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## ARTICLES

# UNFAIRNESS IN ACCESS TO AND CITATION OF UNPUBLISHED FEDERAL COURT DECISIONS

PETER JAN HONIGSBERG\* AND JAMES A. DIKEL\*\*

## I. INTRODUCTION

### A. THE NEW STARE DECISIS

An unfair system has evolved over the past fifteen years in the federal courts. The federal courts changed the concept of stare decisis.

In 1972, the Judicial Conference of the United States decided that they needed to reduce the increasing workload of the federal judges. The best way to do so, they thought, was to distinguish between decisions. Some would be worthy of publication and some would not be. Thus, federal judges were instructed to separate out those rulings which would be useful to future litigants or which did more than merely repeat and mechanically apply well-settled rules of law. These decisions would be published. If a judge felt that a decision would not have "precedential"<sup>1</sup> value, the decision and accompanying opinion would not be published.<sup>2</sup>

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1. See, e.g., Fed. Cir. R. 18(c). For the text of Rule 18(a), see *infra* note 31.

2. This practice of allowing judges, rather than attorneys involved in future litigation, to decide whether their decisions will be useful or not, is antithetical to the common law system. See STATEMENT OF CHIEF JUDGE HOLLOWAY, JOINED IN BY JUDGES BARRETT

Although this seemed like a sensible solution at the time, it has created several unfavorable consequences. Since more than fifty per cent of all federal opinions are no longer published,<sup>3</sup> a significant body of unpublished case law has developed. And the unfavorable consequences are directly tied to the non-publication of these decisions.

One problem is that judges have not been consistent in their interpretation of the directives relating to non-publication decisions established by the various federal circuits.<sup>4</sup> For example, some judges refuse to recognize any value in an unpublished decision.<sup>5</sup> Other judges will note that circuit rules prohibit the citation of unpublished decisions, but will then proceed to read and refer to and even discuss such decisions.<sup>6</sup> Still other judges will not even mention their own circuit court rules on the matter, but will cite, review and discuss useful unpublished decisions.<sup>7</sup> Some of these judges may even rely on such "non-precedential precedents."<sup>8</sup> And finally, some judges will cite and discuss unpublished decisions which they themselves have written, regardless of their circuit's rule.<sup>9</sup>

Then there is the problem of permitting a judge to decide the value of his or her ruling and its impact on future litigation. Although a ruling may not seem significant at the moment, future developments may justify a reassessment of the significance of a decision. Can the importance of these decisions really be predicted?

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AND BALDOCK, CONCURRING AND DISSENTING IN THE RULES. RE: RULES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, ADOPTED NOVEMBER 18, 1986 [hereinafter STATEMENT OF CHIEF JUDGE HOLLOWAY] as quoted in 10th Cir. R. Appendix III (A dissent to the Tenth Circuit's decision to stop allowing the citation of unpublished opinions). See also, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977).

3. D. STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 39-40 (1985). This figure reflects only cases "disposed of by oral argument or after submission without hearing."

4. See *infra* text accompanying notes 62-79.

5. See *infra* notes 64-65 and 71-73 and accompanying text.

6. See *infra* notes 62-63 and 66-69 and accompanying text.

7. See *infra* note 70 and accompanying text.

8. The term "non-precedential precedent" was coined in Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter Reynolds & Richman].

9. See *infra* notes 78-79 and accompanying text.

There is another unfortunate and inequitable result. Not every attorney has equal access to these unpublished decisions. The attorneys in large corporate firms, government attorneys, and attorneys who can afford LEXIS and WESTLAW have greater access to unpublished opinions than other attorneys.<sup>10</sup> Thus the "big boys" have a distinct advantage over the small firms and single practitioners. Since many judges are influenced by the reasonings and decisions of unpublished opinions cited in memoranda and briefs to the court, this advantage can make the difference in preparing and winning a case.

#### B. THE VALUE OF UNPUBLISHED DECISIONS

Naturally, the practitioner is going to use everything he or she can to help persuade a judge to rule in the litigant's favor. Unpublished opinions can make a difference.

For example, unpublished opinions can indicate which precedents are considered relevant by a court,<sup>11</sup> and the rulings and reasonings can be used as guidelines for a litigant's brief or memorandum to the court.<sup>12</sup> The unpublished decisions can also help trace patterns and establish the direction of a court, thus assisting the attorney in predicting the court's actions. Reading and possibly citing unpublished opinions written by the judge who will be hearing the client's case can also be invaluable in preparing one's court presentation or brief. After all, how many judges are willing to admit to inconsistency, even if the earlier decision was unpublished?

In addition, some circuits will permit their courts to grant requests to publish an unreported opinion.<sup>13</sup> Thus, a thorough

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10. See *infra* notes 23-25 and accompanying text.

11. Reynolds & Richman, *supra* note 8, at 1196.

12. *Id.*

13. Five circuits have rules allowing this:

Fed. Cir. R. 18(c): "Any person may request that an unpublished opinion or order be reissued for publication, citing reasons therefor. Such motion will be granted or denied by the panel that rendered the decision.";

1st Cir. R. 36.2 (b)(4): "Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.";

4th Cir. IOP 36.4: "Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.";

attorney would review unpublished opinions in the hope that he or she might find one or more which, when reissued as published opinions, would tip the scale in a litigant's favor.<sup>14</sup>

### C. RESEARCHING THE MATERIAL FOR THIS PAPER

In researching this paper, we traced the circuit court rules on unpublished opinions<sup>15</sup> through key word searches on LEXIS and WESTLAW and through Shepard's indexes. (Legal digests and encyclopedias only refer to and report on published cases.) Naturally, it is possible that we missed some very useful cases.

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7th Cir. R. 35(d)(3): "Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in this rule."; and

9th Cir. R. 21(d): "Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for [it]."

According to D. STIENSTRA, *supra* note 3, at 33, "[t]he remaining circuits have made it known that they permit this practice even though it is not mentioned in their rules." Our research has uncovered two cases in the Second Circuit which were reissues of previously unpublished opinions: *Galante v. Warden*, 573 F.2d 707 (2d Cir. 1977) and *United States v. Vasquez*, 675 F.2d 16 (2d Cir. 1982).

See also STATEMENT OF CHIEF JUDGE HOLLOWAY, *supra* note 2, in which Judge Holloway of the Tenth Circuit stated that, "we are frequently changing our views on publication of decisions, deciding later to publish them on motions of the parties or on our own motion."

Other cases which were reissues of previously unpublished opinions include: *Rough and Ready Timber Co. v. United States*, 707 F.2d 1353 (Fed. Cir. 1983); *United States v. Lawson*, 545 F.2d 557 (7th Cir. 1975); *Mertens v. Hummell*, 587 F.2d 862 (7th Cir. 1978); *DeBrown v. Trainor*, 598 F.2d 1069 (7th Cir. 1979); *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978); *United States v. Spears*, 671 F.2d 991 (7th Cir. 1982); and *United States v. Baskes*, 687 F.2d 165 (7th Cir. 1981).

14. Government agencies, insurance companies, and other large firms with a great deal of litigation in certain areas systematically review unpublished opinions and request publication in favor of their interests. Such requests are purportedly granted "routinely." See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 126 (1985).

*Cf.* J. CECIL, *ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT* 39 (1985). This report states that the Office of Staff Attorneys of the Ninth Circuit routinely review unpublished opinions and recommend publication "in appropriate cases." In the three year period studied (August 1979 through April 1982), the Staff Attorneys recommended publication of forty-two unpublished dispositions, and the court published twenty-two of them.

15. Researching the circuit court rules can be very confusing. The rules are periodically changed and renumbered. They take many forms: Circuit Court Rules, Appendices, and Internal Operating Procedures. It is not always clear whether the Appendices are superseded by changes in the Rules, or whether the Internal Operating Procedures supersede or supplement the Circuit Court Rules. Often the difference between one and the other is that the language of the prior rule is clearer, yet the general thrust of the subsequent rule is the same. We have primarily focused on the most recent versions.

For if a case substantially relied on an unpublished opinion but did not cite a circuit court rule or otherwise mention the fact that it was relying on an unpublished opinion, we would not have found it through our research. Nevertheless, we did find an ample number of very informative cases.

## II. THE GROWTH OF UNPUBLISHED OPINIONS IN THE FEDERAL COURTS

During the 1960s and early 1970s there was a dramatic increase in federal litigation.<sup>16</sup> The federal courts of appeal were not prepared to handle the increased caseloads. Judges complained that they had to spend upwards of half their time drafting opinions.<sup>17</sup> Many of these opinions were in relatively unimportant cases, while more compelling cases and other matters were sometimes given insufficient concern.

As a result, in 1972, the Judicial Conference of the United States developed plans to decrease the judges' workloads.<sup>18</sup> One approach was to limit the publication of cases to those of obvious precedential value. Because this proposal was noncontroversial it won quick approval.<sup>19</sup> The judges felt that there were many well-settled rules which did not need to be restated again and again, and that there were many decisions which were useful only to the parties involved.<sup>20</sup>

Every federal circuit drew up rules on when opinions should or should not be published. Most of the circuits also drafted rules on whether the unpublished decisions could be cited. By the end of the Judicial Conference's six year trial period, an average of 61.7% of the federal appellate opinions went unpublished,<sup>21</sup> with as many as 81.9% unpublished in one circuit.<sup>22</sup>

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16. Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, n.2 (1977).

17. *Id.*, at 128, n.3.

18. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405, 406 (1981).

19. *Id.*

20. *Id.*

21. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 587 (1981).

22. *Id.* The Third Circuit.

However, although the judges probably intended that the unpublished decisions be out of the public scrutiny, these opinions are largely still available to the practitioner. LEXIS and WESTLAW carry most of the unpublished opinions with the applicable no-cite rule attached.<sup>23</sup> Unpublished opinions are also available in certain specialized law reports in fields such as those for patent, securities and antitrust law.<sup>24</sup> They are also collected by large corporate firms and government offices.<sup>25</sup> Finally, some circuit courts distribute their unpublished opinions to the judges in their circuits.<sup>26</sup>

The Judicial Conference issued a report at the end of the six year experiment.<sup>27</sup> It recommended that because of the lack of consensus about the legal and policy issues surrounding unpublished opinions, the experiment should continue.<sup>28</sup> The report "expressed the hope that changes in litigation rates, judicial manpower, and computer technology might permit a return to more traditional practices."<sup>29</sup> It does not seem, however, that the appellate courts have returned to "more traditional practices." In fact, they have continued their policy of not publishing most of their decisions,<sup>30</sup> and for most attorneys the unpublished decisions are still in large part unavailable. Moreover, in spite of most circuits' rules, there is no clear way to determine in advance whether a court will allow a litigant to cite an unpublished

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23. WESTLAW also carries a catalog of unpublished federal district court opinions. In 1988, LEXIS began its own citation system for unpublished decisions. *See, e.g.*, 1988 U.S. App. LEXIS 14490.

24. R. POSNER, *supra* note 14, at 122.

25. Reynolds & Richman, *supra* note 8, at 1187.

26. *Id.*, at 1196 n.151. The First, Fourth, Sixth, and Ninth Circuits distribute unpublished opinions to all judges in their circuits. The Seventh Circuit sends its opinions only to the appellate judges in its circuit.

*But cf.* D. STIENSTRA, *supra* note 3, at 18-19. Her discussions with the circuit court clerks (conducted six years after Reynolds' and Richman's study) resulted in the discovery that the Eighth, Eleventh, Federal, and D.C. Circuits also distribute their opinions to all appellate courts in their circuits. The Eighth Circuit sends copies to all district judges in its circuit as well. The First and Sixth Circuits, however, presumably do not circulate unpublished opinions at all.

27. SUBCOMMITTEE ON FEDERAL JURISDICTION, THE COMMITTEE ON COURT ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON OPINION PUBLICATION PLANS IN THE UNITED STATES COURTS OF APPEALS 12-13 (1978) [hereinafter SUBCOMMITTEE ON FEDERAL JURISDICTION], *quoted in* D. STIENSTRA, *supra* note 3, at 13.

28. *Id.*

29. SUBCOMMITTEE ON FEDERAL JURISDICTION, *quoted in* HOFFMAN, *supra* note 18, at 408.

30. D. STIENSTRA, *supra* note 3, at 39-40.

case.

### III. THE RULES IN THE FEDERAL CIRCUIT COURTS

#### A. THE CIRCUIT COURT RULES ON CITING UNPUBLISHED OPINIONS

The federal circuit court rules on whether to publish an opinion essentially provide that an opinion should be published only if it has “precedential value.”<sup>31</sup> The circuit courts have varying criteria regarding what constitutes “precedential value.” Many circuits require publication if the case involves an issue of continuing “public interest,”<sup>32</sup> or interests “persons other than

31. *See, e.g.* Fed. Cir. R. 18(c): “Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decisions.”;

2d Cir. R. § 0.23: “[I]n those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.”; and

3rd Cir. IOP V(F)(1): “The criterion normally applied is whether or not the opinion has precedential or institutional value. An opinion which appears to have value only to the trial court or the parties is ordinarily not published.”

32. 4th Cir. IOP 36.3: “Opinions delivered by the Court will be published only if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication:

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

5th Cir. R. 47.5.1: “The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way *interest persons other than the parties* to a case should be published. Therefore, an opinion will be published if it:

- establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
- applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
- explains, criticizes, or reviews the history of existing decisional or enacted law;
- creates or resolves a conflict of authority either within the circuit or between this circuit and another;

- concerns or discusses a factual or legal issue of *significant public interest*;
- is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it: is accompanied by a concurring or dissenting opinion; reverses the decision below or affirms it upon different grounds” (emphasis



added);

6th Cir. R. 24(a): "The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

(i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;

(ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(iii) whether it discusses a legal or factual issue of *continuing public interest*;

(iv) whether it is accompanied by a concurring or dissenting opinion;

(v) whether it reverses the decision below, unless:

(a) the reversal is caused by an intervening change in law or fact, or

(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;

(vi) whether it addresses a lower court or administrative agency decision that has been published; or

(vii) whether it is a decision which has been reviewed by the United States Supreme Court" (emphasis added);

7th Cir. R. 35(c)(1): "A published opinion will be filed when the decision:

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of *continuing public interest*;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order or remand from the Supreme Court and is not rendered merely in ministerial obedience to specified directions of that Court" (emphasis added);

8th Cir. R. 14: "The judgment or order appealed from may be affirmed or enforced without opinion if the court determines that an opinion would have no precedential value and that any one of the following circumstances is dispositive of the matter submitted to the court for decision:

(1) a judgment of the district court is based on findings of fact that are not clearly erroneous;

(2) the evidence in support of a jury verdict is not insufficient;

(3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or

(4) no error of law appears;" and

8th Cir. R. Appendix II — "Plan for Publication of Opinions": "An opinion should be published when the case or opinion:

(a) establishes a new rule of law or questions or changes an existing rule of law in this Circuit,

(b) is a new interpretation of or conflicts with a decision of a federal or state appellate court,

(c) applies an established rule of law to a factual situation significantly different from that in published opinions,

(d) involves a legal or factual issue of *continuing or unusual public or legal interest*,

(e) does not accept the rationale of a previously published opinion in that case, or

(f) is a significant contribution to legal literature through historical review or resolution of an apparent conflict" (emphasis added);

9th Cir. R. 21(b): "Dispositions shall be published if one or more of the criteria for publication set forth below are met. The disposition:

the parties.”<sup>33</sup> A number of circuits will also require publication when the decision establishes a new rule of law;<sup>34</sup> alters, modifies, or clarifies a rule of law;<sup>35</sup> calls attention to a rule of law which may have been overlooked;<sup>36</sup> criticizes existing law;<sup>37</sup> or resolves or creates a conflict of authority within the circuit or

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- (1) Establishes, alters, modifies or clarifies a rule of law, or
  - (2) Calls attention to a rule of law which appears to have been generally overlooked,
- or
- (3) Criticizes existing law, or
  - (4) Involves a legal or factual issue of *unique interest or substantial public importance*, or
  - (5) Decides a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
  - (6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression” (emphasis added).

33. 5th Cir. R. 47.5.1. For text, *see supra* note 32.

34. 1st Cir. R. 36.2: “(a) In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion *does not articulate a new rule of law*, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants.

. . . .

(b)(3) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court in banc the opinion or opinions shall be published.

. . . .

(b)(5) If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion” (emphasis added);

10th Cir. R. 36.1: “It is unnecessary for the court to write opinions in every case. The court may, in its discretion and without written opinion, enter either an order, “Affirmed,” or an order and judgment disposing of the appeal or petition. Disposition without opinion does not mean that the case is considered unimportant. It does mean that the panel believes the case involves application of *no new points of law* that would make the decision of value as a precedent” (emphasis added);

10th Cir. R. 36.2: “When an opinion has been previously published by a district court, an administrative agency, or the United States Tax Court, this court will ordinarily designate its disposition for publication. If a panel has written an order and judgment which would ordinarily not be published, a separate page may be added to the disposition designating for publication only that dispositive judgment or order.”

*See also* 5th Cir. R. 47.5.1, 6th Cir. R. 24(a)(i), 7th Cir. R. 35(c)(1)(i), 8th Cir. R. Appendix II(a), and 9th Cir. R. 21(b)(1). For texts, *see supra* note 32.

35. 1st Cir. R. 36.2(a). For text, *see supra* note 34. 4th Cir. IOP 36.3(i), 5th Cir. R. 47.5.1, 6th Cir. R. 24(a)(i), and 9th Cir. R. 21(b)(i). For texts, *see supra* note 32.

36. 5th Cir. R. 47.5.1 and 9th Cir. R. 21(b)(2). For texts, *see supra* note 32.

37. 4th Cir. IOP 36.3(iii), 5th Cir. R. 47.5.1, 7th Cir. R. 35(c)(1)(iii), and 9th Cir. R. 21(b)(3). For texts, *see supra* note 32.

between the circuit and another circuit.<sup>38</sup> On the other hand, where the judgment of the district court is based on findings of fact which are not clearly erroneous and no error of law appears in the appeal, the opinion would not need to be published.<sup>39</sup> A few circuits require publication if the case is a reversal of the disposition below,<sup>40</sup> or if the case below is published.<sup>41</sup>

However, when it comes to determining whether an unpublished opinion may be cited, the courts differ significantly. Until November of 1986, only the Tenth Circuit clearly provided for the citation of unpublished opinions.<sup>42</sup> As of November 18, 1986, however, the Tenth Circuit's rules now prohibit the citation of unpublished opinions.<sup>43</sup> The Eleventh Circuit allows for the cita-

38. 4th Cir. IOP 36.3(v), 5th Cir. R. 47.5.1, 6th Cir. R. 24(a)(ii), 7th Cir. R. 35(c)(1)(iv)(C), and 8th Cir. Appendix II(f). For texts, *see supra* note 32. *See also*, D. STIENSTRA, *supra* note 3, at 36. Stienstra indicates that all of the remaining circuits have adopted this policy in practice.

39. 11th Cir. R. 25: "When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are *not clearly erroneous*;

(b) the evidence in support of a jury verdict is not insufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered *without an error of law*; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion" (emphasis added).

40. 5th Cir. R. 47.5.1, 6th Cir. R. 24(a)(1)(v), and 7th Cir. R. 35(c)(1)(v). For texts, *see supra* note 32. *Cf.*, D. STIENSTRA, *supra* note 3, at 34, stating that it is also the practice of the First, Second, and Eighth Circuits to publish reversals.

41. 1st Cir. R. 36.2(b)(5), 10th Cir. R. 36.2. For texts, *see supra* note 34. *See also* 6th Cir. R. 24(a)(1)(iv). For text, *see supra* note 32. *Cf.*, D. STIENSTRA, *supra* note 3, at 33, stating that the practices of the Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits is to publish when the lower court's decision was published.

If this is not required, an unpublished affirmance of a published district court opinion may be cited and misinterpreted as adopting all of the language in the lower court's opinion. *See infra* notes 74-77 and accompanying text.

42. 10th Cir. R. 17(c): (*Superseded*) "Unpublished opinions, although unreported, can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel."

Until discontinued in 1984, the circuit even printed an index of unpublished opinions, and it sold the individual opinions as well. *See* 10th Cir. R. 17(c) (*superseded*).

43. 10th Cir. R. 36.3: "Unpublished opinions and orders and judgments have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, *res judicata*, or collateral estoppel."

tion of unpublished opinions, but it does so through judicial decision.<sup>44</sup> The circuit has no specific rule addressing this issue.

The Fifth Circuit's rule, as amended in 1983,<sup>45</sup> may allow litigants to cite most unpublished opinions because it provides that an unpublished decision may be cited if it "involves related facts."<sup>46</sup> Certainly, it could be argued that almost any case involves related facts. The Third Circuit also seems to allow (at least at times) for the citation of unpublished decisions. There is no Third Circuit rule, and its cases are inconsistent.<sup>47</sup>

Two circuits provide that citation is "disfavored" but will allow citation if no published opinion would serve as well in regards to a "material issue" of a case and a copy of the opinion is served on all the parties.<sup>48</sup> The remaining circuits do not appear to allow litigants to cite unpublished opinions unless it is for the purpose of establishing the law of the case, as a basis for res

This action was protested by Chief Judge Holloway, and joined by two other Tenth Circuit judges. See STATEMENT OF CHIEF JUDGE HOLLOWAY, *supra* note 2.

44. See *infra* notes 58-59 and accompanying text.

45. Prior to 1983, the only guideline was 5th Cir. R. 21, which did not address whether citation was allowed. It did state that opinions should not be published if, "the Court also determines that . . . an opinion would have no precedential value."

46. 5th Cir. R. 47.5.3: "Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it:

- (1) established the law of the case,
- (2) is relied upon as a basis for res judicata or collateral estoppel, or
- (3) involves related facts.

If an unpublished opinion is cited, a copy shall be attached to each copy of the brief."

47. See *infra* notes 60-61 and accompanying text.

48. 4th Cir. IOP 36.5: "In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

"If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court."

See also 6th Cir. R. 24(b): "Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

"If 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 decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court."

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judicata or collateral estoppel,<sup>49</sup> in “related cases,”<sup>50</sup> or “when the cases are related by virtue of an identity between the parties or the causes of action.”<sup>51</sup>

However, these rules do not really settle the matter. For the question remains as to what does it mean to “cite” a case? It would seem that including an unpublished case in an attorney’s brief or in a presentation to the court would be prohibited. Two of the circuits clearly indicate an intention to prohibit such use.<sup>52</sup> But three other circuits prohibit citing an unpublished case “as precedent.”<sup>53</sup> This may mean that the decision can be

49. Fed. Cir. R. 18(c): “Opinions and orders designated as unpublished shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case.”;

D.C. Cir. R. 8(f): “Unpublished orders, including explanatory memoranda of this Court, are not to be cited in briefs or memoranda of counsel as precedents. However, counsel may refer to such orders and memoranda for such purposes as application of the doctrines of res judicata, collateral estoppel and law of the case, which turn on the binding effect of the judgment, and not on its quality as precedent.”;

7th Cir. R. 35(b)(2)(iv): “Except to support a claim of res judicata, collateral estoppel or law of the case, [unpublished opinions] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose.”;

9th Cir. R. 21(c): “A disposition that is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.”

See 10th Cir. R. 36.3. For text, see *supra* note 43. See also 4th Cir. IOP 36.5 and 6th Cir. R. 24(b). For texts, see *supra* note 48.

50. 1st Cir. R. 36.2(b)(6): “Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise.”;

2d Cir. R. § 0.23: “Since [unpublished opinions] do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.”

51. 8th Cir. R. 8(i): “No party may cite an opinion that was not intended for publication by this or any other federal or state court, except when the cases are related by virtue of an identity between the parties or the causes of action. See Plan for Publication of Opinions, § 3.”

8th Cir. R. Appendix II—“Plan for Publication of Opinions,” § 3: “Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before ‘this court or any district court in this circuit’ except when the cases are related by virtue of an identity between the parties or the causes of action.”

52. 2d Cir. R. § 0.23: “[Unpublished opinions] shall not be cited or otherwise used . . .” For text, see *supra* note 50. See also 8th Cir. R. Appendix II: “Unpublished opinions . . . may not be cited or otherwise used . . . (emphasis added).” For full texts, see *supra* note 51. See also 1st Cir. R. 14 (*superseded*), stating that unpublished opinions are “never to be cited” (emphasis added).

53. Fed. Cir. R. 18(a), D.C. Cir. R. 8(f), and 7th Cir. R. 35(b)(2)(iv). For texts, see *supra* note 49.

incorporated for its persuasive value, unless of course these rules are based on the assumption that all citation necessarily refers to a case as possible “precedent.” Normally, one would look at how the rules have been applied to find the answer to such a question. But, as we have found, the judges have not been consistent in their interpretation of the no-cite rules.<sup>54</sup>

The question of whether unpublished district court decisions can be cited, even if unpublished appellate court decisions cannot, is also left open by the rules. The Eighth Circuit’s rule disallows such citation.<sup>55</sup> The other courts do not address this issue. However, almost<sup>56</sup> all of the no-cite rules and the rules which “disfavor” citation, apply equally to citation *in* the district courts.<sup>57</sup>

## B. THE COMMON LAW RULES ON CITATION OF UNPUBLISHED OPINIONS

As we noted above, two circuits, the Eleventh Circuit and the Third Circuit, do not have statutory rules dealing specifically with the citation of unpublished opinions. The Eleventh Circuit’s rule on publication provides that an opinion should not be published if the court determines that the opinion would have no “precedential value.”<sup>58</sup> This would seem to imply that unpublished decisions would not be allowed. However, decisions

54. See *infra* notes 62-79 and accompanying text.

55. 8th Cir. R. 8(i): “No party may cite an opinion that was not intended for publication by this *or any other* federal or state court . . .” (emphasis added). For full text, see *supra* note 51.

56. The Federal and D.C. Circuits’ rules do not say one way or another. See *supra* note 49 for texts.

57. 4th Cir. IOP 36.5 (“Citation . . . in this Court and *in the district courts within this circuit* is disfavored.” (emphasis added)). See also 6th Cir. R. 24(b) (“Citation . . . in this court and *in the district courts within this circuit* is disfavored” (emphasis added)). For full texts, see *supra* note 48.

2d Cir. R. §0.23 (“[Unpublished opinions] shall not be cited or otherwise used in unrelated cases before this *or any other* court” (emphasis added)). For full text, see *supra* note 50. See also 8th Cir. R. Appendix II (“Unpublished opinions . . . may not be cited or otherwise used in any proceedings before this court *or any district court in this circuit* . . .” (emphasis added)). For full text, see *supra* note 51. See also 7th Cir. R. 35(b)(2)(iv) (“Unpublished orders shall not be cited or used as precedent (a) in *any federal court within the circuit*” (emphasis added)). See also 9th Cir. R. 21(c) (“[Unpublished dispositions] shall not be cited to or by this Court *or any district court of the Ninth Circuit*” (emphasis added)). For full texts, see *supra* note 49.

58. 11th Cir. R. 25(d). For text, see *supra* note 39.

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by courts in the circuit indicate that an attorney may cite unpublished opinions.<sup>59</sup>

The case law in the Third Circuit is unclear on whether unpublished opinions may be cited. The courts do not specifically prohibit the citation of unpublished opinions. In fact, in several cases unpublished opinions were cited and discussed without any references to such opinions' precedential value.<sup>60</sup> Some cases, however, were found where judges did not follow opinions because of their unpublished status.<sup>61</sup> Interestingly, the approach of the judges in the Third Circuit toward the citing of unpublished opinions is also the approach used by judges in circuits which clearly forbid the citation of unpublished opinions.

## IV. JUDICIAL COMPLIANCE WITH THE RULES

It is in the attorney's interest to cite unpublished cases. As we will see, judges often discuss these cases, even when the circuit rule prohibits the citation of them.

Citing an unpublished opinion can make the difference even if the judge does not discuss or even refer to the opinion. For if the judge reads the unpublished opinion before ruling on the case, the judge may be influenced by the opinion and use it in reasoning out his or her own decision. The judge may not want to acknowledge this, and thus will not cite the unpublished opinion in the decision. Yet the result is the same. The attorney who

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59. *Harris v. United States*, 769 F.2d 718, 721 n.1 (11th Cir. 1985) and *Howell v. Schweiker*, 699 F.2d 524, 526 (11th Cir. 1983) have been cited as holding that unpublished opinions are binding precedent in the Eleventh Circuit. However, neither *Harris* nor *Howell* discussed the reasoning behind such a rule. Both cases merely cited other opinions that discussed unpublished opinions without comment. In *Harris*, the court cited *United States v. Rollins*, 699 F.2d 530, 534 (11th Cir. 1983) and in *Howell*, the court cited *United States v. Ellis*, 547 F.2d 863, 868 (5th Cir. 1977). Nevertheless, we have not found any cases in the Eleventh Circuit that do not allow citation of unpublished opinions.

60. See, e.g., *Cerro Metal Prod. v. Marshall*, 620 F.2d 964, 982 n.49 (3rd Cir. 1980); *Blaszcyk v. Horace T. Potts Co.*, 591 F. Supp. 871, 878 (E.D.Pa. 1984); and *Peters v. Township of Hopewell*, 534 F. Supp. 1324, 1335 (D.N.J. 1982).

61. See, e.g., *Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685, 689 (3rd Cir. 1977), where the court stated that an inconsistent unpublished opinion was not a binding precedent. See also *In re Penn Central Transp. Co.*, 400 F. Supp. 919, 920 (E.D.Pa.1975), where the judge was not persuaded by an unpublished opinion, stating that "as I understand the internal operating rules of the appellate court, [the cited opinion] is not deemed to have precedential value."

cited the unpublished opinion will have persuaded the court.

Certainly, when judges write that unpublished opinions are “not binding precedent, [but are] of analytical importance,”<sup>62</sup> or when judges say that they are discussing unpublished opinions “in the interest of thoroughness,”<sup>63</sup> an attorney cannot help but think that citing an unpublished “persuasive” opinion to a judge can make the difference.

Although a number of judges make it clear that unpublished cases cannot be cited, no judge has ever sanctioned an attorney for citing an unpublished case. In fact there is no circuit rule on sanctioning attorneys in these instances. In the typical situation, the judge will merely indicate, usually in a footnote, that the attorney had cited an unpublished opinion and that the circuit’s rules prohibit the use of such opinions. There would be no further discussion.<sup>64</sup> In one case,<sup>65</sup> a district judge did go further. Although the judge did not sanction the attorney, the judge *did* indicate that the citing of an unpublished case, while not necessarily “misconduct,” is “improper.”

Judges who did not strictly follow the no-cite rules, or whose circuits were more lenient in the citation of unpublished decisions, approached the issue in different ways. For example, a judge might mention that a party had cited an unpublished opinion and that such citation was forbidden. The judge would then go on to distinguish the unpublished case.<sup>66</sup>

Other judges have said that a cited unpublished case lacked

62. *United States v. Friedman*, 436 F. Supp. 1033, 1036 (S.D.N.Y. 1977).

63. *Aviles v. United States*, 405 F. Supp. 1374, 1377 n.6 (S.D.N.Y. 1975).

64. *See, e.g., Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 n.12 (1st Cir. 1981).

65. *United States v. Corbin Farm Service*, 444 F. Supp. 510, 524 n.6 (E.D.Cal. 1978).

66. *See, e.g., United States v. Kinsley*, 518 F.2d 665, 670 n.10 (8th Cir. 1975). The court responded to the government’s reliance on an unpublished opinion by saying that such opinions “may not be cited or otherwise used . . .” The court then stated, “We therefore decline to consider [the unpublished opinion], or *demonstrate how it is plainly distinguishable from these appeals*” (emphasis added).

*See also International Minerals & Chem. Corp. v. I.C.C.*, 656 F.2d 251, 259 n.8 (7th Cir. 1981), where the plaintiff cited an unpublished order of the circuit court. The judge said that the circuit rule prohibits such citation, and then said, “This is an important rule of practice, and one to which we expect counsel scrupulously to adhere. *In any event, the case cited is clearly distinguishable*”(emphasis added).



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precedential value, but could still be used for its persuasiveness. In one such case,<sup>67</sup> the court stated that the defendants "have the advantage of authority in their favor," and proceeded to discuss an unpublished opinion that was cited by the defendants.<sup>68</sup> Although the court said that since the decision was unpublished it was "not fully dispositive," the court *did* say that unpublished opinions were entitled to, "the weight they generate by the persuasiveness of their reasoning."<sup>69</sup>

We found a number of cases where an unpublished opinion was discussed by the court without any references to a circuit rule.<sup>70</sup> Whether the court's omission of the rule was deliberate or not, the result was the same. An attorney was able to get the court to read and consider an unpublished opinion before making its ruling.

In some situations, the circuit court wanted to adhere to the no-cite rule, but was compelled to discuss an unpublished decision because the district court below relied on it. In one such case, the district court based its holding on an unpublished memorandum.<sup>71</sup> The appellate court reversed, basing its decision on the published case law.<sup>72</sup> We found only one other case where an appellate court reversed a district court on the grounds of improper use of an unpublished opinion.<sup>73</sup>

The federal courts have also had to deal with situations in which a published lower court opinion is affirmed by unpublished order. In one case, the court discussed a district court

67. *Hupman v. Cook*, 640 F.2d 497 (4th Cir. 1981).

68. *Id.* at 500-01.

69. *Id.* at 501.

70. See, e.g., *Perkins v. Board of Directors*, 686 F.2d 49, 55 n.16 (1st Cir. 1982), *United States v. Picariello*, 568 F.2d 222, 228 (1st Cir. 1978), and *Davis v. Ball Memorial Hosp. Ass'n*, 640 F.2d 30, 46 (7th Cir. 1980).

71. *United States v. Allard*, 600 F.2d 1301, 1305 n.3, 1306 n.5 (9th Cir. 1979).

72. *Id.* See also *Walker v. Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984). The circuit court stated that discussion of an unpublished opinion was unavoidable because the district court below relied on it. Also of note is *Springsteen v. Medows, Inc.*, 534 F. Supp. 504, 507 n.2 (D.Mass. 1982), in which the magistrate below relied on four unpublished cases. The court stated, "I agree with the defendant that unpublished opinions should not be cited and I have reached my conclusion in the case at hand without any reference or reliance upon the unpublished opinions." (The court affirmed the findings of the magistrate.)

73. *United States v. Anderson*, 709 F.2d 1305, 1306 (9th Cir. 1983).

opinion whose affirmance was unpublished.<sup>74</sup> The court said that the affirmance was not precedential and that the district court's opinion was not being cited as precedent "but as a well-reasoned disposition of a similar case."<sup>75</sup> One court argued that the circuit's no-cite rule should not be applied "with full rigor to an [unpublished] order . . . which affirmed 'substantially for the reasons stated by [the district judge].'"<sup>76</sup>

The problem with citing published lower court decisions affirmed by an unpublished order is that the affirmation may be for reasons other than those given by the district court. Perhaps the appellate court was only interested in the result. Or perhaps the appellate court only cared to adopt some but not all of the district court's reasonings. Thus, citing and discussing the lower court's opinion along with the statement that it was affirmed by unpublished order may give it greater weight than it deserves. Indeed, three circuits, the First Circuit, the Sixth Circuit and the Tenth Circuit, attempt to solve the problem by requiring that all affirmances of published district court opinions must also be published.<sup>77</sup>

Perhaps the most curious effect of the rules on unpublished decisions arises when a judge is referred to an unpublished opinion which he or she had written. The judge may then be faced with the choice of relying on the earlier unpublished opinion or risking inconsistency. One court addressed this dilemma by erroneously noting that "the Rule does not say that this Court may not cite its own unpublished opinions, and indeed it would be a

74. *Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979).

75. *Id.* at 22. See also *United States v. Diggs*, 497 F.2d 391, 393 n.3 (2d Cir. 1974), in which the court examined the same lower court opinion discussed in *Carvey*. The court said, "our affirmance of which, of course, has no precedential value." See also *People v. Yang*, 800 F.2d 945, 947-50 (9th Cir. 1986), in which the court relied on two unpublished affirmances of unpublished lower court decisions. The dissent argued that the reliance was improper, and that instead the court should have only used them as "persuasive authority," rather than as precedent.

76. *Wolkenstein v. Reville*, 694 F.2d 35, 38 n.3 (2d Cir. 1982).

77. 6th Cir. R. 24(a)(1)(vi). For text, see *supra* note 32. 10th Cir. R. 36.2, and 1st Cir. R. 36.2(5). For texts, see *supra* note 34. Note that the First Circuit's rule is somewhat ambiguous on this point, stating that "the order of court upon review shall be published *even when the court does not publish an opinion*" (emphasis added). 1st Cir. R. Appendix I(B), "Plan for the Publication of Opinions," (which may or may not have been superseded by Rule 36.2(5)) is somewhat less ambiguous, stating that, "If a district court opinion is published, the final order affirming, reversing, or otherwise disposing of the case should also be published."

curious rule of law that would prevent a court from referring to its past decisions, whether published or not.”<sup>78</sup> Again, the attorney who has researched unpublished cases will be at an advantage. Most judges do not like to be inconsistent in their rulings.<sup>79</sup>

## V. ACCESS TO UNPUBLISHED OPINIONS

If everyone had equal access to unpublished opinions, then perhaps the problem of citing these cases would not be as serious. The application of the various circuit court rules would still be irregular, but at least all the attorneys would be on equal footing. Any attorney who wanted to research the unpublished cases would be able to do so.

But the problem is that unpublished cases are not equally accessible to all attorneys. Specialists, including government attorneys, usually catalog copies of all unpublished opinions in their fields.<sup>80</sup> Thus, if these attorneys find an opinion to their liking, they can always obtain it. Attorneys who are not specialists in a particular field do not have the same access to these resources.<sup>81</sup>

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78. *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983). See also *United States v. Erving*, 388 F. Supp. 1011, 1017 (W.D. Wis. 1975). The judge in *Erving* cited the circuit rules prohibiting citation of unpublished opinions, and then said, “Of course, the United States Attorney is free to cite as precedent here the earlier unpublished decision in this court . . . , [and] to draw my attention that this court’s decision . . . was affirmed by the court of appeals.” The judge then said that the content of the unpublished affirmance could not be cited, and proceeded to discuss the content of the unpublished district court opinion.

79. See, e.g., STATEMENT OF CHIEF JUDGE HOLLOWAY, *supra* note 2, where Judge Holloway states, “What will this court do if we know of a prior ruling which is controlling, although it was unpublished? We would clearly have the duty as a matter of basic justice to apply it, and in so doing logic would demand citing the earlier ruling.”

80. *Reynolds & Richman*, *supra* note 8, at 1187.

81. The original proposal by the Judicial Conference of America stated that, Nothing proposed in this report will overcome the discrepancy that exists today and will continue to exist between lawyers continually litigating specific types of matters before a court, and the lawyer who only occasionally appears on such matters . . . We believe this proposal does not accentuate this problem and perhaps minimizes it by preventing the knowledgeable lawyer from citing the unpublished opinions to the court.

THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES, THE ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973) as quoted in D. STIENSTRA, *supra* note 3, at 8.

Given the frequency of use of unpublished opinions in spite of the no-cite rules,

The other major sources for unpublished cases are WESTLAW and LEXIS. Every large law firm has access to one or both of these computer assisted legal research programs. And even if the attorney in the firm does not know how to use the computer system, someone else in the firm will do the search. However, the single practitioner or the small firm cannot always afford the cost of a computerized legal research system. Thus, the single practitioner or attorney who works for a small firm will not be able to locate unpublished cases as easily, if at all. Although it is true that unpublished cases are listed in tables in the *Federal Reporter*, this will not help the practitioner because there is no reference to the substance of the cases. Shepard's does not include unpublished cases in its indexes.

Some circuits require that an attorney who cites an unpublished decision serve a copy of the decision on all the parties.<sup>82</sup> Although this is a step in the right direction, it is not sufficient. For the nonspecialized attorney who does not have access to LEXIS or WESTLAW still cannot locate unpublished decisions favoring his or her position. The attorney can only respond to decisions presumably favoring the other side. Nor is it likely that an attorney who has access to unpublished decisions, and who locates an unpublished decision favoring the opposition, will inform the opposition of it.

The Tenth Circuit used to provide an index of all unpublished decisions in the circuit.<sup>83</sup> The practitioner could also purchase a copy of any unpublished decision for a minimal cost. This was a very sensible approach, for it recognized the problem of the inaccessibility of unpublished decisions. It would certainly help if the circuits provided such an index, and all libraries kept these indexes on file.

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indicated above, such a discrepancy *is* accentuated rather than minimized.

82. 4th Cir. IOP 36.5 and 6th Cir. R. 24(b). For texts, *see supra* note 42. 5th Cir. R. 47.5.3. For text, *see supra* note 40.

83. This index was compiled from August 1972 through December 1983, and was available at designated libraries throughout the circuit. D. STIENSTRA, *supra* note 3, at 19, n.39.

## VI. SOME THOUGHTS ON SOLVING THE PROBLEM

### A. SUGGESTIONS MADE BY OTHERS

“No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness.”

—Chief Justice Holloway, Tenth Circuit<sup>84</sup>

Yet fundamental fairness is difficult to obtain when the rules change from circuit to circuit and even from judge to judge.<sup>85</sup> So how might we resolve this unfair situation?

One solution which has been suggested is to rigidly enforce a no-cite rule, with sanctions levied against attorneys who cite unpublished opinions. There are several problems with this approach. Because many judges feel that unpublished decisions can contribute to their understanding of the problem, they may feel uncomfortable sanctioning an attorney who advises them on the state of the unpublished law. A judge who is cited to an unpublished decision that he or she had written may find it even more difficult to fine the attorney for citing the case.

Moreover, even if sanctions were evenly applied, attorneys who have access to the unpublished decisions would still benefit.

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84. STATEMENT OF CHIEF JUDGE HOLLOWAY, *supra* note 2.

85. The inability to use a supportive unpublished decision may be a denial of due process. In addition, the outcome of an appeal may be influenced by the fact that the lower court's decision was unpublished. This too may offend litigants' constitutional rights.

Two due process challenges to the no-cite rules have gone to the United States Supreme Court: *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) and *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1978). Both cases were decided on other grounds, though, and in *Browder* the court stated that “We leave these questions for another day.” *Id.* at 259, n.2. For a discussion of *Do-Right Auto Sales*, see Note, *supra*, note 16, at 141-43.

Any future challenges to the no-cite rules will be welcomed by at least one member of the Court, Justice Stevens. He has expressed a strong disapproval of the rules prohibiting citation of unpublished opinions. He feels that although the non-publication of opinions may be an efficient way of cutting down on the judicial workload, the precedential value of such opinions cannot and should not be predicted. See Stevens' dissent to *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985), and Stevens, *Address to the Illinois State Bar Association's Centennial Dinner*, 65 ILL. BAR J. 508, 510 (1977).

For the attorneys could review the decisions of the judge or judges sitting on the case, assess the direction in which the court is leaning, and prepare their strategy based on that assessment.

Another suggestion is to prohibit LEXIS and WESTLAW as well as specialty journals from carrying unpublished opinions. Besides the obvious first amendment concerns, this probably would not succeed in its goal anyway. Many of the large firms and the government attorneys catalog unpublished cases in areas of relevance to their clients' interests, and no doubt they would continue to do so.

One obvious solution would be to provide free access to all unpublished opinions and eliminate all no-cite rules. Presumably, the large firms, the government attorneys, and the attorneys with access to LEXIS and WESTLAW would then no longer maintain the clear advantage over the small firm and the single practitioner.<sup>86</sup>

However, this brings us back to pre-1972, when the courts first felt the need to reduce the workload of the judges. Returning to pre-1972 would not really resolve the problem, for judges would then again need to spend equal time on all of their decisions, and would not be able to focus on the more important ones.

## B. OUR PROPOSED SOLUTION

A variation on the above suggestion, and a seemingly better approach, would be the following:

1. Allow judges to continue to make a distinction between those cases which make a significant contribution to the law and those cases which do not. Thus, the judges could still concentrate only on the important cases.

2. Designate all cases which are deemed to be less important (currently those cases which are not published) as "non-prece-

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86. This solution could further burden the small firm or single practitioner's resources in researching the law, but at least the attorney would have access to the same cases and could make use of them if he or she found them valuable.

dential” cases. These cases would have only persuasive value.

3. Authorize publication of all the cases, whether precedential or non-precedential. To save library space, “non-precedential” opinions could be published only on microfiche, or released separately on microfiche or microfilm.

Essentially, our proposal would continue to recognize that the less significant cases should not have precedential value, just as “unpublished” decisions currently do not.<sup>87</sup> Thus judges would still be able to focus on the important cases. The non-precedential designation on a case will put the attorney on notice that although the attorney may cite the decision, the case can only be used as persuasive authority. In effect, the judge would have the option of deciding whether to follow the holding and reasonings of a “non-precedential” ruling in the same manner as he or she does when reviewing cases from other jurisdictions.

By authorizing publication of the cases, the federal courts would succeed in making the cases equally available to every attorney.<sup>88</sup> Attorneys in small firms or in self-practice would be able to research all of the courts’ decisions just as the larger firms and government attorneys now do.

It would certainly make things a lot more precise if certain decisions were designated as “non-precedential.” As it stands now, most judges tend to view unpublished decisions as persuasive authority rather than as precedent.<sup>89</sup> But the judges are not always consistent in their recognition of whether unpublished cases have precedential value or not.<sup>90</sup>

By calling a spade a spade and declaring that certain decisions will only have persuasive authority, the circuits will no longer be sending out mixed signals on the value of certain cases. Attorneys will know whether a case has precedential value

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87. See, e.g., Fed. Cir. R. 18(c), 2d Cir. R. §0.23, and 3rd Cir. I.O.P. V(F)(1). For texts, see *supra* note 31.

88. The publisher of the non-precedential opinions would need to include an index if it were to provide attorneys access which would approximate that obtained through WESTLAW and LEXIS.

89. See, e.g., *supra* notes 67-69 and accompanying text.

90. See, e.g., *supra* notes 62-79 and accompanying text.

and will cite the case appropriately. And the circuits will be able to pursue their policy of decreasing the amount of paperwork and time a judge puts into his or her unimportant decisions.

## VII. CONCLUSION

As Judge Holloway said,

“[W]hen we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. As we know, we are frequently changing our views on publication of decisions, deciding later to publish them on motions of the parties or on our own motion.”<sup>91</sup>

If judges admit that the importance of decisions can change with the times, then we should change with the times too. Every attorney should have equal access to every decision, and every attorney should have the opportunity to convince the court that a “non-precedential” decision is persuasive to his or her case. The attorneys and the judges of tomorrow should assess the value and impact of the cases of today.

By publishing every decision, (or at least every non-precedential decision), on ultrafiche, microfiche or microfilm, and by designating certain decisions as non-precedential, the federal courts will continue to concentrate on their important cases, and yet guarantee every attorney equal access to the courts’ decisions.

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91. STATEMENT OF CHIEF JUDGE HOLLOWAY, *supra* note 2.