposes; it is hard to imagine how a court could not do so. This article therefore will generally omit the omnipresent qualifier, “except for related cases.”

4. 1st Cir. R. 32.3(a)(2).

5. *Id.*

6. *See* D.C. Cir. R. 28(c)(12)(B); Barnett, *supra* n. 2, at 3 n. 11.

7. *See* 1st Cir. R. 32.3(a)(2); *supra* text at nn. 4-5.

8. Notwithstanding Third Circuit Appellate Rule 1, I.O.P. 5.7 (“The court by tradition does not cite to its not precedential opinions as authority”), and the Third Circuit Press Release of December 5, 2001 (“the *court* will not cite to non-precedential opinions as authority”) (emphasis in original), attorneys in the Third Circuit may and do cite to

Eighth,¹² Tenth,¹³ Eleventh,¹⁴ and D.C.¹⁵ Circuits. Those still forbidding citation are the Second,¹⁶ Seventh,¹⁷ Ninth,¹⁸ and Federal¹⁹ Circuits. Nine of thirteen is a substantial majority;

unpublished opinions. Telephone Interview with Trish Dodszeit, Leg. Coord., 3d Cir. (Oct. 30, 2003).

9. *See* 4th Cir. R. 36(c) (citation of unpublished opinions “disfavored,” but “[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited”).

10. *See* 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, “are precedent,” but “because every opinion believed to have precedential value is published,” unpublished opinions “normally” should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are “not precedent”; such opinions “may, however, be persuasive” and may be cited).

11. *See* 6th Cir. R. 28(g) (citation of unpublished opinions “disfavored,” but “[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited”).

12. *See* 8th Cir. R. 28(A)(i) (unpublished opinions “are not precedent and parties generally should not cite them,” but parties may do so if the opinion has “persuasive value on a material issue and no published opinion of this or another court would serve as well”).

13. *See* 10th Cir. R. 36.3 (unpublished decisions “not binding precedents” and their citation is “disfavored,” but unpublished decision may be cited if it has “persuasive value with respect to a material issue that has not been addressed in a published opinion” and if it would “assist the court in its disposition”).

14. *See* 11th Cir. R. 36-2 (unpublished opinions “not considered binding precedent” but may be cited as persuasive authority); *see also* 11th Cir. R. 36-3, I.O.P. 5 (“[o]pinions that the panel believes to have no precedential value are not published,” and “[r]eliance on unpublished opinions is not favored by the court”).

15. D.C. Cir. R. 28(c)(12)(B) (unpublished decisions issued on or after January 1, 2002, “may be cited as precedent”); *but cf.* D.C. Cir. R. 36(c)(2) (“a panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition”).

16. *See* 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited).

17. *See* 7th Cir. R. 53(b)(2)(iv) (unpublished orders “shall not be cited or used as precedent”).

18. *See* 9th Cir. R. 36-3 (unpublished dispositions “not binding precedent” and “may not be cited”). The Ninth Circuit has a provisional exception that allows citation of unpublished dispositions in petitions for rehearing or rehearing en banc and in requests to publish opinions, solely for the purpose of showing a conflict between panel opinions. *See id.*; Ninth Cir. Notice (Dec. 30, 2002). (This limited exception will be set aside here, and the Ninth Circuit’s policy considered as one that does not allow citation of unpublished dispositions.)

19. *See* Fed. Cir. R. 47.6(b) (opinion or order “designated not to be cited as precedent . . . must not be employed or cited as precedent”).

citability of unpublished opinions thus comes close to being the norm in the federal circuits today.²⁰

In another federal court development, the Fifth Circuit, which already allowed its unpublished opinions to be cited, in July 2003 broke down and joined all but one of the other circuits in putting those opinions online at the court's website.²¹ That leaves the Eleventh Circuit as the last holdout refusing to put its unpublished opinions online. This will have to change in two years, when the E-Government Act of 2002²² takes effect. That Act requires each circuit to maintain a website affording access—in a “text searchable format”—to “all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter.”²³

20. One report suggests that the switch to citability—at least when done prospectively—makes little observable difference. See Jonathan Groner, *Circuit's New Citation Rule: Few Takers*, 26 Leg. Times 1 (Jan. 6, 2003) (D.C. Circuit after year of experience “has not noticed any problems with lawyers’ use of unpublished . . . rulings. In fact, the court has hardly noticed any change at all”; D.C. Circuit judge suggests limited use of new rule reflects its prospective nature, applicable only to unpublished opinions issued after rule took effect).

21. See *Opinions Search Pages of the Fifth Circuit Court of Appeals* (available at <http://www.ca5.uscourts.gov/Opinions/OpinHome.cfm>) (accessed Dec. 11, 2003; copy on file with Journal of Appellate Practice and Process); Telephone Interview with Fritz Fulbruge, Clerk, U.S. Ct. of App. for 5th Cir. (Aug. 7, 2003). The online opinions are picked up by West Group for publication in its *Federal Appendix*. Fulbruge Interview, *supra* this note.

22. E-Government Act of 2002, Pub. L. No. 107-347, § 205(f), 116 Stat. 2899, 2914 (2003).

23. *Id.* at 2913. Some judges and others have suggested that action by the legislature to require citability of unpublished opinions might run afoul of the separation of powers. See e.g. Subcomm. on Cts., the Internet & Intellectual Property, H.R. Jud. Comm., *Unpublished Judicial Opinions*, 107th Cong. 15-16 (June 27, 2002) (testimony of the Honorable Alex Kozinski) (available at <http://www.house.gov/judiciary/80454.PDF>) (accessed Dec. 9, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter Kozinski Testimony]. The suggestion is regularly made in California when the state legislature considers bills that would require citability of appellate court opinions. See e.g. Cal. Assembly Jud. Comm., *Hearings on AB 1165—Appellate Opinions: New Publication and Citability Rules*, 2003-2004 Assembly 6 (May 6, 2003) (available at <http://www.assembly.ca.gov/acs/acsframeset2text.htm>) (accessed Dec. 9, 2003; copy on file with Journal of Appellate Practice and Process). The E-Government Act—assuming it is constitutional—would seem relevant here. If Congress can require that unpublished court of appeal opinions be put online, why could it not require—and why could a state legislature not require—the alternative form of public access that consists of making the opinions citable?

II. THE STATES

A. *The Serfass-Cranford Findings and Judge Kozinski's Testimony*

It may not have attracted much attention, but there is a lot going on in the states. State activity with respect to citation of unpublished opinions tends to draw little national notice; not only are there some four times as many states as federal circuits to take into account, but the states differ in their court systems and in the kinds of “opinions” their courts issue. Some states have no intermediate appellate courts, and hence, no unpublished opinions of those courts. In some states, the *supreme court* issues unpublished opinions. Some states have no unpublished opinions but do have unpublished dispositions without opinion. Further, a state’s “rule” with respect to citing unpublished opinions may not be easy to find, existing as it sometimes does in caselaw (not always clear and consistent) or even in custom.

Merely to collect, let alone to classify and compare, the rules of all the states is therefore a substantial undertaking. Pioneers in the task were Melissa M. Serfass and Jessie L. Cranford, who reported their results in this Journal in 2001.²⁴ In June 2002, the Serfass-Cranford study was relied on by Judge Alex Kozinski of the Ninth Circuit in testimony he gave before a subcommittee of the House Judiciary Committee.²⁵ Judge Kozinski produced a chart counting and classifying the rules of all the states as reported by Serfass and Cranford.²⁶

As a gauge of the trend in the states, it may be instructive to compare the situation that prevailed some two and one-half years ago, as reported by Serfass and Cranford and Judge Kozinski, with the situation prevailing today. I propose first to do this, in order to identify the changes that have taken place recently. Then I will integrate the most recent data into a complete survey of today’s state rules on citing unpublished

24. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

25. Kozinski Testimony, *supra* n. 23, at 15.

26. *Id.* at 18-19.

opinions, updating and revising the work of Serfass and Cranford.

B. Judge Kozinski's Report Compared with the Situation Today

In his statement to the House Judiciary subcommittee, Judge Kozinski, a champion of no-citation rules,²⁷ defended those rules with his usual force, pungency, and wit. Judge Kozinski said nothing about the then-existing rule count in the federal courts. (Eight of the thirteen circuits allowed citation of unpublished opinions, a figure since increased to nine of thirteen.²⁸) Instead, Judge Kozinski looked to the states for numerical help.²⁹ He asked, "Are Federal Courts Unique in Prohibiting Citation to Unpublished Decisions?" and answered, "[E]mpirically no."³⁰ For this, Judge Kozinski cited the "very revealing" findings of Serfass and Cranford, which showed that "[t]he vast majority of state court systems restrict citation to unpublished decisions."³¹ Specifically, Judge Kozinski calculated from the Serfass-Cranford findings that thirty-eight states (plus the District of Columbia) "restrict citation to unpublished opinions to some degree."³² And, he continued, "[B]y far the largest number (35) have a mandatory prohibition phrased much like the Ninth Circuit's rule."³³

In comparing the Serfass-Cranford-Kozinski findings with the situation today,³⁴ the striking fact is that in the two and one-half years since those findings were compiled, six states have

27. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (court's opinion authored by Kozinski, J.); see also Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!* 20 Cal. Law. 43 (June 2000).

28. See *supra* pp. 474-75.

29. "The state courts, of course, hear vastly more cases in the aggregate than do the federal courts." Kozinski Testimony, *supra* n. 23, at 15.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. This comparison is aided by the research into state and federal citation rules reported in *McCoy v. State*, 59 P.3d 747, 753 (Alaska App. 2002) (Mannheimer, J., opinion on rehearing), republished at ___ P.3d ___, 2002 WL 32332961 (Alaska App. Oct 04, 2002); see also Jason B. Binimow, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003).

switched from not allowing citation of unpublished opinions³⁵—what Judge Kozinski calls a “mandatory prohibition”³⁶—to allowing it. Three of those states now permit citation of unpublished opinions as “precedent”: Texas,³⁷ Utah,³⁸ and West Virginia.³⁹ The other three permit it for “persuasive” value:⁴⁰ Alaska,⁴¹ Iowa,⁴² and Kansas.⁴³ A seventh state, Ohio, has

35. I use the term “unpublished opinions” here to encompass all forms of opinions, orders, or other dispositions by a state’s appellate courts that are regarded as “unpublished” or unreported.

36. Kozinski Testimony, *supra* n. 23, at 15.

37. On January 1, 2003, Texas, which had prohibited citation of its unpublished court of appeals opinions, discontinued the category of unpublished opinions in civil cases and made all new civil-case opinions citable without restriction. Tex. R. App. P. 47.7; see Dorsaneo & Soules’ Texas Rules Ann., Tex. R. App. P. 47, Comment to 2002 Change (Lexis 2003). Prior unpublished opinions “have no precedential value,” but are citable. Tex. R. App. P. 47.7. Unpublished criminal-case opinions are still uncitable. Tex. R. App. P. 47.2(b), 77.3.

38. See *Grand Co. v. Rogers*, 44 P.3d 734, 738 (Utah 2002) (striking down “no citation” rule promulgated by Utah Judicial Council; unpublished opinions of court of appeals “are equally binding upon lower courts of this state, and may be cited to the degree that they are useful, authoritatively and persuasively”; such decisions, “although not ‘officially published,’ may be presented as precedential authority to a lower court or as persuasive authority to this court, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited”).

39. See *Walker v. Doe*, 558 S.E.2d 290, 296 (W. Va. 2001) (“a per curiam opinion [of the West Virginia Supreme Court of Appeals] may be cited in support of a legal argument”; the court “renounce[s] any prior statements of this Court to the effect that per curiam opinions are not legal precedent”).

40. Jurisdictions that allow citation of unpublished opinions as “precedent” also allow it, of course, for the lesser effect of “persuasive” value. These “persuasive value” states therefore might more accurately be described as allowing citation “only” for persuasive value. I omit the “only” as a shorthand device.

41. See *McCoy v. State*, 59 P.3d 747, 753-760 (Alaska App. 2002) (interprets Alaska’s Appellate Rule 214(d), providing that unpublished opinions “may not be cited in the courts of this state,” as meaning that they may not be cited “as precedent,” and not as forbidding judges and lawyers “from relying on unpublished decisions for whatever persuasive power those decisions might have”). Judge Kozinski in his congressional testimony ironically cited Alaska’s Rule 214 as “typical” of the “mandatory prohibition” of citation that he found in many states. Kozinski Testimony, *supra* n. 23, at 15.

42. Iowa rules prohibiting citation of unpublished opinions were replaced on February 15, 2002, by Iowa Appellate Rule 6.14 (5)(b). The new rule provides that an unpublished opinion of any appellate court “may be cited in a brief,” but it “shall not constitute controlling legal authority.” *Id.*

43. Kansas Supreme Court Rule 7.04, barring citation of unpublished opinions, was amended on February 7, 2003. The amended rule provides that “unpublished memorandum opinions of any court or agency,” while “not binding precedents” and “not favored for citation,” nonetheless “may be cited if they have persuasive value with respect to a

switched from allowing citation for persuasive value to allowing it for whatever weight is deemed appropriate by the court.⁴⁴

In addition, two states that still prohibit citation currently have before their supreme courts proposed rule changes that would allow citation for persuasive value: Hawaii⁴⁵ and Illinois.⁴⁶ The possibility thus exists that eight states will have moved out of the “no citation” column since Judge Kozinski compiled his data.

C. Classifying and Counting the States

Classifying the states with respect to their positions on citing unpublished opinions can be difficult, for reasons I have suggested. Not only are the facts often murky, but the bottom-line decision often involves a judgment call that could go either way. Indeed, I count five states as having a foot in both camps

material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition.” *Id.*

44. The Ohio Supreme Court Rules for the Reporting of Opinions had provided (former Rule 2(G)) that unpublished decisions of Ohio’s courts were not controlling authority but could be cited as persuasive. In May 2002, Rule 2(G) was superseded by a revised Rule 4. Rule 4(A) now provides that “distinctions between ‘controlling’ and ‘persuasive’ opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished”; Rule 4(B) states that all court of appeal opinions issued after the effective date of the new rules “may be cited as legal authority and weighted as deemed appropriate by the courts.”

45. The Hawaii Supreme Court currently has before it a proposal to amend Rule 35 of the Hawaii Rules of Appellate Procedure to allow citation to unpublished appellate opinions for their “persuasive value.” Comments were due in the Supreme Court by December 29, 2003. News Release, Hawaii Jud. Pub. Affairs Off., *Comment Wanted on Proposed Amendment to Hawai’i Rules of Appellate Procedure* (Mar. 25, 2003) (available at <http://www.courts.state.hi.us>) (accessed Dec. 1, 2003; copy on file with Journal of Appellate Practice and Process); see *State v. Uyesugi*, 60 P.3d 843, 874 (Haw. 2002) (Acoba, J., concurring) (discussing proposal).

46. The Illinois Supreme Court in February 2003 appointed a special committee to study Supreme Court Rule 23. See Press Release, *Supreme Court Forms Committee to Study Rule 23* (Feb. 27, 2003) (available at <http://www.state.il.us/court/PressRel/2003/031403.pdf>) (accessed Dec. 10, 2003; copy on file with Journal of Appellate Practice and Process). That Rule bars citation of unpublished opinions, including both “written orders” and “summary orders.” Ill. S. Ct. R. 23(e). The committee has recommended that unpublished written orders henceforth issued be citable as “persuasive authority.” See Letter from Justice Thomas R. Appleton, Comm. Co-Chair, to author, *Proposed Amendments, Ill. S. Ct. R. 23(e)* (Nov. 17, 2003) (on file with author). The Illinois Supreme Court has referred the proposal to the court’s Rules Committee, which is expected to consider it in 2004. Telephone Interview with Patricia C. Bobb, Esq., Chair, Rules Comm., Ill. S. Ct. (Nov. 20, 2003).

and thus being “too close to call”—although that call, too, is arguable. Nonetheless, I have grouped the states into five categories, as follows (in order of declining citability):

1. No Unpublished Opinions or No Rule against Citation

This category contains four states: Connecticut,⁴⁷ Mississippi,⁴⁸ New York,⁴⁹ and North Dakota.⁵⁰

2. States That Allow Citation of Unpublished Opinions as “Precedent”

In this category I count five states: Delaware,⁵¹ Ohio,⁵² Texas,⁵³ Utah,⁵⁴ and West Virginia.⁵⁵

47. In Connecticut, all case dispositions by both the supreme court and the appellate court are published. *See* Conn. Gen. Stat. § 51-212(b) (West 2003) (supreme court); Conn. Gen. Stat. § 51-215a(b) (West 2003) (appellate court). Unpublished opinions that may issue from trial courts or courts in other jurisdictions are covered by Conn. R. App. P. 67-9, which provides that they may be cited if a copy is provided to the court and opposing counsel. Telephone interview with Cynthia Gworek, Asst. Clerk, Conn. S. Ct. (Aug. 15, 2003). (Statutes or rules that allow citation of unpublished opinions very commonly require that a copy of the opinion be provided to the court and opposing counsel; henceforth such “provide a copy” requirements generally will not be mentioned in describing citation rules.)

48. All opinions of the Mississippi Supreme Court and Court of Appeal issued on or after November 1, 1998, are published and hence may be cited; in addition, there is no law or rule that prohibits or limits citation of these opinions. Telephone Interview with Jack Pool, Dir. of C. Leg. Staff, Miss. S. Ct. (Aug. 27, 2003). Although the rules provide that unpublished opinions issued before November 1, 1998, are not citable, Miss. R. App. P. 35-A(b) (supreme court); Miss. R. App. P. 35-B(b) (court of appeals), in practice the supreme court entertains citation of those opinions and considers them on their persuasive merits, Pool Interview, *supra* this note. *See e.g. McBride v. Jones*, 803 So. 2d 1168, 1170, 1171 (Miss. 2002) (McRae, J., dissenting) (majority and dissent both cite unpublished opinion and debate its merits).

49. In New York, all opinions of the court of appeals and the appellate division are published. Trial court and appellate term opinions sometimes are not published. There is no law or rule that limits or prohibits the citation of unpublished opinions. Telephone Interview with Marjorie McCoy, Dep. Clerk, N.Y. Ct. of App. (Aug. 15, 2003); Telephone Interview with Gary Spivey, N.Y. St. Rptr. (Aug. 15, 2003).

50. The North Dakota Supreme Court issues some “summary dispositions,” which consist of one or two paragraphs and avoid stating the facts. *See* N.D. R. App. P. 35.1. These are posted on the court’s website and may be cited, as there is no law or rule that says they may not be. The same is true of opinions issued by the sporadically sitting North Dakota Court of Appeals. Telephone Interviews with Penny Miller, Clerk of N.D. S. Ct. (Aug. 18, 2003; Aug. 26, 2003).

51. Delaware’s Supreme Court Rule 17(a) was amended in 1983 “to permit unreported orders of the Delaware Supreme Court to be cited as precedent.” Del. Sup. Ct. R.I.O.P.

3. States That Allow Citation for “Persuasive Value”

In this category I count twelve states: Alaska,⁵⁶ Iowa,⁵⁷ Kansas,⁵⁸ Michigan,⁵⁹ New Mexico,⁶⁰ Tennessee,⁶¹ Vermont,⁶² Wyoming,⁶³ Virginia,⁶⁴ Minnesota,⁶⁵ New Jersey,⁶⁶ and Georgia.⁶⁷

X(8); see *New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983) (citing rule change and distinguishing unreported decision relied on).

52. See *supra* n. 44.

53. See *supra* n. 37.

54. See *supra* n. 38.

55. See *supra* n. 39.

56. See *supra* n. 41.

57. See *supra* n. 42.

58. See *supra* n. 43.

59. Michigan’s Court Rule 7.215(C) states that an unpublished opinion “is not precedentially binding under the rule of stare decisis,” but goes on, “[a] party who cites an unpublished opinion must provide a copy”—making clear that citation is allowed.

60. New Mexico’s Appellate Rule 12-405(C) bars citing unpublished opinions “as precedent in any court.” But the New Mexico Court of Appeals has ruled, “[I]f counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration. It would be more appropriate to present the language without reference to its source, so that the court to which it is presented is asked to consider it on its own merits, rather than as precedent or controlling authority.” *State v. Gonzales*, 794 P.2d 361, 370-371 (N.M. App. 1990).

61. See Tenn. S. Ct. R. 4(H)(1) (unpublished opinions “persuasive authority”); *McConnell v. State*, 12 S.W.3d 795, 799 n. 5 (Tenn. 2000) (“persuasive force”); *State v. Kelley*, 2002 WL 927610 at *17 (Tenn. Crim. App. Oct. 21, 2002) (unpublished) (“persuasive authority only”).

62. See Vt. R. App. P. 33.1(c) (unpublished order “may be cited as persuasive authority but shall not be considered as controlling precedent”).

63. Although “abbreviated opinions” of the Wyoming Supreme Court are not published and “shall not constitute precedent of the appellate court,” Wyo. R. App. P. 9.06, Wyoming has no rule against citing unpublished opinions, and they can be cited for persuasive value, Telephone Interview with Judy Pacheco, Clerk, Wyo. S. Ct. (Aug. 11, 2003).

64. See *Fairfax County Sch. Bd. v. Rose*, 509 S.E.2d 525, 528 n. 3 (Va. App. 1999) (“Although an unpublished opinion of the Court has no precedential value, a court or the commission does not err by considering the rationale and adopting it to the extent it is persuasive.”) (citation omitted); accord *Johnson v. Paul Johnson Plastering & Natl. Sur. Corp.*, 561 S.E.2d 40, 45 n. 7 (Va. App. 2002); but see *Grajales v. Commonwealth*, 353 S.E.2d 789, 791 n. 1 (Va. App. 1987) (unpublished memorandum decisions of court of appeals “not to be cited or relied upon as precedent”); *Robdau v. Commonwealth*, 543 S.E.2d 602, 604 n. 4 (Va. App. 2001) (refusing to consider unpublished case). As these decisions indicate, the judges of the court of appeals are split on considering unpublished opinions for persuasive value; “it depends on which judge you get.” Telephone Interview with Marty Ring, Dep. Clerk of Va. App. Ct. (Aug. 25, 2003). The unreceptive judges, however, pose no risk of sanctions—only that the cited case won’t be considered. *Id.* (Given this fact, as well as the apparent willingness of the courts in the majority of recent

4. *States Too Close to Call*

Some states seem in equipoise between allowing citation and forbidding it. For example, they may have conflicting practices for different classes of unpublished opinions. Also included here are the two states, Illinois and Hawaii, that are considering proposals to reverse their rules and allow citation. I therefore classify five states as on the fence: Hawaii,⁶⁸ Illinois,⁶⁹ Maine,⁷⁰ Oklahoma,⁷¹ and Oregon.⁷²

cases to consider the cited opinions, I am classifying Virginia as a state that allows citation for persuasive value.)

65. Rule 136.01(b) of Minnesota's Rules of Civil Appellate Procedure provides that unpublished opinions "are not precedential . . . and may be cited only as provided" in Minn. Stat. Ann. § 480A.08(3). That statute says unpublished opinions "must not be cited unless" a copy is provided to opposing counsel. *Id.* Minnesota courts understandably have interpreted this statute as allowing citation for persuasive value. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-801 (Minn. App. 1993); *State v. Rosillo*, 2001 WL 881279 at **3-5 (Minn. App. July 31, 2001) (unpublished).

66. The New Jersey Courts' Rules of General Application, Rule 1:36-3, provides that unpublished opinions shall not "constitute precedent" or "be cited by any court." This rule is regularly ignored, with unpublished opinions commonly cited and considered for their persuasive value. See e.g. *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 2003 WL 1904383 at *6 (N.J. Super. App. Div. Jan. 14, 2003) (unpublished) ("[p]laintiff relies on an unpublished opinion," which court cites and distinguishes); *Creskill Bd. of Educ. v. Creskill Educ. Assn.*, 826 A.2d 778, 783 (N.J. Super. App. Div. 2003) (unpublished opinion "not precedential and is distinguishable on its facts"); accord Telephone Interview with Paula Schlosser, Admin. Specialist, N.J. S. Ct. (Aug. 12, 2003) (unpublished cases regularly cited despite rule).

67. Georgia Appellate Court Rule 33(b) says unreported opinions of court of appeals are not precedents. But "there is no rule against" citing them for persuasive value, and that is done, though infrequently. Telephone Interview with William L. Martin III, Clerk, Ga. Ct. App. (Aug. 18, 2003).

68. See *supra* n. 45 and accompanying text.

69. See *supra* n. 46 and accompanying text.

70. Maine has an Administrative Order of the Supreme Judicial Court which states that unpublished memorandum decisions and summary orders of that court may not be cited "as precedent." S. Jud. Ct. of Me., *New Citation Form* (Aug. 20, 1996). But the court's clerk reports that lawyers do cite such decisions and orders, without incurring sanctions; "it depends on how bold the attorney is." Telephone Interview with James C. Chute, Clerk, S. Jud. Ct. of Me. (Aug. 11, 2003).

71. Oklahoma has conflicting rules for its supreme court (civil cases) and its court of criminal appeals. Unpublished opinions of the supreme court are not precedential and may not be cited. Okla. S. Ct. R. 1.200(b)(5)-(8); Telephone Interview with Michael Richie, Clerk, Okla. S. Ct., App. Cts., & Ct. of Crim. App. (Aug. 18, 2003). Unpublished opinions of the court of criminal appeals are "not binding" on that court, but may be cited to it, "provided counsel states that no published case would serve as well." Okla. Ct. Crim. App. R. 3.5(C)(3); Richie Interview, *supra* this note. (It might be said that if Oklahoma is on the fence, as I have classified it, so is Texas; Texas now allows citation of unpublished civil

5. *No-Citation States*

That leaves what Judge Kozinski calls “mandatory prohibition” states, in which citation is forbidden (except, of course, for related cases). Relying on the Serfass-Cranford data, Judge Kozinski counted thirty-five such states.⁷³ I now count twenty-five: Alabama,⁷⁴ Arizona,⁷⁵ Arkansas,⁷⁶ California,⁷⁷ Colorado,⁷⁸ District of Columbia,⁷⁹ Florida,⁸⁰ Idaho,⁸¹ Indiana,⁸² Kentucky,⁸³ Louisiana,⁸⁴ Maryland,⁸⁵ Massachusetts,⁸⁶ Missouri,⁸⁷ Montana,⁸⁸ Nebraska,⁸⁹ Nevada,⁹⁰ New Hampshire,⁹¹ North

cases but not of criminal ones, while Oklahoma does the opposite. The situation in Texas, however, represents a dramatic recent change of policy by an important state.)

72. In Oregon, all opinions of both the supreme court and the court of appeals are published, and therefore citable. But decisions “affirmed without opinion”—or, in a recent development, reversed without opinion—by the court of appeals may not be cited. Or. R. App. P. 5.20(5); Telephone Interviews with Mary Bauman, Ed., Or. Reps. (Aug. 15, 2003; Oct. 30, 2003).

73. See *supra* text accompanying n. 33; Kozinski Testimony, *supra* n. 23, at 12, 17-20.

74. Ala. R. App. P. 53(d).

75. Ariz. S. Ct. R. 111(c); Ariz. R. Civ. App. P. 28(c). But, as in the Ninth Circuit, memorandum decisions may be cited to show a conflict. See *supra* n. 18.

76. Ark. S. Ct. & Ct. App. R. 5-2(d).

77. Cal. R. Ct. 977.

78. Colorado Ct. App., *Policy of the Court Concerning Citation of Unpublished Opinions* (Apr. 2, 1994) (reprinted in 23 Colo. Law. 1548 (July 1994)).

79. D.C. Ct. App. R. 28(h).

80. The Florida Supreme Court has ruled that per curiam affirmances without written opinion have no precedential value and should not be cited to a court, except that they may be cited to the court that issued the decision. *Dept. of Leg. Affairs v. Dist. Ct. of App.*, 434 So. 2d 310, 312-333 (Fla. 1983).

81. Idaho S. Ct. Internal R. 15(f) (copy on file with Journal of Appellate Practice and Process).

82. Ind. R. App. P. 65(D).

83. Ky. R. Civ. P. 76.28(4)(c).

84. La. Unif. R. Ct. App. 2-16.3.

85. Md. R. App. Rev. 8-114(b).

86. *Horner v. Boston Edison Co.*, 695 N.E.2d 1093, 1094 (Mass. App. 1998).

87. Mo. Sup. Ct. R. 84.16(b).

88. Mont. Internal Op. R. § I(3)(c) (1996) (available at http://www.lawlibrary.state.mt.us/dscgi/ds.py/Get/File-6441/Montana_Supreme_Court_Rules.pdf) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

89. Neb. S. Ct. R. 2(E)(4) (available at <http://court.nol.org/rules/pracproc.htm>) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

90. Nev. S. Ct. R. 123.

91. N.H. S. Ct. R. 12-D(3); N.H. S. Ct. R. 25(5).

Carolina,⁹² Pennsylvania,⁹³ Rhode Island,⁹⁴ South Carolina,⁹⁵ South Dakota,⁹⁶ Washington,⁹⁷ and Wisconsin.⁹⁸ Because my count includes four states that Judge Kozinski did not include,⁹⁹ there are fourteen states that are counted as no-citation by Judge Kozinski but removed from that column by me, on the basis either of intervening events or of further research.¹⁰⁰

D. Summary

A summary of my results is shown in the table in the Appendix. Setting aside the five fence-sitters, I find four states that have either no unpublished opinions or no rule against citation; five states that allow citation of unpublished opinions as precedents; and twelve states that allow citation for persuasive value. That adds up to twenty-one states in which citation is permitted, as compared with the twenty-five states in which it is forbidden. This slim margin would not appear to make the no-citation states today “by far the largest number,” as Judge Kozinski reported that they were in 2002.¹⁰¹ Nor would it seem accurate to say today that “[t]he vast majority of state

92. N.C. R. App. P. 30(e)(3) (available at <http://www.aoc.state.nc.us/www/public/html/pdf/redrules.pdf>) (accessed Dec. 16, 2003; copy on file with Journal of Appellate Practice and Process).

93. Pa. R. Cmmw. Ct. I.O.P. § 414; Pa. R. Super Ct. I.O.P. 65.37(A); *accord U.S. v. Saunders*, 29 Fed. Appx. 78 (3d Cir.) (unreported), *cert. denied*, 535 U.S. 1071 (2002); *but see Commonwealth v. Booth*, 729 A.2d 1187, 1189 (Pa. Super. 1999) (“while we consider the arguments made in [unpublished case], we are not bound to follow it”).

94. R.I. S. Ct. R. 16(h).

95. S.C. App. Ct. R. 220(a); S.C. App. Ct. R. 239(d)(2).

96. S.D. Codified Laws § 15-26A-87.1(E) (2001).

97. Wash. R. App. P. 10.4(h).

98. Wis. Stat. § 809.23(3) (Supp. 2003); *see Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55, 67 (Wis. 1982) (monetary sanction imposed; “violations of the noncitation rule will not be tolerated”).

99. Florida, *see supra* n. 80; North Carolina, *see supra* n. 92; Pennsylvania, *see supra* n. 93; and South Carolina, *see supra* n. 95.

100. The fourteen are Alaska, *supra* n. 41; Georgia, *supra* n. 67; Hawaii, *supra* n. 45; Illinois, *supra* n. 46; Iowa, *supra* n. 42; Kansas, *supra* n. 43; Maine, *supra* n. 70; Mississippi, *supra* n. 48; New Jersey, *supra* n. 66; New Mexico, *supra* n. 60; Oklahoma, *supra* n. 71; Tennessee, *supra* n. 61; Texas, *supra* n. 37; Utah, *supra* n. 38.

101. Kozinski Testimony, *supra* n. 23, at 15.

court systems restrict citation to unpublished decisions,”¹⁰² or that “the overwhelming majority of states have adopted a prohibition against citation.”¹⁰³

In place of that “vast” and “overwhelming” majority, the two camps today, numbering twenty-five and twenty-one states, seem roughly equal. Moreover, the states allowing citation include populous ones such as New York, Ohio, Texas, Michigan, New Jersey, Virginia, and Georgia. (Indeed, comparing New York and Texas on the one hand with California on the other, one has to wonder how New York can operate its court system with no unpublished opinions from either the court of appeals or the appellate division and no rules against citing the unpublished opinions that it has;¹⁰⁴ or how Texas in 2003 could make all its civil appellate opinions citable;¹⁰⁵ while California, in contrast, issues ninety-three percent of its court of appeal opinions “unpublished” and refuses to allow their citation.¹⁰⁶ If these other populous states can decide their intermediate appellate cases with citable opinions, why can’t California?¹⁰⁷)

102. *Id.* (unless the term “restrict” includes states that permit citation for persuasive value but not as precedent, or states that discourage or disfavor citation of unpublished opinions but allow it). See *infra* pp. 489-94.

103. Kozinski Testimony, *supra* n. 23, at 13.

104. See *supra* n. 49.

105. See *supra* n. 37.

106. Cal. Jud. Council, *2003 Court Statistics Report* 31, tbl. 9 (Admin. Off. of Cts. 2003) (showing percentage of majority opinions published by courts of appeal) (available at <http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf>) (accessed Dec. 10, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *2003 Court Statistics*]; Cal. R. Ct. 977(a).

107. California’s addiction to unpublished opinions may reflect habits of undue leisure on the part of the state’s court of appeal justices. One judge who sat for twenty-one years on that court reported that “too many appellate court justices viewed the court as a kind of retirement.” Craig Anderson, *Front-Row Seat at the Rerun*, S.F. Daily J. 1 (Dec. 19, 2002) (profile of former justice Marcel Poché). The average number of published opinions produced annually by justices of the California Court of Appeal, in the latest year reported, was nine. See *2003 Court Statistics*, *supra* n. 106, at 20, tbl. 1 (total written opinions of courts of appeal 12,056, and full-time judge equivalents 92.7); *id.* at 31, tbl. 9 (seven percent of opinions published, producing 844 published opinions). It may be asked whether the public is getting its money’s worth from appellate judges who produce, on average, well under one citable opinion per month. (The average number of unpublished opinions per judge was 121. See *id.* But unpublished opinions are more likely to be delegated entirely to staff and not to trouble the judge.)

Whatever the roll call of states between the two camps today, the important thing is the trend. It is unmistakable. Since the Serfass-Cranford data were published in spring 2001, six states have switched from banning citation to allowing it; two more states are considering proposals to do the same; and no state during this period appears to have switched the other way. This clear trend among the states—like that among the federal circuits¹⁰⁸—is significant not only in its own right. Just as Judge Kozinski argued that a supposed “overwhelming” state preference for no-citation rules showed such rules to be “an important tool in managing the development of a coherent body of caselaw,”¹⁰⁹ so the present trend in the states away from no-citation rules demonstrates something. It shows an increasing recognition by state courts that they can make their opinions citable without impairing performance of their judicial function. The sky does not fall.

III. FEDERAL COURT RULEMAKING

A. Introduction: The Proposed Rule

The weightiest attack on no-citation rules may come from the rulemaking power of the federal judiciary. In May 2003, the U.S. Judicial Conference’s Advisory Committee on Appellate Rules approved a proposed new Federal Rule of Appellate Procedure, FRAP Rule 32.1, that would require all federal circuits to allow citation of their unpublished opinions.¹¹⁰ The

108. See *supra* nn. 4-21.

109. Kozinski Testimony, *supra* n. 23, at 15.

110. See Memorandum from Judge Samuel A. Alito, Jr., Chair of Advisory Comm. on App. Rules, to Judge Anthony J. Scirica, Chair of Standing Comm. on Rules of Prac. & Proc., *Report of Advisory Committee on Appellate Rules 27-36* (May 22, 2003) (proposed Rule at 28-29; Committee Note at 29-36) (available at <http://www.uscourts.gov/rules/app0803.pdf>) (accessed Nov. 3, 2003; copy on file with Journal of Appellate Practice and Process) [hereinafter *Alito Memorandum*]. The Advisory Committee’s vote was seven to one, with one abstention.

The committee defines “unpublished,” clumsily but workably, as a “term of art” denoting judicial dispositions “that have been designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like.” *Alito Memorandum, supra* this note, at 29. Somewhat compulsively, the committee proceeds to put the ubiquitous term “unpublished” in quotation marks throughout its Memorandum. See *e.g. id.* at 30

proposed Rule was put out for public comment with a deadline of February 16, 2004;¹¹¹ it could take effect, at the earliest, in December 2005.¹¹²

The proposed Rule 32.1 reads in part:¹¹³

Rule 32.1: *Citation of Judicial Dispositions*

a) *Citation Permitted.* No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.¹¹⁴

As one who believes that judicial opinions by their nature should be citable, I applaud the committee’s development of this proposed Rule. The committee rightly points out that the conflicting citation rules of the various circuits “create a hardship for practitioners,” especially because citing an “uncitable” opinion can bring sanctions or professional discipline.¹¹⁵ The committee is also correct, I believe, in

(proposed rule “says nothing about what effect a court must give to one of its ‘unpublished’ opinions or to the ‘unpublished’ opinions of another court”).

111. See *Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules* (available at <http://www.uscourts.gov/rules/memo0803.pdf>) (accessed Dec. 12, 2003; copy on file with Journal of Appellate Practice and Process). Public hearings by the Advisory Committee were scheduled for Los Angeles on January 20, 2004, and Washington, D.C., on January 26, 2004. *Id.*

112. The Rule and any comments received will be considered by the Advisory Committee at its spring 2004 meeting. If approved there (with or without modification), the Rule then would have to run the gauntlet of the Standing Committee on Rules (June 2004), the Judicial Conference itself (September 2004), the Supreme Court (by May 1, 2005), and the Congress, before possibly taking effect—if still standing—on December 1, 2005.

113. Part (b) of the proposed Rule provides that a party who cites an unpublished opinion that is “not available in a publicly accessible electronic database” must file and serve a copy of the opinion along with the brief or other paper in which it is cited. *Memorandum to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules*, *supra* n. 111. As noted earlier (*supra* n. 47), such “provide a copy” requirements exist in most jurisdictions where citation of unpublished opinions is allowed; in the following discussion they will generally be taken for granted and not mentioned.

114. *Alito Memorandum*, *supra* n. 110, at 28-29. A colleague, on encountering this language, thought it so dense and awkward as to need a translation.

115. See *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (sanctions not imposed because of good-faith constitutional challenge); *Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55, 67 (Wis. 1982) (sanction imposed).

concluding that no-citation rules are “wrong as a policy matter.”¹¹⁶ In principle, then, the proposed Rule 32.1, in my view, deserves the profession’s support.

The way the Rule is presently drafted, however, launches a cascade of questions. I propose to explore these questions and to offer an alternative draft of the Rule (which I’ll call “Draft B”).

B. Citation and the Weight Given Citation

Perhaps the most conspicuous question raised by the proposed Rule 32.1—or by any rule authorizing citation of unpublished opinions—is the weight to be given to the cited opinions. May they be regarded as “precedents,” possibly even binding precedents, or only as “persuasive” authority? And who is to decide this question—the Judicial Conference of the United States (overseen by Congress and the Supreme Court), through a national rule, or the individual circuits through their local rules?

There is a case for national uniformity in the weight given unpublished opinions. The nine federal circuits that presently allow citation of unpublished opinions are divided almost evenly in the weight they accord those citations.¹¹⁷ If one of the goals of

116. *Alito Memorandum*, *supra* n. 110, at 27. The committee further observes, “[I]t is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence *except* those contained in the court’s own ‘unpublished’ opinions.” *Id.* at 33 (emphasis in original). This seems overstated; parties are barred from telling a court, for example, about facts outside the record. *See e.g.* R. S. Ct. U.S. 24-6 (“A brief shall be concise . . . and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph”) (available at <http://supremecourtus.gov/rulesofthecourt.pdf>) (accessed Dec. 30, 2003; copy on file with Journal of Appellate Practice and Process). What can be said is that a *prior judicial decision*, under our system of law based on precedent, is a special kind of information that attorneys have a specially strong claim—arguably a constitutional claim—to be able to disclose to a court when they think it will aid their client’s case. *Cf. Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 545 (2001) (congressional ban on use of Legal Services Corporation funds to challenge welfare laws violates First Amendment as attempt to “prohibit the analysis of certain legal issues and to truncate presentation to the courts”).

117. In five circuits, the First, Eighth, Tenth, Eleventh, and—with respect to opinions issued on or after January 1, 1996—the Fifth, unpublished opinions may be cited not as “precedents,” but only for “persuasive” value. *See supra* nn. 4, 10, 12-14. In four circuits, the Fourth, Sixth, D.C., and—with respect to opinions issued before January 1, 1996—the Fifth, such opinions may also be cited as “precedent” (or for “precedential value”). *See supra* nn. 6, 9-11. In the Third Circuit the opinions simply may be cited, with no weight specified in the rule. *See supra* n. 8.

Rule 32.1 is to unify divergent citation rules of the circuits,¹¹⁸ that goal arguably applies as much to weight as to citability.

On the question of weight, though, the value of uniformity does not seem strong enough to overrule circuit choice. There are compelling considerations of judicial integrity, constitutional rights, and public policy that make it “wrong as a policy matter” to prohibit citation of judicial opinions. No equally forceful arguments require the cited opinions to be accorded any particular weight, whether “precedential” or only “persuasive.”¹¹⁹ If nothing else, the considerable variation in circuit practice probably makes it too soon to impose a uniform rule.

The Advisory Committee apparently agrees. The committee is at pains to make clear that its proposed Rule “says nothing whatsoever about the effect that a court must give” to an unpublished opinion.¹²⁰ “The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as ‘unpublished’ or ‘non-precedential,’” the committee states.¹²¹

C. “Restrictions” on Citation: Introducing Draft B

Despite this assurance, under the present drafting it is not clear that the proposed Rule 32.1 does preserve circuit choice on the question of citation weight. When the proposed Rule says, “No prohibition or restriction may be imposed upon the citation of [unpublished] judicial opinions,” what does “restriction”

118. See *Alito Memorandum*, *supra* n. 110, at 35. (“Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice . . .”).

119. The “precedential” camp does claim the imprimatur of Article III. See *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). But that camp is a minority among the circuits (though a slim one) and does not seem likely, at least for a good while, to obtain Judicial Conference endorsement in preference to the “persuasive” approach. See *supra* n. 117. Moreover, the concepts of “precedential” and “persuasive” authority are not so crystalline and distinct that a rule distinguishing between them could be enforced. On the one hand, there are various levels of precedent. On the other, the “persuasive” effect of any prior decision may be impossible to disentangle, in the mind of a common law judge, from the fact that it *is* a prior decision—and hence, in fact, a precedent. See *Barnett*, *supra* n. 2, at 9-12.

120. *Alito Memorandum*, *supra* n. 110, at 28.

121. *Id.* (emphasis in original).

mean? If a circuit's rule provides—as several do¹²²—that unpublished opinions may be cited only for their “persuasive” value, is that not a “restriction” on their citation? One might think so. And if so, it would follow that circuit rules limiting citation to persuasive value are forbidden by Rule 32.1, because no such limit is imposed on the citation of published opinions.¹²³

Two possible remedies come to mind. One is legislative history, or drafter's gloss. The Committee Note might declare the committee's view that the Rule deals only with citability and “says nothing whatsoever about the effect that a court must give” to the cited opinions.¹²⁴ If we may assume that the judges and lawyers operating in the federal appellate courts have no aversion to legislative history,¹²⁵ this approach might produce the committee's desired interpretation of its Rule.

The other approach would proceed on the basis that if you want to permit citation, you might just say that citation is permitted.¹²⁶ Draft B thus would simply provide:

Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court.

This language would make quite clear the committee's view that the Rule deals only with permitting citation and says nothing about the weight to be given citations. Draft B also would take the lead out of the drafting. You don't have to be Bryan Garner to object to the present draft's double negative (“[n]o prohibition”); its vast passive (“may be imposed”); its

122. See *supra* n. 117.

123. In an apparent effort to avoid this problem, the committee minimizes the differences that exist among the circuits with respect to the weight given to citations of unpublished opinions, downplaying in particular the extent to which those opinions are treated as precedents. Thus, the committee says that “the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of ‘unpublished’ opinions for their persuasive value,” *Alito Memorandum, supra* n. 110, at 31, without mentioning that the circuits have differed even more dramatically with respect to the restrictions they have placed on citation of unpublished opinions for their precedential value, see *supra* n. 117.

124. *Alito Memorandum, supra* n. 110, at 28.

125. But see e.g. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutman ed., Princeton U. Press 1997).

126. The committee does just say that in the two-word preamble to its Rule: “Citation permitted.” This language does not seem operational, however, because it does not say citation of *what* is permitted. Instead, the drafters turn to a prohibitory approach and forbid any “prohibition or restriction” on citation. Under this approach, to know what is permitted you have to know what is a “prohibition or restriction.”

awkward laundry list of unpublished dispositions; or its backhanded approach of making opinions citable by banning restrictions on citation.

Before concluding, however, that the elegant Draft B should replace the committee's cumbersome Draft A, it is necessary to consider how each draft would handle a major problem that will arise.

D. Discouraging Words

This is the problem of discouraging words. Although nine of the thirteen circuits now allow citation of their unpublished opinions, all nine discourage the practice; they all have language in their rules stating that such citation is “disfavored,” that unpublished opinions should not be cited unless no published opinion would serve as well, that the court “sees no precedential value” in unpublished opinions, and so forth.¹²⁷ The question is whether such discouraging words are a forbidden “restriction” on citation under proposed Rule 32.1.

The Advisory Committee addresses this question with the following Delphic pronouncement:

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing “unpublished” opinions is “disfavored” or limited to particular circumstances (such as when no “published” opinion adequately addresses an issue). Again, it is difficult to understand why “unpublished” opinions should be subject to restrictions that do not apply to other sources.¹²⁸

The first sentence of this passage does not say that Rule 32.1 would overrule those local rules—only that it is “[u]nlike” them. The second sentence, however, characterizes the discouraging words as “restrictions,” so in the committee's apparent view, Rule 32.1 *would* overrule them.

Four questions follow: (1) *Are* discouraging words “restrictions” on citation under Rule 32.1? (2) What difference, if any, does it make? (3) What is the risk of judicial resistance to

127. See *supra* nn. 8-15.

128. *Alito Memorandum*, *supra* n. 110, at 34.

no-citation rules, through discouraging words or other means? and (4) *Should* discouraging words be forbidden?

1. Are Discouraging Words “Restrictions” under Rule 32.1?

The committee’s statement notwithstanding, it is not clear that discouraging words have to be considered “restrictions” on citation under the proposed Rule 32.1. These words may be wholly admonitory—and unenforceable. The Fourth Circuit’s rule, for example, states that citing unpublished opinions is “disfavored,” but that it may be done “[i]f counsel believes, nevertheless, that [an unpublished opinion] has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well.”¹²⁹ On the question of what counsel “believes,” surely counsel should be taken at her word; counsel’s asserted belief that an unpublished opinion has precedential or persuasive value should not be considered a falsifiable fact. Hence no sanction should be available for violating the Fourth Circuit’s rule, and the rule’s discouraging language in turn would not be a “prohibition or restriction” that was barred by Rule 32.1 as presently drafted.

In the rules of some other circuits, however, the language disfavoring citation of unpublished opinions is unmoored from anyone’s “belief” and arguably does impose an objective “prohibition or restriction” determinable by a court.¹³⁰ A court might find, for example, that the required “persuasive value with respect to a material issue that has not been addressed in a published opinion”¹³¹ was not present, and hence that the citation was not permitted by the circuit rule.

With what result? It would follow, paradoxically, that the opinion could be cited—because the circuit rule would be struck down under Rule 32.1 as a forbidden “restriction” on citation.

The committee’s double-negative drafting thus creates a Hall of Mirrors in which citation of an unpublished opinion

129. *See supra* n. 9.

130. The Tenth Circuit’s rule, for example, states that although citation of unpublished opinions is “disfavored,” such an opinion may be cited if “(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.” *See supra* n. 13. There is nothing here about what counsel “believes.”

131. *See supra* n. 130.

would be allowed either way. If the local rule's discouraging language is merely hortatory, it is not a "restriction" forbidden by Rule 32.1; but that doesn't matter, because such a rule does not bar the citation in the first place. If, on the other hand, the local rule's language has bite and is a "restriction," then Rule 32.1 strikes it down, and again the citation is permitted.

2. What Difference Does It Make Whether Discouraging Words Are "Restrictions"?

There is one live question, however, that would turn on whether a local rule's discouraging language constituted a "restriction" on citation. If the language was a restriction, it would be condemned by Rule 32.1¹³² *and so presumably would have to be removed from the local circuit rule*. Each circuit's rule thus would have to be parsed to determine whether its discouraging words were purely hortatory or legally enforceable; and each circuit thus would have to decide—subject to review by the Judicial Conference?—which of its discouraging words it could keep.

This not only would present each circuit with a tricky job of drafting or redrafting. More importantly, imposing this task on the circuits, and thus invalidating many of their existing rules, could well forfeit the political support from the circuits that Rule 32.1 needs to survive the Judicial Conference and its committees.

Here again, Draft B may come to the rescue. Its simple statement that unpublished opinions "may be cited" would trump whatever a local rule might say to disfavor or discourage citation. There would thus be no "prohibition or restriction" on citation and hence no need to rewrite all the local rules to remove the discouraging words.

3. The Risk of Judicial Resistance

Before concluding that the permissive Draft B works better than the prohibitory Draft A, however, one must ask how the two versions would stand up, respectively, to possible opposition by adamant anti-citationists. The committee

132. That Rule, of course, provides that "no prohibition or restriction may be imposed."

reportedly chose the prohibitory Draft A over a permissive Draft B out of concern that, the Rule's permission notwithstanding, a recalcitrant circuit might impose some "prohibition or restriction" that would make it difficult or impossible for attorneys to cite unpublished opinions.¹³³ This fear of a rogue circuit defying duly adopted Federal Rules seems overblown (if not fantastic).

A circuit might more plausibly react, however, not by restricting attorneys in what they can cite, but by restricting the circuit judges themselves. The Third Circuit, for example, while allowing attorneys to cite unpublished opinions, has an announced "tradition" that it will not itself cite those opinions.¹³⁴

It might be said that such foreswearance by judges should not bother lawyers, who remain free to cite unpublished opinions *to* the judges. But surely a lawyer's chance of prevailing in her case is greater if the judge can cite the authority on which the lawyer and the judge rely. In practice, then, a court's policy of not itself citing unpublished opinions may undermine the right of attorneys to cite those opinions. So if a rule is adopted that allows citation of unpublished opinions, policies by which courts foreswear citing those opinions should be eliminated.

For this purpose, the committee's more explicit Draft A might be more effective than my Draft B.¹³⁵ No explicit command should be needed, however. Federal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter. It therefore should be sufficient, if a rule is adopted stating that unpublished opinions "may be cited," to include in the Committee Note a statement

133. It reportedly has been suggested, for example, that a circuit's local rule might require permission of the court clerk before citing one of the court's unpublished opinions.

134. See 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority."); see also *supra* n. 8.

135. Draft A presumably would ban the Third Circuit's "tradition" of non-citation, deeming it a forbidden "prohibition" or "restriction." Draft B, stating only that unpublished opinions "may be cited," would not on its face strike down self-imposed practices of not citing.

that judicial policies, practices, or traditions of not citing such opinions therefore should be lifted.¹³⁶

4. *Should Discouraging Words Be Allowed?*

Finally, whether or not discouraging words would violate Rule 32.1, there remains the normative question whether such words should be allowed to persist in a circuit's rules. The Advisory Committee apparently thinks not, embracing equal rights for published and unpublished opinions.¹³⁷ I disagree. Discouraging words have been adopted by all the circuits—and many of the states—that allow citation of unpublished opinions, and I think with reason. Unpublished opinions are different from published ones. This is partly because the courts give them “published” status in traditional case reporters, but more importantly, because unpublished rulings do not get as much attention and consideration from judges as published rulings do. Given these differences, courts treat unpublished opinions as second-class precedents in various ways—for example, by regarding them as citable only for “persuasive” value and not as precedents. If unpublished opinions may be treated that way after they have been decided, the same logic indicates that

136. If a more explicit approach is considered necessary, an effective one can be found short of Draft A. One could retain Draft B—

(1) Any opinion; order, judgment, or other disposition by a federal court may be cited to or by any court —

and add a second paragraph:

2) No federal court may decline to consider or to cite any judicial disposition on the ground that such disposition has been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

This approach, no less than Draft A, would expressly invalidate the no-citation-by-judges policy now existing in the Third Circuit, as well as any such policies or rules that might be devised in the future to undermine citability. (The Third Circuit judges avowedly “decline to . . . cite” opinions because they are unpublished.) At the same time, the new language would be limited to judicial words or actions that specifically “decline to consider or to cite” any disposition on the ground of its being unpublished. This language would avoid the vagueness of the term “restriction” in the present Draft A; it thus would avoid having to parse the discouraging words in each circuit's rule to determine whether those words represent a “restriction” and have to be removed.

137. “[I]t is difficult to understand why ‘unpublished’ opinions should be subject to restrictions that do not apply to other sources.” *Alito Memorandum, supra* n. 110, at 34.

citation of those opinions may be discouraged beforehand—as long as the citation is *allowed*.¹³⁸

In the longer term, the discouraging words are likely to prove needless. As the Advisory Committee points out, citing an unpublished opinion “is usually tantamount to admitting that no ‘published’ opinion supports a contention, [so] parties already have an incentive not to cite ‘unpublished’ opinions.”¹³⁹ But as long as the local rule’s admonitions against citation are only admonitions, so the decision on citation remains wholly and freely up to the lawyer, no harm appears in letting circuits maintain the second-class status of unpublished opinions. If words discouraging citation will reassure judges and lawyers as they venture into a new world of citable judicial opinions, toleration of such comforting judicial speech is not too high a price to pay.

IV. CONCLUSION

The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling. Rule 32.1, proposed by the Federal Rules Advisory Committee, accords with this trend and deserves the support of the legal profession.

At the same time, the Rule’s drafting should be reconsidered. Its double-negative approach—forbidding any “prohibition or restriction” on citation—should be replaced with a statement that unpublished opinions “may be cited.” This change would make it clear that the forbidden “restriction[s]” do not include local circuit rules stating either (a) that unpublished opinions may be cited only for “persuasive value,” or (b) that citation of unpublished opinions is “disfavored,” or the like, or should not be done unless there is no published opinion that serves as well (“discouraging words”). Discretion

138. See also Barnett, *supra* n. 2, at 22 (in defense of treating unpublished opinions as second-class precedents).

139. Alito Memorandum, *supra* n. 110, at 34.

to employ statements of both kinds should be left, for now, to the individual circuits. The Advisory Committee is correct, however, on the fundamental proposition that decisions of the federal courts should be citable in those courts.

APPENDIX

State Court Rules on Citation of Unpublished Opinions 2003

| I | II | III | IV | V |
|--|--|---|---|---|
| All Opinions Freely Citable* | Citable as Precedent | Citable for Persuasive Value | Too Close to Call | Citation Prohibited |
| Connecticut Mississippi New York North Dakota | Delaware Ohio Texas Utah West Virginia | Alaska Georgia Iowa Kansas Michigan Minnesota New Jersey New Mexico Tennessee Vermont Virginia Wyoming | Hawaii Illinois Maine Oklahoma Oregon | Alabama Arizona Arkansas California Colorado District of Columbia Florida Idaho Indiana Kentucky Louisiana Maryland Massachusetts Missouri Montana Nebraska Nevada New Hampshire North Carolina Pennsylvania Rhode Island South Carolina South Dakota Washington Wisconsin |
| 4 | 5 | 12 | 5 | 25 |
| 21 Citation States | | | | 25 No-Citation States |

*These states either publish all opinions or place no restrictions on the citation of unpublished opinions.

