June 24, 2015

To: Nevada Supreme Court
From: Appellate Litigation Section of the State Bar of Nevada

Re: Comments on ADKT 504

Dear Honorable Justices:

On July 1, 2015, this Court will consider whether to repeal SCR 123 and amend NRAP 36. In their current form, these rules prohibit practitioners from citing to unpublished orders except in limited circumstances. The Ninth Circuit recently amended its analogous rule concerning citation to such orders, and Nevada may follow suit.

To assist this Court in assessing the proposed repeal of SCR 123 and amendment to NRAP 36, the Appellate Litigation Section of the State Bar of Nevada ("Appellate Section") created a committee to study the rule and compile comments and feedback for the Court to consider. Through this process, led by Franny Forsman, we discovered that this is a divisive topic with passionate advocates on both sides. We also realized that we could not reach a consensus as to whether the Court should proceed with any amendments to the rules or maintain the status quo. Accordingly, attached to this letter are two position papers: one in favor of allowing practitioners to cite to unpublished orders and one against.

The Appellate Section extends its appreciation to the Justices of the Nevada Supreme Court and the Clerk of the Supreme Court for accepting these written comments. While they may not reflect the individual views of each member of the Section, they reflect the overall comments and concerns of the Section as a whole.

Representatives from the Section will be attending the public hearing at 1:00 p.m. on Wednesday, July 1, 2015 to discuss these comments.

Sincerely,

Seth T. Floyd
Chair of the Appellate Litigation Section
State Bar of Nevada

15-19477

ARGUMENTS IN SUPPORT

ARGUMENTS IN FAVOR OF ALLOWING CITATION OF UNPUBLISHED DISPOSITIONS

Amending SCR 123 to allow citation of the unpublished dispositions of the Nevada Supreme Court and the Nevada Court of Appeals to any court in Nevada would bring Nevada's practice in line with that of the federal courts. *See* FED. R. CIV. P. 32.1 (2006). In addition to the benefit of consistency across jurisdictions, there are substantive reasons to favor the amendment as well.

I.

INCREASE FAIRNESS IN THE ADVERSARIAL PROCESS AND TRUST IN THE JUDICIARY' S INTEGRITY

Realism and pragmatism call for repealing the rule. Let us be candid. It appears to many that Nevada jurists, in practice, do consider unpublished dispositions of the Nevada Supreme Court in resolving cases before them. Given that, the system benefits more from transparency than denial.

A. As Judges and Justices May Actually Consider Unpublished Decisions, Parties Must Have the Opportunity to Address those Quasi-Authorities

Assuming unpublished dispositions are impactful behind the scenes, both the courts and the parties would benefit from making the process transparent. In the district court, the judge should not fear expressing consideration of a seemingly analogous unpublished disposition. Because they include less discussion of facts, they are particularly susceptible to being read out of context. Attorneys must have the opportunity to provide the context of those cases and distinguish them if necessary. If there is an analogous case that can provide an example, moreover, both the court and the parties will be served by allowing attorneys to point them out.

On appeal, it also is counterproductive to preclude discussion of unpublished dispositions. First, if the appellate judges or justices have recently deliberated over

particular issues and arguments in a case, which they ultimately resolved by unpublished disposition, the justices and judges likely will bring that experience to subsequent, analogous cases. In other words, the unpublished dispositions are still *de facto* precedents. It only harms the parties and the courts to preclude parties from addressing those *de facto* precedents. Secondly, if a district court relies on an unpublished case, concealing that fact frustrates meaningful review. And it would be unfair to prohibit parties on appeal from citing or discussing the non-precedential opinion on which the district court appeared to rely.

B. Transparent Discussion of the Unpublished Decisions Would Curtail the Sharp Practice of Attorneys Making Inside, Veiled References to them

The current prohibition fails to prevent attorneys from hinting to appellate courts that the court has resolved other cases in a favorable manner. Attorneys also allude to prior cases in the district court. This happens. Due to the impropriety of mentioning case names of unpublished dispositions, where the other attorney is unaware of the contemplated case, the discussion effectively results in *ex parte* communication. Transparency would allow fair notice of all persuasive authorities.

C. Allay any Concern that Cases Resolved by Unpublished Decisions May Have Been Decided Arbitrarily or Without Due Care

The prohibition against citing to unpublished dispositions can foster a perception that those cases might have been decided arbitrarily or with questionable analysis that the court is unwilling to stand behind. While members of the bar have faith in the judiciary and understand that that is not the case, the public at large may have concerns. Repealing Rule 123 would alleviate such concerns, because it would improve accountability by empowering observers to compare the results in similar cases and advocate for uniform application of the law.

II.

REPEALING THE RULE WOULD RESOLVE ABSURD AND PERHAPS EVEN UNCONSTITUTIONAL CONSEQUENCES

A. Unpublished Authorities from Other Jurisdictions Are Cited in Nevada

It is odd that Nevada attorneys may cite to unpublished decisions from any other jurisdiction but not from the Nevada appellate courts, the dispositions from jurists whose opinions are most relevant. Rule 123 counterproductively elevates rule of over substance. And it restricts the courts and attorneys from thoughtfully discussing proverbial elephants in the room.

B. Nevada's Unpublished Authorities Are Cited Anywhere Else

Rule 123 fails to provide much of the benefit its framers intended. Attorneys and judges still point to those cases as persuasive authority on Nevada law, albeit outside Nevada. For instance, the Ninth Circuit Court of Appeals has expressly ruled that federal courts can and should consider unpublished decisions when ruling on questions of state law. *Nunez v. City of San Diego*, 114 F.3d 935, 943 n. 4 (9th Cir. 1997); *Employers Ins. Co. v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003). Where Nevada unpublished decisions are, in fact, cited in other jurisdictions, it is nonsensical to prohibit discussing them in the appellate courts from which they emanate, or in Nevada's lower courts where they would serve the most use.

C. Rule 123 Limits a Party's Ability to Mount the Strongest Possible Argument and thus Raises Constitutional Concerns

Rule 123 presents civil-liberties concerns. As a matter of due process, it may preclude an attorney from making an argument that the attorney believes will help the client. The rule also poses an equal protection issue. Non-Nevada

licensed attorneys practicing in other states are not precluded from citing Nevada's unpublished opinions in their state or federal cases.

III.

THE FREEDOM TO DISCUSS *ALL* NEVADA AUTHORITIES WOULD AID THE ADMINISTRATION AND DEVELOPMENT OF NEVADA LAW

A. Unpublished Authorities May Provide Examples to the Trial Court of the Appellate Court's Conception and Preferred Application of Law

In the district court, any guidance is better than none. Most trial judges are conscientious, which involves regard for the eventual treatment on appeal. As Justice Holmes reasoned: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., The Common Law, ed. Mark DeWolfe Howe, 5 (Boston: Little, Brown, 1963). The Court's analysis in unpublished orders provides good, if not the best, guidance to the district court about the current higher court's interpretation on specific issues. Indeed, because the law evolves, the more recent unpublished orders may be better insight on an issue than an older published opinion.

B. By Referring to Inconsistent Decisions, Appellants Could Most Effectively Point Out Issues Calling for *En Banc* Review

Just as the United States Supreme Court develops the law by issuing writs of *certiorari* in cases that present unanswered questions of law, which have resulted in inconsistent rulings, allowing Nevada attorneys to discuss inconsistent unpublished dispositions would assist the Nevada Supreme Court. Referring to unpublished dispositions would be particularly helpful in docketing statements and routing statements.

VI.

COUNTERVAILING CONCERNS ARE EASILY RESOLVED

The reasons behind Rule 123 have abated or can be ameliorated without an outright ban.

A. "Unpublished" Authorities are Now Readily Accessible to the Public

Rule 123 made sense when unpublished opinions were not readily accessible. Although the case files were public records, they could be viewed only by physically reviewing them. One also could order copies documents from the clerk's office. But, in that circumstance, people would have to know already what they were looking for, and would have to wait to receive the copies.

Now, unpublished dispositions are available through Westlaw and Lexis. They are subject to text-based searches, and included in the headnote system. Indeed, the Nevada Supreme Court even provides access to the orders free of charge on its website. Thus, permitting citation of such decisions would no longer give a substantial advantage to local attorneys with special knowledge or to litigants with extraordinary resources.

B. Unpublished Dispositions Would Remain Merely Persuasive

Liberalizing the rule will not open floodgates. Practitioners still will have to be cautions before citing to non-precedential decisions, as doing so is tantamount to admitting that no precedential decision supports one's position.

C. By Applying the Rule Change Only to Dispositions Issued After its Effective Date, the Appellate Judges and Justices Will Be Aware of Possible Usage

There may be concern that unpublished opinions make poor persuasive authority because the justices or court personnel who draft them assumed they would never have precedential import and, therefore, that the drafters might have omitted material that would be important if the disposition were to be relied upon by non-parties. To remedy that concern, the repeal of Rule 123 will apply only to unpublished dispositions issued after the rule change becomes effective. Thus, the justices, appellate judges and court personnel now will be on notice that every disposition may be discussed in future cases, and draft them accordingly.

ARGUMENTS IN OPPOSITION

ARGUMENTS IN OPPOSITION TO ALLOWING CITATION OF UNPUBLISHED OPINIONS

NRAP 36 should not be amended to permit citation to unpublished dispositions of the Nevada Supreme Court and the Court of Appeals.

The petition in ADKT 540 provides the following justification for changing the long-standing rule that unpublished dispositions cannot be cited in unrelated litigation: 1) the decisions are no longer truly unpublished due to electronic accessibility; 2) collateral litigation over violations of SCR 123 has increased; 3) the creation of the new court of appeals will allow more time to be devoted to unpublished decisions; 4) FRAP 32.1 was revised to prevent Circuit Courts of Appeals from prohibiting citation to unpublished opinions.

I.

THE WORKLOAD OF NEVADA'S APPELLATE COURTS WILL NOT BE REDUCED SUFFICIENTLY IN THE NEAR FUTURE TO PERMIT ADEQUATE TIME TO BE DEVOTED TO UNPUBLISHED DISPOSITIONS

At the beginning of 2015, the Supreme Court had a backlog of 1819 appeals. With assignment of 300 cases to the Court of Appeals in the first three months, the backlog dropped to 1568 cases. This year, each Supreme Court justice will be responsible for dispositions in 224 cases without consideration of new filings. In 2014, the court issued dispositions in 2582 appeals. Excluding those cases which were dismissed voluntarily or by stipulation, the total number of dispositions was 2288. Including the three new appellate judges, and assuming that the filings remain approximately the same, each judge or justice of the court will be responsible

for 228 dispositions.[1]

The petition refers to the amendment of FRAP 32.1 in support of its proposed rule changes. The amendments to the federal rule were vigorously opposed by a number of Ninth Circuit judges. Hon. Alex Kozinski of the Ninth Circuit explained his reasons for opposing the rule change in testimony before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 105th Congress (2002). *See* **Exhibit 1**. He explained that in the Ninth Circuit, at the time of his testimony, each judge was responsible for approximately 20 opinions and 130 unpublished dispositions per year. Judge Kozinski believes that because there is insufficient time to adequately prepare the published opinions with the caseload, if all dispositions will be cited by the parties, the result will be fewer published opinions, less carefully reasoned opinions, fewer *en banc* cases, reduction of unpublished dispositions to one-word orders.

The judges of the Nevada Supreme Court, in its current composition, will be responsible for almost 100 more cases per year than the Ninth Circuit judges were handling at the time of Judge Kozinski's testimony. While the Nevada Court of Appeals will assist in freeing up some of the Nevada Supreme Court's workload, the current composition of the Court of Appeals appears insufficient to adequately reduce the volume of work at the Nevada Supreme Court to ensure that each disposition not slated for official publication can receive the attention it needs to meet the dual (and conflicting) goals of efficient resolution of appeals and ensuring that those unpublished orders are sufficiently robust that any citation or reliance on

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[1] These numbers are based solely on the premise that one judge or justice will write the disposition on a case and do not account for the time required by other judges or justices on the court for review and additional drafting, and does not take into account dissents or concurring decisions.

them is likely to produce correct results.

It seems foreseeable that in the future, the relative balance of the workload between the Court of Appeals and the Supreme Court will allow the Nevada Supreme Court to devote the requisite time and attention to each case on its docket to issue either published opinions in each case, or at least very robust dispositive orders. Respectfully, that time has not yet come, and the rule change appears premature.

II.

CITATION TO UNPUBLISHED DISPOSITIONS WILL INCREASE THE LACK OF CLARITY OF THE LAW IN NEVADA AND INCREASE COST TO THE PARTIES

Unlike the Ninth Circuit, or larger states, there remain a number of issues of Nevada law that have not been decided. It could be argued that the ability to cite unpublished dispositions will fill the gap, which has not yet been filled by published decisions of the court. However, the nature of the unpublished disposition is such that the ability to cite to unpublished dispositions will likely further muddle unclear areas of the law. Also, because unpublished dispositions are written for the parties and not the public, the factual basis for the dispositions is usually not detailed and the parties will be required to resort to the briefs in the case to distinguish the decision.

The petition notes that the public can already obtain access to "unpublished" dispositions. But the issue of whether an order is "truly unpublished" is a different issue than whether a dispositive (or procedural) order in an appeal or writ proceeding should be citable in unrelated cases. The mere fact that members of the bench, bar, and public can actually obtain copies of dispositive orders does not alter the fact that

a dispositive order is designed to resolve a particular case, while an opinion of law establishes a point of law in Nevada's jurisprudence. Indeed, SCR 123 serves as a bulwark against reliance on those dispositive orders, which are tailored to specific facts of specific cases for specific parties.

The intended audience of the unpublished disposition is the parties, not the larger legal community. An unpublished disposition is written to parties familiar with the facts and is likely to be "unintelligible" to those unfamiliar with the case. Wasby, Stephen L. *Unpublished Court of Appeal Decisions: A Hard Look at the Process*, a paper presented to the Midwest Political Science Association (Chicago, Ill. April 2002) (quoting four different judges from the Ninth Circuit), attached as **Exhibit 2**. In Nevada, where the caseloads of the justices and appellate judges remains too high for any judge to invest the time required for careful drafting of all dispositions, the unpublished decisions are likely to be written primarily by law clerks and staff attorneys and the danger of an unintended consequence of the language is increased.

In order to respond to the citation to an unpublished disposition which does not contain a careful and detailed presentation of the facts, any competent counsel will be required to secure the briefs, and possibly the record, of the case cited in order to determine if the citation is relevant to the issue presented. Presently, the Nevada Supreme Court's website does not make available the appendices to appeals or original proceedings. Consequently, practitioners will need to order copies of such appendices from the clerk's office, increasing demand on that office. This will create a difficulty in timely responding to district court motion practice that relies on unpublished orders, perhaps even several unpublished orders.

Further, unpublished orders never receive formal abrogation or overturning when a subsequent opinion comes out. For some issues, the lack of such an

acknowledgment is not problematic, but in some areas of law, it is not always clear that subsequent case law is actually controlling or that subsequent decisions conflict with prior dispositions. Because there is no lineage to unpublished orders, the amount of effort needed in cite checking these decisions will be significant for practitioners and courts alike.

By contrast, the current system already contains a mechanism that allows the most useful unpublished orders to become citable. Presently, any interested party may file a motion with this Court seeking publication of an order as an opinion. This system allows the bar to inform this Court when an issue decided by unpublished order would be of assistance in developing the jurisprudence of the state. Respectfully, this seems a superior mechanism to resolve the tension between the dire caseload of this Court, and the need to advance jurisprudence in this state, until such time as this Court (with the assistance of the Court of Appeals) is in a position to resolve all matters by published opinion.

III.

EVEN IF NRAP 36 IS AMENDED, SCR 123 SHOULD NOT BE REPEALED, BUT LIKEWISE AMENDED

If members of the bar are violating a rule, it seems a questionable remedy to rescind the rule. SCR 123 is located in Part III of the Supreme Court Rules, Government of the Legal Profession. SCR 123 could be easily amended to specify a set penalty for violation; or a set progression of penalties for repeated violation. With a remedy specified, the collateral litigation over violations should decrease as the district courts and this Court could mechanically resolve any violation. This appears a more tailored solution than repealing the rule entirely.

Furthermore, allowing citation to unpublished orders from the effective date of the rule amendment is a separate issue from citation to previous unpublished and

uncitable orders. If NRAP 36 is amended to allow prospective citation, SCR 123 should be retained and modified to apply to unpublished order issued before the effective dates. If SCR 123 is repealed, then there appears to be no mechanism to dissuade members of the bar from citing to older unpublished uncitable decisions. Consequently, it does not appear that the rule change as proposed would actually reduce collateral litigation concerning citation to older unpublished orders.

Respectfully, to the extent that this Court determines that "going forward" all decisions should be citable, it appears that the better course would be to amend SCR 123 to state that it applies to orders issued before the effective date. In such a way it would serve as a complement to the amended NRAP 36.

IV.

CITATION TO UNPUBLISHED ORDERS WHEN CONSIDERING WHETHER THE CASE SHOULD BE DECIDED EN BANC RAISES FEWER CONCERNS

The arguments in support of the proposed amendments suggest that unpublished dispositions would serve as useful tools in determining whether the court should accept a case for *en banc* consideration.

While NRAP 40A(a) specifies that petitions for *en banc* reconsideration are to ensure uniformity of decisions, NRAP 40A(c) specifies that "A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases." NRAP 40A(a) provides that it is only uniformity of published opinions that is of concern in the Rule.

Citation to unpublished orders in the context of a petition for *en banc*

reconsideration does not raise the same concerns expressed concerning erroneous district court reliance. The Supreme Court is, ostensibly, in a most superior position to parse out the significance of any inconsistencies in its body of unpublished dispositions. However, if a response to a petition for *en banc* reconsideration is ordered, the same concerns regarding the need to quickly pull briefing and records for unpublished cases still exist.

The opponents of the proposed rule change acknowledge that there may be some utility in permitting limited citation to unpublished orders in petitions for *en banc* reconsideration, but suggest that such a concern can be addressed by adding an exception to SCR 123 and amending NRAP 40A(c).

V.

RECOMMENDATION

The members of the Appellate Section who oppose the amendments to NRAP 36 respectfully submit that the petition is in service of a laudable goal: That every decision of the Nevada Supreme Court has force and effect on the jurisprudence of Nevada. Respectfully, that goal would be best accomplished by issuing every decision as an opinion, which all recognize is not achievable at this time. Consequently, until such time as that can be accomplished, SCR 123 should remain in place as a bulwark against confusion, inconsistency, and misplaced reliance on case-specific dispositions by the district courts.

The caseload of the Nevada Supreme Court and the Court of Appeals remains too high to permit sufficient judicial involvement in the crafting of unpublished dispositions without sacrificing the quality of published decisions. Additionally, citation to unpublished dispositions will require an unwarranted increase in time and cost to the parties when the disposition does not contain a detailed recitation of the facts and resort to the briefs and record may be required. Finally, due to the lack of

precedent on many issues in Nevada, citation to unpublished decisions will likely lead to confusion, inconsistency, and an increased risk of reliance on language which has not been subjected to the lengthy process required when an opinion is intended for publication.

We respectfully submit that this Court not adopt the petition filed in ADKT 0504 at this time.

Exhibit 1

Testimony of Hon. Alex Kozinski Before the Subcommittee on Courts, the Internet, and Intellectual Property

Washington, D.C., June 27, 2002

Mr. Chairman and Members of the Subcommittee. My name is Alex Kozinski and I am a judge of the Court of Appeals for the Ninth Circuit, where I have served since 1985. Prior to that time I served for three years as Chief Judge of the United States Claims Court, now called the United States Court of Federal Claims. Immediately after law school, I clerked for then-Judge (now Justice) Anthony M. Kennedy on the Ninth Circuit. I have thus spent over two decades working for courts that issue both published and unpublished rulings, which are the subject of these oversight hearings.

I thank the subcommittee for giving me the opportunity to state my views. I was invited to speak as an individual and not on behalf of my court or the federal judiciary. The views I express are therefore my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues and many other federal appellate judges as well.

What Are Unpublished Dispositions?

As Judge Alito points out in his testimony, the term "unpublished" is an anachronism, dating back to the days when failing to designate a disposition for inclusion in a national reporter meant that it would not be published at all, and therefore unavailable to most members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West's Federal Appendix.

Unpublished dispositions differ from published ones in only one respect – albeit an important one: They may not be cited by or to the courts of our circuit. Ninth Circuit R. 36-3. (As Judge Alito explains, the rule operates somewhat differently in other circuits.) With minor exceptions dealing with subjects like res judicata and double jeopardy, none of the judges of our circuit – district judges, magistrate judges, bankruptcy judges, even circuit judges – may rely on these unpublished dispositions in making their decisions. And, in order to help them avoid the temptation to do so, we prohibit the lawyers from citing them in their briefs. The rule only applies to practice in the courts of our circuit; lawyers are free to cite our unpublished dispositions to other courts, who may give them whatever weight they deem appropriate; they may write about them in law review articles or post them on websites. There is no general prohibition against citing, discussing, criticizing or deconstructing unpublished dispositions. The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context, and that context alone, the unpublished disposition may not be considered.

Why the Prohibition Against Citation?

The answer to this question is fairly straightforward: Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit – the law applied by lower-court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of action. Maintaining a consistent, internally coherent and predictable body of circuit law is a significant challenge for a collegial court consisting of a dozen or more judges (more than two dozen in our

case) who sit in ever-changing panels of three. Appellate courts nevertheless have to speak with a consistent voice. If they fail to do so – if they leave the law uncertain or in disarray – they will make it very difficult for lawyers to advise their clients and for lower-court judges to decide cases correctly. The ripple effect of uncertain or unclear caselaw is felt acutely by those caught up in legal disputes, who must litigate their case all the way to the court of appeals if they want to know how the dispute would be decided.

In order to maintain a clear and consistent body of caselaw, appellate judges spend much of their time working on published opinions – those that announce and calibrate the circuit's decisional law. To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled How To Write It Right by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70-80 drafts of an opinion over a span of several months.)

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges frequently exchange lengthy inter-chambers memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished disposition is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about half the published cases. Off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999, there were 44 en banc calls in our court, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing and the response. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than for a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4500 cases on the merits, approximately 700 by opinion and 3800 by unpublished disposition. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions – 20 opinions and 130 unpublished dispositions – per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom we sat.

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster – about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels – at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent through the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have other circuits. None of these is a palatable alternative, yet something would have to give.

Do We Give Short Shrift to Cases Decided by Unpublished Dispositions?

The answer to this question is no. Much of the time spent in deciding a case is not reflected in the length or complexity of the disposition: we read briefs, review the record, read the applicable authorities. All this behind-the-scenes work goes into every case and necessarily takes a substantial amount of time. How much? There is no set amount. Some cases have a large record, yet have a dispositive issue – such as a jurisdictional defect – right near the surface. Others require a deeper examination before a dispositive issue is identified, although in the end, the resolution may be quite straightforward. The written dispositions in both cases may be short, they may look quite similar in structure and detail, yet they reflect very different time commitments.

Writing up an unpublished disposition is infinitely easier than writing a published opinion. To begin with, the facts need not be recited in detail because the parties to the dispute – the only ones for whom the disposition is intended – already know them. Nor is it important to be terribly precise in phrasing the legal standard announced, or providing the rationale for the decision. Most importantly, the judge drafting the disposition need not ponder how the disposition will be applied and interpreted in future cases presenting slightly different facts and considerations. The time – often a huge amount of time – that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone. Is this time taken away from the case? Is this an illegitimate shortcut? Not at all, because when judges

do write opinions, much of the time they spend in the drafting process doesn't go toward actually deciding the case, but rather to making the reasoning consistent with the existing body of circuit caselaw and useful for other decisions in the future.

Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions – that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the judges. We have discussed this among the judges of my court and are, frankly, baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it.

Nevertheless, we have worried about claims like these, and so in recent years we have taken two initiatives to help discover whether unpublished dispositions are, in fact, in wholesale, lawless conflict with published precedents. First, in February and March 2000 we distributed a memorandum to all district judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished dispositions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website. Responses were collected by e-mail, fax, and a response form at the website. Only six responses were received. Of these, we found two to be meritorious and, despite our instructions, both responses identified conflicts between two published Ninth Circuit decisions – conflicts of which we were already aware. No one identified an unpublished disposition that conflicted with a published opinion or with another unpublished disposition.

Second, for a 30-month period beginning July 2000, we relaxed the court's rules barring citation of unpublished dispositions to allow their citation in requests for publication and in petitions for rehearing. For the first nine months, court staff examined all requests for publication filed. Only fifteen requests for publication were received, and none of these identified a legitimate conflict among unpublished dispositions or published opinions.

We are certainly not infallible, and I will not try to persuade this subcommittee that we never make a mistake when we decide 4500 cases a year. But I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence. I feel so confident of this point, having participated in rendering thousands of these dispositions myself, that I would welcome an audit or evaluation by an independent source.

How About That Claim of Unconstitutionality?

Two years ago, in Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000), Judge Richard Arnold of the Eighth Circuit set this area of law ablaze by holding that stare decisis in the strict form – an obligation to follow earlier opinions of the court, published or not – was part and parcel of the Article III judge's obligation to apply the law. If Judge Arnold were correct, this would mean that every one of our 3800 yearly unpublished dispositions is binding on every federal judge in our circuit. Lawyers would have a field day digging for superficial inconsistencies or imprecisions in wording, and we'd do little but hear cases en banc to settle claimed conflicts of authority.

Fortunately, Anastasoff turned out to be a false alarm. Judge Arnold is one of the ornaments of the federal judiciary, a judge widely respected for his erudition and wisdom. But even Homer nods, and Judge Arnold took a big nod on this one. While his argument in Anastasoff has superficial appeal, closer examination exposes its flaws. I reached the opposite conclusion in an opinion I wrote by the name of Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001), a copy of which is attached as an exhibit. More recently, attorney Thomas Healy thoroughly examined Judge

Arnold's constitutional claim in an article titled Stare Decisis as a Constitutional Requirement, 104 W. Va. L. Rev. 43 (2001). Mr. Healy concluded, as I had, that the historical record comes nowhere near supporting Judge Arnold's thesis, and in fact refutes it. Mr. Healy's article is also attached as an exhibit.

Finally, some legal scholars have suggested that there may be First Amendment problems with a citation ban. No case of which I am aware has addressed this claim, but it seems implausible on its face. As noted, our rule doesn't prevent people from talking about unpublished cases. Its prohibition is limited to what lawyers may say in their briefs and arguments in court. There are a multitude of restrictions on what lawyers may say in court, none of which raises First Amendment concerns. Lawyers may not, for example, knowingly leave the "nos" and "nots" out of the quotations in their briefs, or cite to evidence that's not in the record, or fail to cite applicable binding authority of which they are aware. A knowing violation of any of these rules may result in sanctions. Attempting to defraud the court in one's pleadings is the kind of conduct that may be punished, even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court – the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance. As the Massachusetts Appeals Court noted in Lyons v. Labor Relations Commission, 476 N.E.2d 243 (Mass. App. 1985), unpublished dispositions can be quite misleading to those other than the parties to the case: "[T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decisions. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." Id. at 246 n.7.

Are Federal Courts Unique in Prohibiting Citation to Unpublished Decisions?

The answer is emphatically no. The vast majority of state court systems restrict citation to unpublished decisions. Last year, an article in the Journal of Appellate Practice and Process provided a thorough catalogue of these rules at both the federal and state levels. Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions, 3 J. App. Prac. & Process 251 (2001). (A copy of this article is attached as an exhibit, and a summary of its findings appears at the end of my statement.)

Their findings are very revealing. Thirty-eight states (plus the District of Columbia) restrict citation to unpublished opinions to some degree; by far the largest number (35) have a mandatory prohibition that is phrased much like the Ninth Circuit's rule. (Like the Ninth Circuit, some of these states permit citation for purposes of establishing res judicata or law of the case.) A typical rule, that of Alaska, reads as follows: "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state." Alaska R. App. P. 214(d). Only nine states have rules explicitly authorizing citation of unpublished cases as precedent, and only five have no rules at all on the matter. (The total comes out to fifty-two, plus the District of Columbia, because two states explicitly authorize citation of unpublished opinions as to some courts and explicitly deny it as to unpublished opinions of others.) Two states, California and Tennessee, have provisions that authorize the state's highest court to "de-publish" opinions of the lower courts, thereby depriving them of precedential authority and making them non-citeable.

The state courts, of course, hear vastly more cases in the aggregate than do the federal courts. That the overwhelming majority of states have adopted a prohibition against citation of, or reliance on, a large number of appellate decisions is significant in two respects. First, it shows that this is a legitimate and widely accepted practice in the legal community nationwide. Second, it discloses that many court systems in addition to the federal courts have found the non-publication/non-citation practice to be an important tool in managing the development of a coherent body of caselaw.

Are There Separation of Powers Concerns?

While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, overseeing the development of the law within their jurisdiction. The fact that so many state and federal courts have nonpublication rules and related prohibitions against citation suggests that this is an area of uniquely judicial concern.

There is not much recent authority on point, but almost 140 years ago the new state of California tried to impose, by statute, a requirement that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court." California Supreme Court Justice Stephen Field – the very same Justice Field who later sat on the United States Supreme Court and wrote that case we all remember so well from law school, Pennoyer v. Neff, 95 U.S. 714 (1877) – would have none of it. Speaking for a unanimous court, he held the law unconstitutional:

> [The statute] is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?
>
> The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations. The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.
>
> In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate."
>
> The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law

> which govern the Court, and should guide litigants; and right-minded Judges, in important cases – when the pressure of other business will permit – will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.

Houston v. Williams, 13 Cal. 24, 25-26 (1859) (citations omitted). Does this state the law today? I can offer no advisory opinion, but I do believe that Justice Field's observations are worthy of careful consideration. Perhaps the best approach is not to test the issue by staying far clear of a confrontation between the judicial and legislative branches.

What About The Law Of Unintended Consequences?

It is the sad experience of mankind that often, in trying to make things better, we do something that has exactly the opposite effect. Unpublished, unciteable appellate decisions play an important role in the management of our dual responsibilities of deciding a multitude of cases, while keeping the law clear and consistent. Would it make things better if this tool were removed from the judicial arsenal?

To answer this question, I ask you to imagine a different kind of rule Congress might pass. Let's say Congress decided that we simply didn't have enough uniformity in the application of the law, and the reason was that the United States Supreme Court wasn't issuing enough opinions. So, in order to improve things, Congress passed a law that required the Supreme Court to grant review to, and decide, 1600 cases a year, rather than the 80 or so it decided this past Term. This would be only 178 case dispositions per Justice per year, less than half the number of the average Court of Appeals judge.

Assuming the Justices disagreed with Justice Field and did not see the law as an unconstitutional encroachment on their authority, what would be the consequences? It's unlikely that this enactment would cause the Justices to work twenty times harder to come up with twenty times the number of published opinions equal in caliber to their current opinions. My guess is that they'd write something in 1600 cases, but in the vast majority, it would not be something that was very good or very useful. In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write "published" opinions that have very little useful content – akin to very abbreviated dispositions or judgment orders – that contain little more than the word "Affirmed."

Something like this will, I suspect, happen if courts of appeals are forced to accord precedential value to their unpublished dispositions: We would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinions.

And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less, in order to protect the integrity and stability of our circuit law from those who would misconstrue or twist it.

Conclusion

The topic the subcommittee has chosen for its oversight hearings is certainly a timely one. As Judge Alito has suggested, we in the judiciary are in the process of reevaluating our rules. I hope, in the end, we will leave well enough alone, and allow each court to decide this issue according to its own customs and needs. However, whatever happens will be the action of the judiciary, taken after careful reflection and with full knowledge of the institutional constraints under which we operate. I hope that whatever rule we adopt – whether to stay with the current local option or to adopt a national rule – the political branches of government will accept and respect it.

Citation Rules in State Courts

	Unpublished Opinions *Shall Not* Be Cited		Unpublished Opinions *Should Not* Be Cited		Unpublished Opinions *May* Be Cited	
	Supreme Court*	Intermediate App. Court**	Supreme Court	Intermediate App. Court	Supreme Court	Intermediate App. Court
Alabama	X+	X+				
Alaska	X	X				
Arizona	X+%	X+%				
Arkansas		X+				
California		X+				
Colorado	X					
Connecticut						X$
Delaware					X	
District of Columbia	X+					
Florida				X		

Georgia	X					
Hawaii		X+				
Idaho	X					
Illinois	X+					
Indiana		X+				
Iowa	X	X				
Kansas	X+	X+				
Kentucky		X				
Louisiana		X+				
Maine	X					
Maryland	X+	X+				
Massachusetts		X+				
Michigan						X
Minnesota						X
Mississippi	X+	X+				
Missouri	X					
Montana	X					

Nebraska	X	X+				
Nevada	X+					
New Hampshire	X					
New Jersey	X+	X+				
New Mexico	X	X				
New York						
North Carolina				X+		
North Dakota					X	
Ohio						X
Oklahoma	X+	X+#				X#
Oregon				X	X	
Pennsylvania						
Rhode Island	X					
South Carolina			X+	X+		
South Dakota	X+					
Tennessee	X+					
Texas		X				

Utah	X+	X+				
Vermont					X	
Virginia						
Washington		X				
West Virginia						
Wisconsin	X+	X+				
Wyoming						
TOTAL	26	22	1	4	4	5
TOTAL (EITHER)	35		4		9	
TOTAL (EITHER)	39				9	

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

Notes:

* No entry may indicate that state requires its Supreme Court to publish all opinions and/or orders

** No entry may indicate that state has no intermediate appellate court

+ Exceptions for res judicata, collateral estoppel, law of the case, etc.

% Exceptions for publication requests and petitions for rehearing.

$ All appellate opinions are published. Citation of unpublished out-of-state opinions is allowed.

Court of Criminal Appeals is citeable; Court of Civil Appeals is not.

Sample Language:

Shall Not Be Cited:

"Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."

Alaska R. App. P. 214(d).

Should Not Be Cited:

"Cases affirmed without opinion by the Court of Appeals should not be cited as authority."

Or. R. App. P. 5.20(5).

May Be Cited:

"Unreported opinions or orders may be cited, but a copy must be provided."

Del. Sup. Ct. R. 14(b)(vi)(4).

Exhibit 2

UNPUBLISHED COURT OF APPEALS DECISIONS: A HARD LOOK AT THE PROCESS[†]

STEPHEN L. WASBY[‡]

I. INTRODUCTION

The burgeoning caseload of the U.S. courts of appeals, which has outpaced the increase in district court filings and also has risen more rapidly than has the number of appellate judges, has caused a problem for these courts. As mandatory jurisdiction courts which must rule on all appeals brought to them, even if the issues are elementary and the answers obvious, what should they do? Both formally and informally, they have used a type of triage by sorting out cases for differing types of treatment. To aid in coping, for over thirty years the courts of appeals have issued dispositions which are not published and which are not to be cited as precedent.

Whether dispositions become published opinions or unpublished memoranda is a result of the judges, clerks, and parties who prepare them and the process through which dispositions move. A published opinion may have started as such, or it may have been proposed as an unpublished judgment. A disposition that began life as a proposed memorandum disposition may see the light of day as a published opinion, and there may have been debate within the panel of judges as to the type of disposition to be issued. Because it is time for systematic attention to the actuality of practices in the courts of appeals leading to unpublished dispositions,[1] this article is offered to provide some empirical groundwork about the *process*

[†] This article is based on a paper presented to the Midwest Political Science Association (Chicago, Ill. April 2002). A minimalist version of the latter part of this article appeared as *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRACT. & PROC. 325 (2001). In my work on this subject, I have benefited from the comments of Sara Benesh, Martha Humphries Ginn, Judge Alfred T. Goodwin, Roger Hartley, Arthur Hellman, Stefanie Lindquist, Karen Swenson, and Todd Lochner. Judge Goodwin's assistance in answering questions and permitting access to his papers is very much appreciated.

[‡] B.A., Antioch College; M.A., Ph.D., University of Oregon. Professor of Political Science, Emeritus, University at Albany, SUNY. Visiting Scholar, University of Massachusetts-Dartmouth. Editor-in-Chief, JUSTICE SYSTEM JOURNAL.

[1] The misnomer "unpublished" dispositions is used here because it is standard terminology, although it is now "no more than a shorthand for opinions that are designated by the court as 'not for publication'." *Oversight Hearing on Unpublished Judicial Opinions Before the Subcomm. on Courts, the Internet, & Intellectual Prop., House Comm. on the Judiciary*, 105th Cong. (2002) (Statement of Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law). *See also* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 185 (1999) ("almost a term of art, because all federal appeals court opinions may be published in some way even if not in the official book reporters.").

that produces unpublished dispositions. Such groundwork, in assisting understanding of that process, both provides background for those undertaking the study of decisionmaking in the U.S. courts of appeals and casts light on the proposed change in the Federal Rules of Appellate Procedure that "would require all federal circuits to allow citation of their unpublished opinions."[2]

The new Rule 32.1, which would have removed any prohibition or restriction on the citation of unpublished opinions, was being considered as this article was written. In August 2003, the Advisory Committee on Appellate Rules had published the Rule for commentary, and had recommended approval and transmission to the Judicial Conference. However, in June 2004, the Committee on Rules of Practice and Procedure failed to approve the new Rule, instead postponing action so that the Federal Judicial Center (FJC) could complete research (already under way) on some matters relating to the Rule, particularly issues raised by those opposing it.[3]

The principal point of this article is to describe the process of making the decision to publish. Included are when courts of appeals judges make the determination to publish, the roles of judges and clerks in preparing not-for-publication dispositions, and judges' reconsideration of their initial decision as to publication and re-designation of unpublished memorandum dispositions as published opinions. This is set into a broader discussion of the use of unpublished dispositions and what they look like, because much discussion of them has proceeded without attention to such basic matters. (The circumstances in which unpublished dispositions are used, including guidelines for publication, their enforcement, and compliance with those guidelines and importance of other norms concerning non-publication are examined in separate studies.)[4] This article provides information about judges' views on an important aspect of the process by which they make decisions, and a view of judicial interaction in the course of their reaching a final product. It is intended not to test any theory, but to provide information about a widely-used practice about which the level of controversy may be said to exceed the amount of knowledge held even by many of those who use the federal appellate courts.

Receiving principal attention is the process in the U.S. Court of Appeals for the Ninth Circuit. The process in the Ninth Circuit can be taken as indicative of what happens elsewhere because, despite minor procedural variations from one circuit to the next, basic elements of the process are similar across circuits, as are the formal criteria for

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[2] Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROC. 473, 487 (2003).

[3] *See* Howard Bashman, *A First-Hand Report on Last Week's Meeting of the U.S. Court's Standing Committee on Rules of Practice and Procedure*, HOW APPEALING, *at* http://www.legalaffairs.org/howappealing/2004_06_01_appellateblog_archieve.html#108793216008620 (June 30, 2004).

[4] *See* Stephen L. Wasby, "Unpublished Dispostions: Are the Criteria Followed?" Papers presented to S. Pol. Sci. Ass'n (Savannah, Ga. 2003), and to Am. Pol. Sci. Ass'n (Philadelphia, Pa: 2003).

publication.[5] One important difference, however, is that Ninth Circuit memorandum dispositions are written text, not the one-line "Affirmed—See Rule 36-1" dispositions common in, for example, the Third and Eleventh Circuits, and the object of considerable criticism.

The picture presented here is drawn from not-for-publication dispositions from the late 1970s to the present time,[6] discussions with some judges, files in closed cases, and the author's extended observation of the functioning of the Ninth Circuit. Materials from the files are used to provide examples for each of the elements examined. Because those files contain clerks' work and judges' communication with each other during consideration of a case, they provide a more complete understanding of why cases are published or not published.[7] Because a major purpose of this article is to provide the reader with a look at the inner workings of a court of appeals to which access is usually not easily available, use of quotations from the case files will be extensive.

The article proceeds as follows. First, background is provided that includes criticism of unpublished dispositions and a review of the limited number of previous studies of these dispositions. Then, a description of what unpublished dispositions look like is followed by a discussion of justifications for the use of unpublished dispositions, particularly the lessened attention they require; their length; the audience(s) for which they are intended; and the relation of these justifications to their non-precedential status. Next comes a brief look at instances in which judges and lawyers have mentioned unpublished dispositions. This is followed by the key section of the article: an exploration of decisionmaking concerning unpublished dispositions at each of the stages of the process, from pre-argument through the period after dispositions are filed.

II. BACKGROUND

A. INCREASE IN USE AND AWARENESS

"Unpublished" rulings, denominated "memorandum dispositions" (often called "memodispos" by Ninth Circuit judges and staff) to distinguish them from published "opinions," are now used in upwards of three-fourths of all cases in the U.S. courts of appeals, although there has been considerable variation in their use across circuits, which publish from roughly ten percent to slightly over half of their dispositions. By 1987, the proportion of all courts of appeals dispositive judgments resulting in

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[5] *See* Judith A. McKenna, Laural L. Hooper, & Mary Clark, Case Management Procedures In the Federal Courts of Appeals 18, 33–34 (Fed. Jud. Center 2000).

[6] Unpublished dispositions for 1972 through 1977 were examined in the San Francisco library of the U.S. Court of Appeals for the Ninth Circuit; these dispositions predated even the inclusion of FEDERAL REPORTER lists of such cases, and thus do not bear "F.2d" citations.

[7] Reliance on the papers of a single judge, as occurs here, poses the risk of lack of representativeness, and, through quotation, certainly leads to greater prominence of that judge's views. However, as any one judge sits with many other combinations of judges over time, these multiple interactions should serve to provide a breadth of views and reveal recurring patterns.

published opinions had dropped to thirty-eight percent, and it declined further by 1993 to just over one-fourth, the level at which it remained in 1998.[8] In short, unpublished dispositions, rather than being a rare event, are quite common; so routine is their use that we find them even in some death penalty habeas cases and requests for stays of execution,[9] even when a judge dissents.[10]

Unpublished rulings are not simply a sample of all the dispositions in the courts of appeals, but are thought to represent routine application of existing precedent. This makes it quite likely that published rulings will be *un*representative of all dispositions,[11] with the observer unable to determine from published cases alone whether they are representative of all court of appeals rulings. As students of the federal district courts have observed in a remark applicable to the courts of appeals, "Although many decisions that should be published are not, and a few that should not be published are, it is still fair to say that published opinions generally do represent an atypical population dominated by nonroutine cases that require the exercise of judicial judgment."[12]

Courts of appeals began to make extensive use of not-for-publication dispositions in the early 1970s. The *Federal Reporter* began to include tables of unpublished cases in the early 1970s. A table of unpublished Fifth Circuit affirmances appears as early as 472 F.2d, with the first tables for other circuits' unpublished memoranda appearing shortly thereafter, at 474 F.2d for the Second, Third, Fourth, Sixth, and Seventh Circuits, and for the Eighth and D.C. Circuits at 475 F.2d. A Westlaw staff member indicated that the earliest date that she found unpublished dispositions in each circuit was 1972 for the Second and Sixth Circuits, 1973 for the First, Fourth, Fifth, Seventh, Eleventh and D.C. Circuits, 1976 for the Third Circuit, 1978 for the Ninth Circuit, and 1980 for the Eighth Circuit.[13] However, the date for the Ninth Circuit is certainly too late, as binders of slipsheets for unpublished dispositions in the court's library dated from 1972. After a relatively short period in which nomenclature became uniform and practices became regularized, practices and processes concerning these rulings have remained stable. However, their proportion has increased dramatically.

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[8] *See* MCKENNA ET AL., *supra* note 5, at 21 tbl. 13.

[9] *See* Byrd v. Bagley, 37 FED App. 94 (6th Cir. 2002).

[10] *See* Charm v. Mullin, 37 Fed.App. 475 (10th Cir. 2002) (an affirmance of denial of habeas in a capital case that resulted in an authored opinion of eight printed pages containing not only factual matters but legal analysis); Robinson v. Gibson, 35 Fed.App. 715 (10th Cir. 2002).

[11] *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990) (making the point that examining only published cases can lead to distorted findings in a sophisticated study using district court rather than courts of appeals rulings).

[12] C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 116 (1996). For studies of factors affecting district court decisions to publish, *see* Karen Swenson, *Federal District Judges and the Decision to Publish*, 25 JUST. SYS. J. 121 (2004); Susan W. Johnson & Ronald Stidham, Federal District Court Judges and the Decision to Publish, presented to S. Pol. Sci. Ass'n (Savannah, Ga. 2002).

[13] E-mail from Susan Sipe to Kurt Gruebling (July 19, 2000). Provided to author by Stefanie Lindquist. No date was provided for the Tenth Circuit.

B. CRITICISM OF UNPUBLISHED DISPOSITIONS

Discussion of the prevalence of unpublished opinions and problems associated with them have given rise to a general critical clamor. Criticism of unpublished dispositions is not new. Indeed, until recently, much of the writing about these rulings, particularly in the legal community, has been both normative and highly critical,[14] although there have been exceptions.[15] Critics, some of whom decry the absence in many cases of full treatment, including oral argument, and a published opinion,[16] point to unpublished dispositions' alleged detriments; these include their purported use to avoid having to spell out the rationale of rulings and to avoid public challenge. Many statements like these about the need for published opinions in more (if not all) cases or about the excessive number of unpublished dispositions are blanket indictments. Although some instances of unpublished dispositions are offered as "horror stories" in anecdotal support of the author's claims, the assertions are not based on a close look at a large volume of unpublished memorandum dispositions.

Among the critics of courts of appeals' use of unpublished dispositions are members of the U.S. Supreme Court. In a dissent from his colleagues' summary reversal of a Ninth Circuit ruling, Justice Stevens thought "[t]he brevity of analysis" in the lower court's "unpublished, noncitable opinion" (actually a memorandum disposition) "does not justify the Court's summary reversal," and commented that "the Court of Appeals would have been well advised to discuss the record in greater depth." He concluded with the broader complaint that the Court of Appeals' "decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong."[17]

Sixth Circuit Chief Judge Boyce Martin recently listed six criticisms of the use of unpublished dispositions: loss of precedent, sloppy decisions, lack of uniformity, a lesser likelihood of review by the Supreme Court,

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[14] See, e.g., William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 281–86 (1996). See also William M. Richman, An Argument on the Record for More Federal Judgeships, 1 J. APP. PRAC. & PROC. 37 (1999).

[15] They include the early work of William L. Reynolds and William M. Richman. *See* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals*, 48 U. CHI. L. REV. 573 (1981); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 (1979). *See also* Robert J. Van Der Velde, *Quiet Justice: Unreported Opinions of the United States Courts of Appeals—A Modest Proposal for Change*, CT. REV. 20, 20–27 (Summer 1998). The work of Donald Songer, in the political science literature, is empirical rather than normative; it is discussed *infra* pp. 379–81.

[16] Judge Richard Arnold's assertion is that the remedy for heavy caseload "is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid." Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000), *vacated*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

[17] County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (summarily reversing 633 F.2d 876 (9th Cir. 1985) (table)). Justice Stevens cited Judges Posner and Wald and two articles by Reynolds and Richman from the "extensive comment" on "[t]he proliferation of this secret law."

unfairness to litigants, less judicial accountability, and less predictability.[18] Consolidating matters somewhat, we can say that the principal criticisms are that unpublished dispositions create four types of harms: (1) they create inconsistency in case outcomes, (2) they create the potential for "stealth jurisprudence," (3) they may contain sloppy analysis, and (4) people are unsure about their validity.

If unpublished dispositions do contribute to inconsistency, that inconsistency certainly can have significant effects, not only on doctrine but also on particular individuals. This can be seen in a letter to the court from an attorney about the results reached by two panels in unpublished memoranda concerning the convictions of two individuals. The government had used the same theory against both defendants, but one panel reversed the conviction of one defendant while the other panel affirmed the second person's conviction. The lawyer's frustration was evident, not only regarding the "anomalous" results "in light of the way the facts were presented to the jury, as well as the theories and inferences argued by the government to this Court on appeal," but also as to the difficulty of citing an unpublished opinion to support his complaint. He wrote that the court's rule precluding citation of a memorandum disposition "except when it is relevant under doctrines such as the law of the case, res judicata, or collateral estoppel," coupled with the Federal Rules, "precludes argument to the Court by way of a letter such as this," but he "respectfully submitt[ed], nonetheless, that the disposition of Mr. Azmanian's appeal [was] germane to the result in Mr. Rahimi's matter as the law of the case."[19]

What about "stealth jurisprudence"? As non-precedential rulings, unpublished memoranda cannot create circuit doctrine, although some judges have observed that a colleague might plant the seed of a new doctrine in such a disposition, drawing on it later (without citation) in a published ruling. The frequency with which this occurs is in the eye of the beholder, but these purported judicial misdeeds seem to be based on an implicit assumption of a cabal. Nearly thirty years ago, in claiming that not-for-publication rulings were being used to bury intracircuit inconsistencies,[20] James Gardner was almost conjuring up a picture of judges sitting at post-argument conference, saying, "Let's hide this one." Yet this is improbable given the difficulty of being so Machiavellian in the face of a burdensome caseload and the very real possibility that panel members will not be of like minds, so that one would blow the whistle on any such effort.

This is not to say, however, that judges do not discuss the matter, as we can see in a judge's comment about not wanting to "bury[] the bones of a

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[18] Martin, *supra* note 1, at 180.

[19] Steve Cochran, Wyman Bautzer Kuchel & Silbert, to Clerk of Court (Jan. 4, 1989) (regarding United States v. Rahimi-Ardebili, No. 87-5136, 886 F.2d 1320 (9th Cir. 1989)). An off-panel judge observed, "One would think that these two cases should have been submitted to one panel because of the common issues." Unattributed quotations are from materials to which the author was granted access.

[20] James N. Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A. J. 1224 (1975).

difficult bunch of legal questions in the unpublished landfill," and in the remark of a law clerk to a judge during a panel's consideration of whether to use an unpublished disposition in a case where lawyers had not handled important issues well: "if we were to bury the holding in a memorandum disposition it seems no less 'tidy' than the solution we proposed yesterday." To the extent that unpublished dispositions are available on Westlaw or in the *Federal Appendix* (to be discussed later), intracircuit conflicts, even if at one time they could have been at least somewhat hidden, are no longer buried, as judges with relative frequency openly mention in unpublished dispositions the uncertainty in the law of the circuit. Nonetheless, intracircuit conflicts seem to appear more frequently in published opinions than in memorandum dispositions.[21]

Whether burying is intentional, as critics imply, or results only from judges' sincere belief that the cases before them do not deserve publication, the effect can be substantial, particularly in producing a diversity of approaches to a single question which remains unresolved by a published opinion establishing circuit precedent. This was evident on an important question of what a Supreme Court ruling required of district judges in whose courts people had been convicted of illegal reentry after deportation under two different statutory provisions. By the time a panel published an opinion to set the matter straight, there were almost twenty unpublished memorandum dispositions taking three different approaches.[22]

Even though it is difficult for three judges to agree to inflict certain views on their colleagues, in certain types of cases three like-minded judges might adopt a reading of the law that differs from that held by other members of the court. As one judge has remarked, the "subjective use and misuse of panel decisions not to publish" creates "hiatal opportunities for judges who have a political agenda to capture an open (not yet published) issue for a proclamation of new law."[23] The area of immigration asylum appeals is one in which this might be particularly likely to occur because, it has been suggested, there are "a few judges who grant relief in immigration cases that flies in the face of published opinions, but who do so with unpublished dispositions that fly under the radar of the rest of the court." Once they have done this, they may go further, using a published opinion to grant relief in "a case that has no legal merit but touches the heart strings," with the likelihood that their colleagues will not pursue en banc reversal of

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[21] This is not the result of a systematic count, but is the author's impression from scanning both types of dispositions in connection with work on Ninth Circuit judges' mention of intercircuit conflicts. *See* Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002).

Many of the references concern within-circuit disagreement on the proper standard of review for certain criminal trial court actions, such as jury instructions and admission of certain evidence. Elimination of those categories appears to reduce considerably the frequency of references to intracircuit conflict

[22] *See* United States v. Rivera-Sanchez, 222 F.3d 1057, 1062–63 (9th Cir. 2000).

[23] E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Apr. 27, 1999). Or, as he noted earlier, "Some unpublished cases are covert efforts by rogue judges to smuggle a 'just' result past the en banc watchers and the Supremes." Judge Alfred T. Goodwin to Stephen L. Wasby (July 14, 1998). Transcripts and/or copies of all letters, e-mails, and interviews cited in this article are on file with the author.

the outcome because the heavily fact-specific nature of the cases makes them unworthy candidates for en banc rehearing.[24]

If one criticism is that unpublished dispositions deprive parties and others of what is due them, an alternative criticism is a declamation against the non-citable non-precedential status of these dispositions. This has been the principal focus of discussion prompted by Judge Arnold's opinion in the *Anastasoff* case that unpublished non-precedential rulings were invalid.[25] While much of that opinion focuses on what at first seems to be only a limited aspect of not-for-publication dispositions, namely, their lack of precedential value, that aspect is linked to the *process* by which the courts of appeals reach their dispositions. In particular, as will be explored later, judges who decide to issue a not-for-publication non-precedential disposition devote less time to developing its contours than if the writing were to be published. If all cases received plenary treatment, including published precedential dispositions, more attention to each would be required, with obvious negative effects on backlog and time to disposition.

The immediate denouement of Judge Arnold's *Anastasoff* opinion was the court's vacating of the case as moot when the government changed its position and agreed with Anastasoff on the substantive issue in the case.[26] However, the court indicated that whether unpublished opinions had precedential status "remains an open question in this Circuit."[27] Thus, Judge Arnold's argument persisted even after *Anastasoff* itself was vacated and there have been a nontrivial number of citations to it.[28] Like the open status of the matter in the Eighth Circuit, the issue has been taken up elsewhere. On the same side as Judge Arnold is Judge Jerry Smith, dissenting from denial of rehearing en banc in *Williams v. Dallas Area Rapid Transit*,[29] while on the other side is the Ninth Circuit's Judge Alex Kozinski, who wrote in *Hart v. Massanari*[30] to discuss at length concepts of precedent as controlling authority in relation to the common law. Judge Kozinski reached the conclusion that, because the matter of binding precedent derived from judicial policy rather than constitutional provisions, courts could decide which of its decisions were precedent, and thus the rules on non-publication were valid and appropriate.

Others also have tried to force the issue of the validity of unpublished dispositions. For example, a lawyer went to court in the Northern District of California to challenge the Ninth Circuit's rules on such dispositions. The district court turned away that challenge, saying that it doubted a

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[24] E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Apr. 27, 1999).
[25] Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). *See also* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROC. 219 (1999) (an earlier comment, perhaps telegraphing what he was to say in the *Anastasoff* opinion).
[26] Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc).
[27] *Id.* at 1056.
[28] *See* Jerome I. Braun, *Anastasoff v. United States: An Update*, 85 JUDICATURE 93, 94 (2001) (mentioning, in particular, citations by Judge William Young (D. Mass.)). For his earlier comment, *see* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90 (2000).
[29] 256 F.3d 260 (5th Cir. 2001).
[30] 266 F.3d 1155 (9th Cir. 2001).

district judge had jurisdiction to strike down rules promulgated by a higher court and that the lawyer lacked standing to bring the challenge because he could not show injury from the rules.[31] The normative debate among observers over the propriety of unpublished non-precedential dispositions also continues apace. This is illustrated by the contents of an *Anastasoff*-stimulated symposium on unpublished dispositions, where at least half the contributions focused on a general discussion of the precedential value of such dispositions or argued some normative matter concerning them.[32]

The significance of these problems, and the fact that they are not merely theoretical, have not been lost on political observers, as extra-judicial discussions of unpublished decisions suggest. The courts' use of unpublished dispositions and mention of the controversy concerning their use has reached beyond the hallways of the courts themselves, not only to publications for lawyers but also to broader fora, such as the *New York Times* and the *Wall Street Journal*. The *Times* gave attention to the subject as early as 1983 in a story on the Second Circuit's implementation of its non-citation rule for unpublished dispositions,[33] but there seems to have been greater attention given to the topic more recently. Of particular note in the *Wall Street Journal* was "Appeals Courts Keep More and More Opinions Secret," an op-ed page article in which attorney John Kester, making a variety of charges, argued that his clients had been mistreated by "secret" unpublished opinions.[34] Then, in early 1999, a *New York Times* story focused on the "limited review" received by many cases because of the decrease in oral argument and the increase in use of unpublished dispositions, with particular attention given to the Eleventh Circuit.[35] The article provided quotations from federal judges explaining and defending the practice, and contained prominent mention of criticisms made by law professors William Reynolds and William Richman. There was another *New York Times* story in 2001, "Legal Shortcuts Run Into Some Dead Ends," discussing Judge Richard Arnold's opinion in the *Anastasoff* case, which ruled unconstitutional the non-precedential aspect of such dispositions (see below for further discussion), and the California legislature's consideration of a requirement that all appeals court rulings in that state be usable as precedent.[36]

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[31] Schmier v. U.S. Court of Appeals for the Ninth Circuit, 136 F. Supp. 2d 1048 (N.D. Cal. 2001).

[32] See Symposium: Anastasoff, Unpublished Opinions, and 'No Citation' Rules, 3 J. APP. PRAC. & PROC. 169 (2001).

[33] Marcia Chambers, *U.S. Appeals Court Restricts Use of Opinions by Lawyers*, N.Y. TIMES, Feb. 21, 1983, at A1. This prompted Second Circuit Chief Judge Wilfred Feinberg to respond in a letter to the editor, *U.S. Appeals Court: Separating the Significant From the Trivial*, N.Y. TIMES, Feb. 28, 1983, at A14.

[34] John G. Kester, *Appeals Courts Keep More and More Opinions Secret*, WALL ST. J., Dec. 13, 1995, at A15.

[35] William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at A1.

[36] William Glaberson, *Legal Shortcuts Run Into Some Dead Ends*, N.Y. TIMES, Oct. 8, 2001, at WK 4. For such practices in the states, *see, e.g., Unpublished But Influential*, A.B.A. J., Jan. 1991, at 26 (dispute over unpublished opinions in Wisconsin).

C. WHAT DO WE KNOW? PREVIOUS STUDIES

Available statistics map the substantial increase in the incidence of all court of appeals dispositions issued without published opinion. However, relatively little systematic attention has been given to the process connected with such use, either by participants in the process themselves or by observers of the courts of appeals. Vagrant remarks, like Judge Arnold's statement that "screening panel opinions are routinely unpublished,"[37] can be found. And his *Anastasoff* opinion did lead to some writing that avoided normative claims and provided some basic information about such matters as the frequency of unpublished dispositions, who wins when cases are so decided and which courts use and cite them, the rules of various courts concerning publication, and practices in other venues such as the treatment of veterans' appeals in the specialized federal courts and practice in some state courts.[38]

Until recently, about the only available systematic work was some of the earlier writings of Donald Songer and his colleagues, although they did not focus directly on the process by which the court decided to publish or not. Examining unpublished Eleventh Circuit rulings, they found that a significant portion of non-unanimous rulings were not published, that there was a greater frequency of publication when panels included judges sitting by designation, and that ideology (as measured by the party of the president appointing the judge) affected publication rates.[39] This led them to the conclusion that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe."[40] Reinforcing the view that judges' discretion guided the decision to publish was a statistically significant higher rate of publication for cases in which "upperdog" parties (government and corporations) had appealed than in appeals by "underdogs" (labor unions, individuals, minorities, aliens, convicted defendants).[41]

Examining the extent to which formal criteria for publication appeared to be followed in the Fourth, Eleventh, and District of Columbia Circuits, Songer also found a lack of support for "the assumption that the unpublished decisions are frivolous appeals with no precedential value"[42] because, counter to the criteria, a high proportion of unpublished dispositions were reversals of lower courts or administrative agencies. Important additional findings were that judges differed in the extent to which they participated in not-for-publication dispositions, circuits differed as to publication of cases with underdog appellants, and Democrat-appointed majority panels were more likely to produce a liberal outcome

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[37] Arnold, *supra* note 25, at 224.
[38] *See generally Symposium*, *supra* note 32, at 169.
[39] Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 975 (1989).
[40] *Id.* at 975.
[41] *Id.* at 981–82.
[42] Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 JUDICATURE 307, 313 (1990).

than Republican-appointed majority panels, which were more likely to produce a conservative result.[43]

These findings, which give the lie to the notion that unpublished dispositions are used only in routine and uncomplicated cases, date from more than a dozen years ago. If they were true then, they ought to be all the more true now, as the proportion of cases resulting in unpublished dispositions is much higher now than at the time of Songer's studies. With unpublished dispositions being used in proportionately more cases, those cases are less likely to be routine.

Factors affecting a circuit's overall publication rate, such as those Songer examined, may not be reflected equally across all subject matters. Thus it is necessary to study publication patterns both in less contentious areas of the law and in those more likely to engage the judges' ideological juices, such as criminal procedure and requests for asylum under immigration law, where one might expect more dispute over whether to publish and a greater possibility of manipulation of the criteria for publication. There is variation over time in the latter areas of law, which are ones in which there are many cases and the governing language (usually a constitutional provision) is vague, allowing judges greater leeway to read their own views into the language.

In a recent study of unpublished dispositions in labor relations cases brought under the National Labor Relations Act, Merritt and Brudney found that some of the "rich array of variables [that] distinguishes published from unpublished opinions," such as the reversal of an agency ruling, "track formal publication rules."[44] They also found a number of bivariate and multivariate relationships between rules and court procedures on the one hand, and the extent of unpublished dispositions on the other. For example, there was a bivariate relationship between encouragement of publication of reversals and actual publication.[45]

In terms of the process by which circuits decided whether to publish, when a circuit "allow[ed] one judge to mandate publication," the publication rate was higher (a positive but not statistically significant relationship) than in circuits not specifying the number of judges needed to designate a disposition for publication.[46] Although "circuits requiring a majority consensus for publication published a smaller percentage of their opinions" (not statistically significant),[47] multivariate analysis showed "that circuits explicitly requiring majority approval to publish an opinion published more decisions, on average, than did other circuits."[48] When the criteria concerned judges' separate opinions (concurrences or dissents), the

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[43] *Id.* at 311–13.
[44] Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 VAND. L. REV. 71, 74 (2001).
[45] "Circuits that encouraged publication of reversals . . . published significantly more of their decisions than did other circuits." *Id.* at 87–88.
[46] *Id.* at 88.
[47] Id.
[48] *Id.* at 114 n.131.

bivariate finding was like that for reversals: "circuits that encouraged publication of opinions carrying dissents or concurrences published a significantly lower percentage of their opinions than did other circuits."[49] Here, however, the multivariate relationship was the same—encouraging publication of dispositions with concurrences or dissents led to less rather than more publication.[50]

An earlier study of the Ninth Circuit's 1970s border search cases provides information from an area of criminal procedure. Examining the court's seventy-four founded suspicion cases disposed of by unpublished memoranda from 1972 through 1975,[51] Wepsiec and Wasby found some inconsistency in the tests used in the unpublished dispositions dealing with the "founded suspicion" necessary to justify a stop.[52] Thirty-nine of the unpublished rulings contained no citation to a test for "founded suspicion," twenty-one cited *Wilson v. Porter*,[53] four cited the Supreme Court's "stop and frisk" case of *Terry v. Ohio*,[54] one cited the Ninth Circuit's en banc *Ward* ruling,[55] six cited the Supreme Court's *Brignoni-Ponce* ruling,[56] and four contained citations to multiple cases. The problem created by such multiple citations can be seen in a case in which the panel cited *United States v. Mallides*,[57] which had used the *Terry* test; *United States v. Holland*,[58] which used both *Wilson* and *Ward*; and *Wilson* itself. While one test or some combination of the four tests were cited in all but 3.7% of the published opinions, most unpublished opinions (51.4%) did not cite any of the various tests available to the judges. Overall, the use of tests other than *Wilson* was slightly higher in the unpublished dispositions than in published opinions.

The Supreme Court's decision in *Brignoni-Ponce* quickly produced consistency in the test used in published opinions, but its effect in this regard on unpublished opinions was less. Of the twenty-four unpublished rulings after the justices' decision in *Brignoni-Ponce*, six cited that case, two cited *Wilson v. Porter*, one cited both *Brignoni-Ponce* and *Mallides*, and fifteen contained no citations. Of those fifteen, six employed a test similar to the one the Supreme Court employed in *Brignoni-Ponce* and one used something like the *Wilson* test, while in eight there was insufficient information to ascertain the test used.

These studies aside, there has been no other literature on which to draw, as political scientists' attention to unpublished dispositions has not paralleled the distinct increase in studies of judicial decisionmaking in the

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[49] *Id.* at 88.
[50] The presence of neither district nor visiting judges led to greater frequency of publication. *Id.* at 104.
[51] The number is greater than the fifty-four cases decided by published opinion from 1970 through 1975.
[52] Michael Wepsiec & Stephen L. Wasby, Ninth Circuit Border Searches: Doctrines and Inconsistencies (2000) (unpublished document from earlier work by Wepsiec).
[53] 361 F.2d 412 (9th Cir. 1966).
[54] 392 U.S. 1 (1968).
[55] United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (en banc).
[56] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
[57] 473 F.2d 859 (9th Cir. 1973).
[58] 510 F.2d 453 (9th Cir. 1975).

U.S. courts of appeals. For present purposes, the important matter is that most of the new studies are based on the data from a sample of published opinions provided by the Court of Appeals Database,[59] the use of which distracts from a recognition of the limited proportion of courts of appeals' output that is published and leads researchers to put not-for-publication dispositions out of sight and mind.[60]

III. WHAT THEY LOOK LIKE

Suggestions have been made as to what should be included in an unpublished disposition. An extended fact statement can be omitted, Judges Kozinski and Reinhardt suggest, whereas in a published opinion, "[t[he facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented," and it "is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion."[61] Because the parties know the facts, extended fact recitations seem unnecessary, but their presence—and there are numerous memodispos containing extensive fact statements—may result from the court's issuing an only slightly recycled clerk-prepared bench memorandum as its disposition.[62]

The Ninth Circuit made available a form indicating the matters to be touched on in those dispositions. This reinforced the impression that unpublished memoranda would look different from published opinions. Although instructing federal judges to follow a particular format may be a bit like herding cats because of the difficulty of "telling 'an Article III' what to do," the court-prepared form "directed" its use. The form began with the hortatory language that "every effort should be made to shorten the length

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[59] Court of Appeals Database, at http://www.polisci.msu.edu/~pljp/ctadata.html (developed by Professor Donald R. Songer, University of South Carolina). The principal work drawing on the Database is DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000), which contains material on the judges of the courts of appeals, judicial business, parties appearing before the courts, and the courts' decision making. For a bibliography of articles on the courts of appeals, *see* 161–67. An example of an article drawing on the Database is Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 1 (2001).

Before reading studies of judges' voting behavior like those provided by Songer and colleagues, one should read Jonathan Matthew Cohen, Inside Appellate Courts: The Impact Of Court Organization On Judicial Decision Making In The United States Courts Of Appeals (2002), which examines the process by which decisions are made. Cohen applies organizational theory and uses the theme of the tension between judicial autonomy and independence.

[60] It would be better if studies examining court of appeals decisionmaking that rely only on published opinions prominently displayed this disclaimer: "The decisionmaking of the courts of appeals evidenced in their published dispositions, which are less than half of their total dispositions and not representative of those dispositions in important ways, provides only a partial picture of such courts' decisionmaking."

[61] Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAWYER 43 (June 2000).

[62] *See, e.g.*, United States v. Lee, No. 73-1100 (9th Cir. 1973), in which the court said probable cause was shown, the disposition set out several paragraphs of facts alleged in an affidavit for a warrant. This case is an instance of an unpublished disposition that dates from before West's inclusion of lists of such dispositions in Federal Reporter 2d Series. The Ninth Circuit Court of Appeals' unpublished dispositions were initially available only in slipsheet form. For the period of late 1972, when their use began, through 1977, when West began its lists, they carry no West citation. *See supra* note 6, and *infra* notes 193–94 and accompanying text, for further information on their availability.

of the disposition." "The objective of informing parties of the court's reasoning" was noted, thus putting the court at some distance from "one-line" dispositions of the "Affirmed—See Rule 36-1" (AWOP, or Affirmed Without Opinion) sort used in some other circuits.

The statement then listed what dispositions should, and what they need not, include. The former consisted of: "(1) statement of the court's reason(s) for accepting or rejecting the appellant's contention(s), with appropriate citation(s); and (2) statement of the result." Listed as includable but not essential were: "(3) statement of the nature and posture of the case; and (4) statement of appellant's contentions of appeal." An example was provided: "Defendant's statements were volunteered rather than made in response to police questioning, and were therefore admissible. United States v. Cornejo, 598 F.3d 554, 557 (9th Cir. 1979). AFFIRMED." This form also said that it was "acceptable" to state before this language that "Smith appeals from her conviction for transporting illegal aliens. Defendant argued that statements she made after her arrest were admitted in violation of her Miranda rights."

Despite such a template, there is no single type of unpublished disposition. In most instances they are unsigned. All circuits show the names of the judges deciding a case, but most circuits do not identify the author of an unpublished ruling. The First and Sixth Circuits, however, do show the author, at least some of the time, and the Third and Tenth Circuits do so more regularly. The other circuits either provide no indication after specifying the three members of the panel or, like the District of Columbia, First, and Fourth Circuits, use a "per curiam" designation where the author's name would ordinarily be found.

Even casual initial observation reveals variation in the length of these dispositions. Some courts of appeals make frequent use of one-line affirmances ("Affirmed—See Rule 36-1") or "judgment orders" (JO's), sometimes called AWOPs (Affirmed Without Opinion). Beyond them, there is considerable variation, particularly as to length, as the judges make some effort to meet the objective of "informing parties of the court's reasoning." In the Ninth Circuit itself, there is a wide range of variation in the length of unpublished dispositions, just as there is variation in judges' proclivities toward using them.[63] Some dispositions resemble the form's more extended version, but others are much longer, while still others are one- or two-line affirmances. Some of the latter are affirmances "for reasons stated by the district court," while other brief dispositions do little more than cite to a controlling Ninth Circuit case or a Supreme Court decision, which is thought sufficient when the judges are not going to take time to parse the doctrine embodied in the Supreme Court's rulings or to provide an extended rationale for use of the cases cited. There are now relatively few one- or two-line dispositions in the Ninth Circuit, while

[63] This can be seen in an observation by one judge, in a memorandum to colleagues on a panel, saying, "My standards are different from those followed by most," he added, "I believe most of our memorandum dispositions should be published."

many of the unpublished dispositions are somewhat longer than the form's exemplar.

From the beginning, however, one does find dispositions no longer than two to a half-dozen lines, as in, "[t]he district court's entry of summary judgment and dismissal of the action is affirmed in this frivolous civil rights suit,"[64] or "After examination of the record and briefs . . . we conclude that the appeal is legally frivolous. The judgment of conviction is affirmed and bail is revoked effective now,"[65] neither of which provides more than the conclusion, or a five-line ruling which does provide some substance: "The judgment of the appellate division of the district court is affirmed. Adverse possession was required to be proved by Plaintiff Appellant's decedent. We need go no further than to point out that there was no real showing of the necessary element of adverse possession."[66] Here we might also note another very brief (one paragraph) ruling that was an order "intended to memorialize" the panel's action in which, by "oral opinion delivered from the bench," the judges had reversed and remanded to the district court.[67] However, such practice of "decisions from the bench" is not common in the Ninth Circuit.

On the whole, unpublished dispositions are shorter and less developed than published opinions. However, they extend from bare assertions like, "The evidence is sufficient to sustain the conviction," or "We affirm for reasons stated by the district court," to multi-page documents at least as long as, if not longer than, some opinions. The latter may contain extended fact recitations, a statement of the standard of review, discussion of relevant circuit precedent, and application of that precedent to the facts.

Courts differ as to whether they provide simple statements about the outcome or instead include discussion of at least the principal issues. By and large, unpublished Ninth Circuit rulings seem to give the losing party an explanation of the result, with a citation to some relevant law. For example, in a case involving a Jencks Act claim and evidentiary rulings, the court provided a brief paragraph as to each claim, with Ninth Circuit cases cited for three claims and the Federal Rules of Evidence for another; only one claim lacked a citation.[68] In a case on a union's duty of fair representation to a discharged employee, the facts were recited in two pages of a memorandum disposition totaling slightly less than six pages. The judges then devoted a page to case law on the breach of duty, stating the basic principle that courts will interfere only if the union shows reckless disregard for employee rights. They cited a Ninth Circuit case and provided a long paragraph about it before finding that the union's investigation was not perfunctory.[69]

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[64] Sample v. Baker, No. 76-1770 (9th Cir. 1977).
[65] United States v. Nicholson, No. 76-1849 (9th Cir. 1977).
[66] Torres v. Calvo Fin. Corp., No. 76-2165 (9th Cir. 1977).
[67] Schulte v. Worldwide Ins. Co., Nos. 75-3848, 76-1408 (9th Cir. 1977). There was also a dissent without opinion in this case.
[68] *See* United States v. Sonido, Nos. 85-5226, 85-5228, 793 F.2d 303 (9th Cir. 1986) (table).
[69] *See* Belleque v. Teamsters Local 162, No. 84-4150, 790 F.2d 805 (9th Cir. 1986) (table).

While there are instances in which the court states the propositions for which cited circuit precedent stands, although not necessarily at great length, at other times these are only general references to the state of the law. In one such case, the judges said, without explanation, that an argument for which an attorney had been sanctioned was "not well founded in any viable theory of law," and the case also contained a reference, again without further explanation, to a case "which was the law of the circuit at the time the sanctions were ordered."[70] However, the parties were lawyers and would likely understand the somewhat opaque references.

In some cases, the judges deal with all the issues proffered, devoting anywhere from as little as a paragraph to as much as a couple of pages to each. A multi-page memodispo can result even if each issue receives only brief treatment and less than full development. Thus, in sending a twenty-six-page unpublished memorandum to the panel,[71] its author remarked that "[t]he reason it is so long is the appellant managed to raise about a dozen issues," and then noted, "While only one or two points required reversal, I thought it might be appropriate to mention the other points in the event of a new trial." This provides an example of an appellate court giving advice to the trial judge, perhaps in the hope of avoiding difficulty with a subsequent appeal of the case.

Alternatively, the judges may devote some attention to one or several issues, but not all of those presented. They may, for example, single out one for consideration, stating "We have carefully reviewed the assigned errors. Only one is of consequence," and then devote two-plus pages to it, including quoted testimony.[72] The converse of focusing on one or a few issues is that the judges do *not* address some. For example, they dispatch issues not addressed with the sentences, "Other claims were briefed and argued but none has support in the record," or "Other points were briefed and argued but do not require discussion."[73]

Short dispositions take different forms in different circuits. In addition to "Affirmed—See Rule 36" judgment orders, we find a different form in the Second Circuit: "Upon due consideration, it is hereby ordered, adjudged and decreed that the judgment of said district court . . . be, and it hereby is, AFFIRMED." Rulings affirming for the reasons stated by the district court are short by definition, and would be even if published because the lower court had published its disposition. In disposing of one case on the basis of the district court's ruling, the Fourth Circuit said, "We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal

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[70] *See* Eureka Fed. Sav. & Loan Ass'n v. Kidwell, No. 89-16048, 937 F.2d 612 (9th Cir. 1991) (table).
[71] United States v. Thierman/United States v. Amino Discounters/United States v. Thierman, Nos. 94-10279, 94-10304, 94-10293, 94-10307, 70 F.3d 121 (9th Cir. 1995) (table).
[72] Webster v. Sears, Roebuck & Co., No. 84-3766, 760 F.2d 278 (9th Cir. 1985) (table).
[73] Tran v. Borg, No. 89-15009, 917 F.2d 566 (9th Cir. 1990) (table); Air Separation, Inc. v. William H. McCauley Ins./Air Separation v. Alexander Howden, Nos. 91-15362, 91-15600, 967 F.2d 583 (9th Cir. 1992) (table).

on the reasoning of the district court."[74] The Sixth Circuit has from time to time used a slightly different formulation for this type of disposition:

> Because the reasoning which supports judgment for the defendants has been articulated by the bankruptcy and district courts, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court . . . .[75]

Somewhat longer is a version in which the court instead uses three paragraphs—one stating the issue, one saying the court has considered the record, etc., and a third saying the lower court opinion is adequate.

Many *short* unpublished rulings may come from screening panels, as in multiple short dispositions, filed on the same day, from the same panel of three Ninth Circuit judges.[76] We also see this when a judge, dissenting from affirmance of a denial of a preliminary injunction, would have appointed counsel "and set the case for a hearing by a merits panel."[77] Other short dispositions that are somewhat longer than one-line affirmances come in a variety of forms. Many are one or several paragraphs of boilerplate language containing conclusory findings. The Eighth Circuit's one-paragraph affirmances of dismissals, for example, are wholly conclusory, and the Fourth Circuit often says: "We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error" and thus affirm. Some courts of appeals use these rulings in refusing to issue a Certificate of Appealability (COA). In the Fourth Circuit and elsewhere, these very short (one paragraph) dispositions are labeled dismissals but are de facto rulings on the merits. (When the court finds a basis for giving a COA and remands to the district court, it vacates and remands.)

"Dismissal" is also used in some circuits when counsel has filed an *Anders* brief (indicating a review of possible issues and concluding an appeal would not be meritorious), and the court, in boilerplate, agrees with counsel that there are no nonfrivolous issues and grants the counsel's motion to withdraw. The Tenth Circuit uses a similar disposition on determining that a plea agreement has not been breached. Such dispositions tell the appellant no more than that he or she has lost. The formulaic language adds nothing and one is left to wonder why space is being consumed (and trees felled) for this exercise. In the Seventh Circuit, however, in some *Anders* cases, the court discusses each issue, leading to dispositions of moderate length. The Fourth Circuit also uses the three-paragraph mode of disposition for dismissals for lack of jurisdiction, usually reciting when the notice of appeal was filed or stating that a final judicial order was lacking. These dispositions do, however, provide some reason beyond boilerplate; this is also true in the Eighth Circuit where,

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[74] Raysor v. Eagleton, 30 Fed. App. 92 (4th Cir. 2002).
[75] Butcher v. Lawyers Title Ins. Co., 30 FED App. 458 (6th Cir. 2002).
[76] District judges and visiting judges from other circuits do not serve on screening panels.
[77] *See* Yellen v. Mueller, 37 Fed. App. 877, 878 (9th Cir. 2002) (Berzon, J., dissenting).

although most unpublished dispositions are quite short, some contain one or two citations and perhaps a brief quotation.

In addition to these largely canned rulings, many unpublished dispositions are of moderate length; they convey more than conclusions and use more than boilerplate language to do so. In some circuits, like the Tenth Circuit, they are found in addition to the "short form" dispositions. The dispositions of the Sixth Circuit are often of moderate length or longer, like those in the Ninth Circuit. One can also find longer dispositions that look like what one would find as a published opinion—for example, a sixteen-page writing in a criminal appeal with multiple issues—although what the court says about each issue might not add much to the law and thus not warrant publication.

Although unpublished dispositions are usually shorter than published opinions, there are some unpublished memoranda which should be considered for publication simply because they appear thorough and complete and seem no different from what we would expect of a well-written opinion. An example is *Marra v. Larkins*,[78] affirming a denial of habeas in a murder case. Not only is the opinion of seven printed pages thorough, but in Third Circuit practice, its author is identified; moreover, the district court opinion was published.[79] Another such case is a Fourth Circuit ruling involving alleged libel by G. Gordon Liddy.[80] Here not only was the ruling over a dozen printed pages long, but the disposition reversed in part and remanded. Moreover, all three prior rulings in the case—two district court opinions and a prior Fourth Circuit ruling—had been published.[81]

A similar case from the Sixth Circuit, also with author identified, involved a habeas petition stemming from a cocaine possession conviction where the ruling below had been published. The court of appeals ruling vacating the district court's habeas grant was over ten pages long,[82] although over four pages were consumed with recitation of the facts and the court based its ruling on procedural matters like exhaustion and the filing of successive habeas petitions. Another very long disposition that would seem worthy of publication, as it contains almost five pages of West headnotes and an eighteen-page disposition, is *United States v. Whitmore*.[83]

As noted above, there may be a number of issues to be addressed and, even if each is disposed of with relative brevity, the number of pages necessary to dispose of all matters begins to mount. This is true particularly in criminal cases, where not only do the judges speak to various claims about the validity of the conviction, but they now also

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[78] 37 Fed. App. 29 (3rd Cir. 2002).
[79] Marra v. Larkins, 111 F. Supp. 2d (E.D. Pa. 2000).
[80] Wells v. Liddy, 37 Fed. App. 53 (4th Cir. 2002).
[81] Wells v. Liddy, 1 F. Supp. 2d 532 (D. Md. 1998), *rev'd and remanded*, 186 F.3d 505 (4th Cir. 1999), on remand, 135 F. Supp. 2d 668 (D. Md. 2001).
[82] Morse v. Tripett, 37 FED App. 96 (6th Cir. 2000). The case had also been published below, Morse v. Tripett, 102 F. Supp. 2d 392 (E.D. Mich. 2000), which suggests the need for publication.
[83] 35 Fed. App. 307 (9th Cir. 2002).

address Sentencing Guideline issues raised by both the defendant and the government. One reason for dealing with each of many issues in criminal cases, even if individually they are given relatively short shrift, is that the judges may feel that it is important to exhibit to a convicted defendant that his or her claims have been considered.

An example of a long unpublished disposition of a criminal appeal is *Maberry v. United States,*[84] in which the court addressed these claims by the defendant:

> - A challenge to a one-year residence requirement for service on a grand jury, disposed of with the statement, citing to a 1972 ruling, that "[t]he Ninth Circuit has previously considered similar challenges and found them to be without merit."
>
> - A claim that the absence of judicially-found probable cause renders indictments defective, based on the argument that later cases had undermined a 1932 Supreme Court ruling. Saying, "Defendant's argument is intriguing but *Ex Parte United States*[85] remains the rule," the panel stated that a grand jury indictment fair on its face conclusively determines probable cause.
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> - A claim of prejudice from having been tried on both indictments at the same time. Saying that "A long history of cases has established that the question of severance is one within the discretion of the trial court" and citing to Ninth and Fifth Circuit cases and also discussing a D.C. Circuit case offered by the defendant, the panel found no abuse of discretion.
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> - A claim that *Miranda* rights were not waived. The panel said the record indicated the contrary, with the defendant having been advised of his rights "on numerous occasions."
>
> - A related *Mallory* claim, as to which the panel said the delay in bringing defendant before a magistrate "might have been unwarranted, it did not constitute prejudicial error."
>
> - A claim that the institutions were not banks. The panel, citing a 1969 Ninth Circuit case, said this was beyond rational question or challenge.
>
> - A challenge to the jury instructions. They were found acceptable, as an instruction that banks were insured by the FDIC (in the absence of material in the record) was inadvertent and not plain error, and the instructions clearly indicated that the jury had to find every element beyond a reasonable doubt. Any potential error, said the judges, was cured when the instructions were read in their entirety.

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[84] Nos. 72-2284, 72-2285 (9th Cir. 1973).
[85] Ex parte United States, 287 U.S. 241 (1932).

- A challenge to the sentence. The judges said it was not unreasonable; but more importantly, it was within statutory limits, "so that under circuit precedent, "we have no authority to review" it.

In another example, a fourteen-page memorandum disposition affirming a conviction began with four pages of facts and then contained one-and-one-half pages on sufficiency of the evidence to support a conspiracy conviction, just under two pages on the judge's refusal to issue subpoenas, roughly the same amount on denial of effective assistance of counsel, and over four pages on several sentencing elements.[86]

In an even longer disposition, exceeding twenty-one pages with almost seven pages of facts, the judges devoted over three pages to sufficiency of the evidence of a continuing criminal enterprise (CCE) and two more to a related firearms count, on both of which they reversed. They then devoted less space to a number of other issues, on all of which the court affirmed: sufficiency of the indictment (under two pages), admission of prior bad acts (one-and-one-half pages), admission of prior consistent statements (under one page), exclusion of evidence (less than a page), prosecutorial misconduct (one-plus page), and a sentencing issue (one page).[87]

Nor are these examples unusual. The Ninth Circuit's early unpublished dispositions also include one in which each of four assignments of error received an explanation with citations to Ninth Circuit cases;[88] another with several elements, in which each was discussed and a Ninth Circuit citation provided, leading to a five-page disposition;[89] and still another where each of four issues was given a short clear paragraph of discussion.[90]

While unpublished dispositions in criminal appeals not infrequently cover multiple issues, judges may also address several issues in their unpublished dispositions of civil appeals. An example of a long, multiple-issue memorandum disposition in a civil case was a ruling in a forfeiture action against a plane.[91] A stipulation led to contempt for failure to pay the government under that stipulation, followed by a civil action with a resulting default judgment. In the court of appeals, the result was a long (nine-page) memorandum disposition reversing the district court upon a finding that "uncontroverted evidence establishes Bowman's liability for intentional interference with contractual relations" (the stipulation), so that the district court's finding had been clearly erroneous. The court looked at each of five bases of liability, devoting a short paragraph to one and as much as two-and-one-half pages to the most central element on which liability was found. The judges also spoke to other issues where there was no clear error and one which the judges did not feel the need to resolve, and also devoted a paragraph to affirmative defenses. Then the court remanded

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[86] *See* United States v. Ortiz, No. 92-30364, 15 F.3d 1093 (9th Cir. 1993) (table).
[87] *See* United States v. Archer, No. 93-10753, 92 F.3d 1194 (9th Cir. 1996) (table).
[88] *See* United States v. Robles, No. 73-1993 (9th Cir. 1973).
[89] *See* United States v. Rifai, No. 72-3212 (9th Cir. 1973).
[90] *See* United States v. Johnson, No. 72-2370 (9th Cir. 1973).
[91] *See* United States v. Bowman, No. 83-6476, 758 F.2d 656 (9th Cir. 1985) (table).

for a damages determination and award. Although there was a concurrence by (then) Judge Kennedy, it, like the majority opinion, was based on California law, as he said that an attorney's lack of immunity for intentional torts committed on a client's behalf was "largely dispositive" of the case.

A. REASONS FOR VARIATION

Despite judges' view that unpublished dispositions should be short to conserve resources—part of the justification for their use, discussed *infra*—such dispositions vary in length for a number of reasons. It is unclear why this is so and why there are apparent variations among some circuits in the relative length of these dispositions. Among the reasons are the use of oral argument, the availability of clerk-prepared bench memos as a basis for dispositions, and case complexity. However, what is an acceptable length for an unpublished disposition seems in part to be a function of "local legal culture"—what the judges of any court of appeals seem to feel acceptable *in that court*. Part of that culture may be the occasional effort to cut back on the almost inevitable tendency for unpublished memoranda to increase in length over time. At some point after this begins to happen, the court will adopt a policy or statement urging that unpublished dispositions be shortened—and for a while, this policy will be used to hold the line. Shortly after one such policy statement, in a case in which the proposed memodispo was seven double-spaced pages long, another member of the panel wrote to the author, "Under our new policy, this proposed disposition is too lengthy and reads like a published opinion," and suggested either publishing or deleting certain sections of the document. The result was a published opinion of the same length as the proposed memodispo.[92]

We should also note that it is unclear whether, or to what extent, observable differences in dispositions result from differences in circuit behavior such as the use of one-line orders or differences in what West obtains for inclusion in the *Federal Appendix*. Many rulings from Ninth Circuit motions panels do not appear in the *Federal Appendix*, and for the Federal Circuit, the *Federal Appendix* includes not only some "Affirmed—See Rule 36" dispositions, but also one-sentence Rule 42 dismissals on the parties' agreement and transfer to another court and dismissals for failure to prosecute, which never reach the book from other circuits.

One reason may be whether or not the court has held oral argument in the case. While oral argument once usually meant publication and unargued cases were those not published, the increase in the proportion of unpublished dispositions means that even if a case is considered worthy of oral argument, it might well not result in a published opinion. Some dispositions also have a standard announcement about the absence of oral argument, as in the Fourth Circuit ("We dispense with oral argument because the facts and legal contentions are adequately presented in the

[92] Southwest Ctr. for Biological Diversity v. Babbitt, No. 98-15038, 150 F.3d 1152 (9th Cir. 1998).

materials before the court and argument would not aid the decisional process"), while other circuits say the same thing, if less elegantly.

Cases with oral argument are "heavier" cases with somewhat more difficult issues than those in which argument is waived or found to be unnecessary. Thus, dispositions in cases with oral arguments may be longer. However, on the other hand, when oral argument has given the parties' lawyers an opportunity to engage the judges directly, the judges may prepare shorter written dispositions. Memorandum dispositions in cases without oral argument may be longer to show parties that attention has been paid to the issues, particularly where the district court has not adequately articulated the reasons for its ruling,[93] although if the district court has written an effective opinion, the court of appeals may affirm "for the reasons stated by the district court."

An unpublished disposition may also be long if it is a slightly revised clerk's bench memorandum, and judges refer to them as "warmed-over" (or "recycled") bench memos. Indeed, one judge wrote to his colleagues to say the court should "not [be] publishing slightly revised bench memos which sometimes appear in F3d."[94] It is quicker to make slight alterations to a bench memorandum, with its more extended statement of the facts, than to prepare a concise memorandum disposition from scratch. Bench memoranda tend to be of greater, rather than lesser, length, because they include more detail instead of being barebones presentations. The full statement of facts usually provided in a bench memo can—and some judges feel *should*—be excised from an unpublished ruling later.[95] However, this does not always happen, as we can see when judges who criticized the length of proposed memorandum dispositions did not always propose cuts in their colleagues' offerings.[96] To assist the judges, bench memoranda are likely to contain discussion of multiple issues raised in the briefs, in the event any of those matters is pursued at oral argument. However, at conference the judges may focus on only one or two issues they feel are necessary to resolve the case. While discussion of the other issues could be removed from the disposition, clerks may fail to do so.

Even when proposed memorandum dispositions are sent in lieu of bench memoranda, they are thought to need cutting. When a staff attorney provides a draft "memodispo" in lieu of a bench memorandum, the fact that

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[93] In one case, a judge wrote to panel colleagues, "I feel that a longer than usual disposition is warranted . . . because [the party] complained in his briefs that the district court failed to provide any explanation for its decision to grant summary judgment. As such, I feel it is worth demonstrating to the parties that we had read and thoroughly considered all of their arguments."

[94] Judge Alfred T. Goodwin to associates, Aug. 4, 1998. He added, "There must be better ways to make our clerks feel good."

[95] Interview with Judge Alex Kozinski in Pasadena, Cal. (Jan. 26, 2002). Examination of a sample of unpublished dispositions prepared in Judge Kozinski's chambers shows that they were indeed shorter than those coming from many other judges. Another member of the court commented that Judge Kozinski had been asking his colleagues to get their memodispos shorter and had argued that if they were shorter, the Supreme Court would be less likely to review them. Interview with Judge Dorothy Nelson in Pasadena, Cal. (Jan. 22, 2002).

[96] *See* handwritten note by Judge Alfred Goodwin on face of proposed memorandum disposition (Mar. 18, 1999), "It is too long for a memo, but I don't want to take the time to cut it." Alcan Aluminum Corp. v. Cont'l Ins. Co., No. 99-56951, 2002 WL 92852 (9th Cir. 2002).

the draft disposition is serving to inform the judges of the case would also mean that it would provide greater explanation rather than only a conclusion. In one instance where a draft memodispo was sent in lieu of a bench memo, a judge told the other panel members that the draft "is subject to editing as it contains material suitable for a bench memo but not for a disposition."[97] In another case, in sending "the attached benchmemo which I have had my law clerk prepare in the form of a memodispo," the judge said that "this memorandum can be substantially abbreviated" after argument if the result were agreed to.[98] In submitting a proposed memodispo in another case, a different judge indicated the need to "take some action to prune it back somewhat," and later told the panel that it "has undergone considerable pruning although I realize it is still lengthy for a memodispo" because of the issues raised in the case.

That the cases in which the judges hear oral argument are heavier cases suggests the role of case complexity in whether a disposition will be published. Some subjects like antitrust frequently produce complex cases, while other subjects are more likely to result in simple cases. Direct criminal appeals are among the latter, partly as a result of the high proportion of criminal convictions and Guideline sentences appealed by federal public defenders. One might hypothesize that, other things being equal, the complexity of the issues before the court would affect the decision to publish, with cases containing more complex issues more likely to be published than those with simple, straightforward issues. This is, however, called into question by one judge's observation that "complexity is not as important in the decision to publish as is the novelty of the questions posed or the current clarity of the law of the circuits."[99]

The high proportion of cases now resulting in unpublished dispositions has resulted in an increased proportion of heavy cases receiving that treatment. Perhaps, before unpublished dispositions became the dominant proportion of all cases decided, the equations "simple = unpublished" and "complex = published" held. The former may remain true, but the latter has been eroded. In any event, the relationship may not be so simple. For example, in a complex immigration case, one of the judges wanted the disposition left unpublished because the petitioner had been uncounseled and the issues had not been briefed, while another member of the panel

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[97] Judge Alfred T. Goodwin to panel, Pouss v. Farmers Ins. Exch. No. 97-35794, 152 F.3d 928 (9th Cir. 1998) (table). The proposed memodispo had a three-page-plus section, "Facts and Procedural Background," with a footnote, "This section to be edited out of final draft."

[98] Judge Alfred T. Goodwin to panel, Dec. 19, 1994, United States v. Miller, Nos. 94-10048, 94-10083, 46 F.3d 1147 (9th Cir. 1995) (table). On the face of his copy of this transmission, the judge wrote, probably to the clerk, "Cut out the surplussage . . . ." In still another case, in sending a proposed unpublished disposition, he wrote, "The proposed disposition is too long, but if the panel agrees with the result, I will edit it down before filing." Judge Alfred T. Goodwin to panel, Mar. 11, 1996, Imohi v. I.N.S., No. 94-7505, 87 F.3d 1319 (9th Cir. 1996) (table). Later, after concurrences by the other two panel members, he wrote to them to report that, "after Judge Hawkins consented to minor surgery, I have perhaps committed major surgery on this disposition. I believe this shortened version is better than the long form, however." Judge Alfred T. Goodwin to panel, May 2, 1996.

[99] E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Oct. 16, 2000).

preferred a published opinion because he did not like to have complicated issues appear in unpublished memoranda.[100]

Another reason for lengthy unpublished dispositions may be the Supreme Court's wish to have a clearer statement of the courts of appeals' actions, as in Justice Stevens' earlier-noted criticism, because even unpublished dispositions are the subject of certiorari petitions. In addition, at the start of a case the panel may have believed that the disposition should be published, but the ruling is instead eventually released as an unpublished memorandum. In such situations, because judges pay more attention to a published opinion than to a memodispo, there will likely have been more discussion about the disposition within the panel before the ultimate decision to use an unpublished memorandum. There may also have been communication concerning amendments to previously-circulated draft dispositions or over whether or not to publish, perhaps tied to the possibility of a dissent. Extensive exchanges within the panel may also be needed to resolve the concerns of a would-be dissenter. Put differently, there is variance in the extent of the judges' exchanges in cases with unpublished dispositions and also in those with published opinions, with the ranges overlapping.

IV. JUSTIFICATION

Having taken a look at the appearance, and particularly the length, of unpublished dispositions, we need to turn to the judges' justification for using such rulings. And court of appeals judges *do* offer justification for their use. As Chief Judge Martin observed, "Whereas academics tend to see unpublished opinions as causing a variety of systemic problems, judges tend to see them as a necessary, and not necessarily evil, part of the job."[101] We find that judges *intend* not-for-publication dispositions to be different from published opinions. One aspect is that they are to be shorter than published opinions. A related matter is that less effort is to be invested in them. Both of those matters are related to what the judges see as the intended audience for unpublished memoranda and to their non-precedential status. More generally, supporting their use are "strong arguments" of "practicality and policy," with a prime element of practicality being their use "in order to get through our docket."[102]

A. LENGTH

Unpublished opinions, say many judges, *ought* to be kept brief and spare. A short statement may result from adequate consideration, particularly if the writing judge has stated the conclusions concisely. And some dispositions may be so obvious that three lines (for example) might be enough to dispose of the matter. Brevity in unpublished dispositions is

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[100] *See* Gutierrez-Tavares v. I.N.S., No. 94-70210, 92 F.3d 1192 (9th Cir. 1996).
[101] Martin, *supra* note 1, at 178–79.
[102] *Id.* at 189.

desired in part because, to the extent that the points in the disposition are fully developed, "this stuff finds its way into Lexis & Westlaw and may come back to haunt us," as one judge reminded another who had discussed the legislative history of RICO and other matters in a proposed twenty-nine-page memorandum disposition.[103]

The rationale of writing shorter, less developed dispositions when they are unpublished is not, however, accepted by all judges. Three Tenth Circuit judges, including its then-chief judge, dissented from that court's adoption of its rules for not-for-publication dispositions to say that the suggestion "that in the rush of our business, we must prepare orders and judgments which are not written in the form of polished discourses which we wish to serve as citable opinions" was "the most untenable of the notions suggested for the no-citation rule."[104] They conceded that heavy caseload meant "we are obviously driven to entering orders which are not the literary models that we would like to produce as opinions," but said that a written disposition, whether an opinion or an order, should "be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law we must follow, and as to its consistency with our precedents."[105]

Lengthy writing may actually be *necessary* in some unpublished rulings. Some judges say that they or their clerks may write at greater length in criminal appeals so that defendants, particularly indigents, will understand that their claims, even if rejected, have been heard. And a criminal appeal raising multiple issues may result in a long memorandum disposition even if each issue is simple to decide, because one paragraph per issue, with perhaps somewhat more space devoted to one or two central issues, adds up.

B. AMOUNT OF ATTENTION

Judges devote more attention to some cases than to others because they feel that it is in the interests of the legal system as a whole for them to do so. Such variable allocation of time and effort allows them to meet the sometimes conflicting goals of (1) correcting errors in and disposing of individual cases and (2) developing the law for application to subsequent cases—the oft-drawn distinction between error-correction and law-making.[106] Yet we should keep in mind that the desiderata for an ideal unpublished disposition may run counter to the desiderata of efficiency, that is, making the least expenditure of judicial resources including clerk time.

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[103] Judge Alfred T. Goodwin to panel, Feb. 14, 1996, PG&E v. Howard B. Foley Co., No. 94-16162, 79 F.3d 1154 (9th Cir. 1996) (table). Judge Goodwin concurred nonetheless, being "inclined to leave it to the discretion of the author."

[104] Rules of the United States Court of Appeals for the Tenth Circuit adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1986) (Holloway, C.J., with Barrett and Baldock, JJ, concurring and dissenting).

[105] Id.

[106] For recent use of this distinction in discussing *Anastasoff* and its potential effects, *see* Braun, *Eighth Circuit Decision Intensifies Debate*, 84 JUDICATURE 91 (2000).

If the primary task of the courts of appeals is error-correction, an unpublished memorandum indicating that the record has been examined for error and stating, "We find none," is sufficient. We see this in language reciting the court of appeals' ruling "after careful review of the record, the relevant case law, and the parties' briefs."[107] In that situation, a detailed statement of facts leading to the conclusion may be unnecessary. As Judges Kozinski and Reinhardt recently wrote, "After carefully reviewing the briefs and record, we can succinctly explain who won, and lost, and why."[108] In doing so, the judges need focus only on the key issues, leaving other issues without comment or perhaps with only a statement that they "lack merit." It must, however, be kept in mind that preparing a short disposition may run counter to giving it less attention, because a shorter, more concise disposition may take longer to prepare than a longer, rambling one—an extension of the idea, "if I had more time, I'd have written you a shorter letter."

To the extent that the courts of appeals' identification of lower court error contributes to law development, the judges are thought to need to say more. An example of the judges' acknowledgment of the need to say more in a published opinion is a case involving the denial of federal habeas after a first-degree murder conviction had been affirmed on direct appeal.[109] When the writing judge suggested that publication might be necessary, another member of the panel wrote a note to himself, saying that "if we publish, I would like a little time to study 9th Cir cases on the Carter question prior to 1978;"[110] and the third member of the panel, in agreeing to publication of a portion of the disposition, said that because of publication, "I think a slightly more expansive explanation of our conclusion Carter did not announce a new rule is in order." In another case, in changing a memorandum disposition into an opinion, not only did the author incorporate nits submitted by a fellow panel member but also "inserted citations . . . to support the cognizability of [the] due process claim."

These are instances of adding material when a disposition is to be a published opinion; judges also take additional time to improve an unpublished disposition when they have agreed to redesignate it as a published opinion, which also requires adding a more developed fact statement. However, the additional work involved in shifting from an unpublished disposition to a published opinion may result in a shorter rather than a longer disposition, particularly as the bench memo-like aspects of a memorandum disposition are pared away. We see this reduction in a case in which, although the author had prepared a proposed memorandum disposition, the panel agreed to publish. At that point, the author "edited the proposed disposition, attempted to accommodate [another judge's] concerns, and cut out some parts that seemed

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[107] *See, e.g.*, United States v. Radmall, No. 97-10395, 152 F.3d 931 (9th Cir. 1998) (table).
[108] Kozinski & Reinhardt, *supra* note 61, at 43.
[109] Shults v. Whitley, No. 91-16900, 982 F.2d 361 (9th Cir. 1992).
[110] Judge Alfred T. Goodwin, note on face of memo from another judge to panel, Dec. 4, 1992. "Carter" is Carter v. Kentucky, 450 U.S. 288 (1981).

unnecessary. As a result it is somewhat shorter and terser."[111] Even if the judges are developing the law of the circuit incrementally, or are stating circuit precedent on a small point not previously announced, they should state the facts that might cabin the legal rule being announced.

The answer to the question, "How much needs to be stated in a disposition?" also depends on the criteria or desiderata being used. The answer might be different depending on whether the disposition is intended primarily for the parties; is prepared for public view, with the likelihood that it will be used to hold the judges accountable; is a result of error-correction; or is instead intended to develop circuit precedent. As to the factual detail that need be presented, for example, Judges Kozinski and Reinhardt say that in an opinion, unlike a memorandum disposition, "The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented," while it "is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion."[112] That it is considered more important to include facts in a published opinion than in an unpublished disposition can be seen in a case that resulted in one of each kind of ruling; in the unpublished memorandum, the judges stated that "[t]he facts of this case [were] set out" in the published opinion that was filed concurrently.[113]

A principal justification for unpublished rulings, which judges well understand, is that preparing one takes less effort than preparing a published opinion. (A related concern has been that if all decisions were published and had precedential value, lawyers, not to mention other judges, would be swamped by the task of having to read them in order to stay current with relevant precedent, particularly in a large court like the Ninth Circuit.) "Writing a memodispo is straightforward," say Judges Kozinski and Reinhardt, because the author need not "announce a rule general enough to apply to future cases."[114] Indeed, an unpublished disposition "can often be accomplished in a few sentences with citations to two or three key cases." On the other hand, "writing an opinion is much harder."[115] This understanding can be seen in the observation by a court of appeals judge that at present, "we spend very little judge time now" on the vast majority of cases which received not-for-publication treatment.[116] On average, the exchanges among judges regarding not-for-publication disposition cases are likely to be less extended than for cases with published opinions.

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[111] United States v. Earl, No. 3-10414, 27 F.3d 423 (9th Cir. 1994) (per curiam). *See also* Judge Alfred T. Goodwin to panel (Dec. 7, 1993) (Lunsford v. Am. Guar. & Liab. Ins. Co., No. 91-16356, 18 F.3d 653 (9th Cir. 1994)), suggesting that if the author "wants to publish, I also think the opinion could be shortened up."

[112] Kozinski & Reinhardt, *supra* note 61.

[113] Tellis v. Godinez, No. 91-16296, 8 F.3d 30 (9th Cir. 1993) (table); the published opinion is 5 F.3d 1314 (9th Cir. 1993).

[114] Kozinski & Reinhardt, *supra* note 61.

[115] Id.

[116] E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Aug. 4, 2000).

That unpublished dispositions require less effort than published opinions can also be seen in the fact that they usually appear more promptly after a panel has sat. However, this may also be a result of the circulation of draft memodispos in lieu of bench memos, in advance of the judges' meeting, and with the judges having exchanged "nits" before conference, where they simply confirm their agreement on the disposition. The ability to release an unpublished disposition quickly can also be seen in their use when the court of appeals has to make a ruling quickly on some pending district court matter so that it can proceed. For example, when issues arose concerning questions to be put to grand jury witnesses, the case was specially assigned to a three-judge panel, which issued an order of remand a day after convening. In its unpublished order, the panel specified what the district court was to do in terms of posing questions for the witnesses, specifying limits on the use of testimony, and considering use of *in camera* proceedings, as well as providing for prompt appeal from contempt orders should the witnesses refuse to answer.[117]

Perhaps an unpublished disposition requires less effort to develop than does a disposition headed for publication—and for use as precedent. However, use of an unpublished disposition does not mean the judges need not devote attention to its contents, nor that they necessarily treat them less seriously. As Judge Kozinski put it, "That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented."[118] Even if the judges do not write as carefully as they might otherwise, or if they omit a last clerk cite-check that would otherwise be undertaken, the disposition is examined in the chambers of all panel members. Certainly a judge's disagreeing with his or her colleagues and indicating a dissent—even if the dissenter does not press for publication—makes clear that someone has taken the case seriously. The attention given is also evident from the fact that a response to a proposed published opinion may well be more extensive than one for a proposed memorandum disposition as well as from the more extensive "nits" sent to the writing judge when a published opinion is being prepared. We can see this in a judge's statement that "because we are going to publish, I suggest a few editorial corrections, and would add some supporting citations and limiting language" and proposing the alterations,[119] and in his sending the author of the disposition a full page of nits and editorial suggestions for use if the disposition under consideration were to be published.[120] It is also clear in the comment of another judge: "If this were not an opinion, I would not 'nit,' but I offer the following, fairly picky, nits for whatever they are worth."

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[117] *See* United States v. McQuat, Nos. 76-3321, 76-3325 (9th Cir. 1976).
[118] Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001).
[119] Judge Alfred T. Goodwin to panel, May 20, 1994, Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes, No. 92-35206, 30 F.3d 1203 (9th Cir. 1994).
[120] *See* Judge Alfred T. Goodwin to panel, Jan. 27, 1998, Baskin Distrib. Inc. v. Pittway Corp., No. 96-35882, 141 F.3d 1173 (9th Cir. 1998). He did this while saying he had no objection to publication "but agree[d] that it contains no new law requiring publication."

Problems do arise, however, when judges "fail to scrutinize the language of the unpublished decision because it is unpublished, and we don't want to take the time to polish the product."[121] That may result in language remaining in the disposition that may annoy lower court judges who, when their grant of a summary judgment is reversed, believe the court of appeals is telling them how to decide the case on the merits. Likewise, when unpublished dispositions are used to remand cases likely to return to the court of appeals, the district judge may use the overly broad language of the disposition, with the panel that hears the returning case then adopting the interpretation the initial panel failed to limit.[122]

The argument that it takes longer to prepare a published opinion than a not-for-publication memorandum disposition is understood not only by the judges who, with their clerks, must do the writing, but also by lawyers. For example, the Ninth Circuit recently used an unpublished memorandum to decide a long-pending securities fraud case that had traveled back and forth from the district court to the court of appeals, and to which lawyers had looked "for guidance on how much supporting detail is needed for securities fraud charges to survive a motion to dismiss." Asked, "Why unpublished?" the lawyer in whose favor the case was decided said, "I think the court felt that after four years, it was important to get relief to the parties, rather than to take the extra months to produce a published opinion."[123]

In commenting on the small amount of judge time devoted to unpublished dispositions, one judge said that judges instead "rely on recent graduates from supposedly excellent law schools for the writing and most of the editing," adding to his earlier comment that "we all know that a lot of that stuff is written by externs and checked by law clerks."[124] Confirming the role of clerks in unpublished dispositions, Kozinski and Reinhardt say "Most are drafted by law clerks with relatively few edits from the judges."[125] If preparation of unpublished dispositions requires less *judge* time than do published opinions, less *clerk* time may be needed as well. This would be true at least in the chambers not doing the writing, as the judge may simply direct that no cite check be performed or may ask only for a "lite cite check" rather than a more extensive one.

However, lesser involvement by the *judge* may not mean less involvement for the *clerks*, who may, from initial bench memo to ultimate decision, expend as much effort as if the case were to result in a published

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[121] E-mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Apr. 27, 1999).

[122] *Id.* One type of case where this may cause difficulty is a reversal because unresolved fact questions precluded summary judgment. "Sometimes our law clerks have put in dicta that will lead the trial judge into a brief that we are telling her how to decide the legal consequences after the facts are found at a trial," said one judge. A possible result is the trial judge's producing "bad" law by following the hints in the memodispo's "careless language," with a judge of another panel then using the opportunity to adopt the position that the first panel failed to excise from its unpublished disposition.

[123] Gail Diane Cox, *Did you blink? You may have missed the 9th Circuit's 'Zeid,'* 23 NAT'L L.J. 38, May 14, 2001, at A10 (discussing Zeid v. Kimberly, No. 00-16089, 11 Fed.App. 881 (9th Cir. 2001)).

[124] E-mails from Judge Alfred T. Goodwin to Stephen L. Wasby (Aug. 4, 2000 and Apr. 6, 2000).

[125] Kozinski and Reinhardt, *supra* note 61, at 44. They add, "Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff." *Id.*

opinion. In any event, for cases with unpublished dispositions, the clerks are likely to undertake a higher proportion of the review than for those with published opinions. Although the clerks may feel good when they see their own work in the *Federal Reporter*, it is not likely that they suggest publication for that reason; at least there is no evidence that clerks go beyond what the court's rules require in order to have opinions published. The additional time necessary to transform an unpublished disposition into a published opinion might also be related to *judges'* egos. While the panel members' names appear on unpublished dispositions, the dispositions are not signed; if the name of an individual judge is not attached to the disposition as author, there is less need to polish the writing.[126]

C. AUDIENCE

A major reason for devoting less time to the development of unpublished dispositions is their intended audience. The parties, not the larger legal community, are said to be the primary audience for such dispositions, "and the remaining readership is limited," as a judge remarked in justifying a short unpublished ruling.[127] As Judge Kozinski stated in *Hart v. Massanari*, "An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision"; he also said that an unpublished disposition "is not written in a way that will be fully intelligible to those unfamiliar with the case."[128] As another judge commented, "We know memorandum dispositions are going to the parties, and we address the argument of the losing party with the use of 'sort of a code among those who already know,'"[129] and another colleague said the court has "really tried to give a reasoned disposition so the parties can understand why the case came out as it did."[130]

If the district court has already provided such a "reasoned disposition" of which the court of appeals approves beyond merely affirming the district court's result, the court of appeals judges may feel that explicitly adopting that opinion provides the parties with the explanation they need. That may explain why one sees such brief unpublished dispositions as "The district court's order granting defendants' motion for summary judgment is affirmed for the reasons stated therein"[131] or "The judgment of the district

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[126] A judge recently observed to his colleagues, "I know of no statute that says we have to put our names on our opinions," but he argued against the "total surrender to terrorism" that would be the result if, "for the sake of personal security, we stop accepting responsibility" for the unpublished dispositions "we have been sending to the parties (and to West as uncitable)" as memorandum dispositions. He added, "We are more likely to outrage whatever enemies we have by our published opinions than by the flotsam and jetsam of our 'unpublished' matter." Judge Alfred T. Goodwin to all Ninth Circuit judges, Nov. 5, 2001.

[127] Judge Alfred T. Goodwin to panel, May 9, 1996, Fonsen v. Chater, No. 94-36179, 87 F.3d 1318 (9th Cir. 1996) (table).

[128] Hart v. Massanari, 266 F.3d 1155, 1176, 1178 (9th Cir. 2001).

[129] As noted earlier, quotations without attribution are drawn from material provided on the condition of the subject's anonymity.

[130] Comment by Judge Stephen Trott, "Open Forum on Court of Appeals," Ninth Circuit Judicial Conference, Portland, Or., Aug. 17, 1997.

[131] Wilderness Retreat P'ship v. King County, No. 97-35158, 152 F.3d 932 (9th Cir. 1998) (table).

court is affirmed on the basis of Judge Legge's order of December 30, 1990,"[132] suggested by the authoring chambers because "Judge Legge's order in this case disposes of all the issues." Likewise, in another case, the court of appeals issued only a short unpublished judgment order affirming "for the reasons set forth in the order of the district court"[133] because "[t]he panel agreed that the district court had it right."

At times the judges do not use "for the reasons of the district court," but their internal communication indicates they had that in mind. Thus in a Social Security disability case, the writing judge's law clerk had recommended an order "adopting the order of the district court and/or the opinion of the administrative law judge," as both "provide a more than adequate, and accurate, review of the facts and record in this case" such that "[a]ny memorandum disposition or opinion in this case would only reiterate what has been said below." The writing judge had said, "I recommend that we dispose of the case with a memorandum stating that the order of the district court fully addressed the factual and legal questions in the decision of the administrative law judge" and recommended to his colleagues that they use the district court ruling as a bench memorandum. The unpublished disposition did not say "for the reasons of the district court," but the second paragraph of a two-paragraph disposition did no more than speak of the substantial evidence standard, defined "substantial evidence," and said, "That standard was met."[134]

As a result of writing for an audience limited basically to the parties, only a minimal or truncated fact statement is necessary; the law also need not be stated elaborately, and only enough analysis need be provided to demonstrate to the parties that the legal issues have been considered. Dispositions have regularly contained statements like "Because the parties are familiar with the facts, we shall not recite them here,"[135] or the somewhat longer, "Because the parties are familiar with the long and tortured procedural history and facts of the case, we will not repeat them here."[136] At times, the panel will indicate that it is including mention of some facts because they are thought to be necessary, as in saying that they would not state the background of this case "except as necessary to clarify our decision"[137] or "except as necessary to explain our decision."[138] As one of the members of the court put it recently, "The parties know the facts and issues; we mentioned that in the disposition, but now say it less. We deal with the principal issue in the case; the parties know the remainder."[139]

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[132] Rankins v. Weisenberger, No. 91-15163, 952 F.2d 407 (9th Cir. 1991) (table).
[133] Sphere Drake Ins. PLC v. Fun Charters, Inc., Nos. 97-16387, 97-16397, 165 F.3d 918 (9th Cir. 1998) (table).
[134] Gibson v. Chater, No. 94-36133, 87 F.3d 1318 (9th Cir. 1996) (table).
[135] Arauz v. Reno/Reno v. Wilcoxen Montgomery Harbison, No. 97-57363, 172 F.3d 875 (9th Cir. 1999) (table).
[136] Reyes v. Auburn Nissan, No. 96-16742, and related case, 168 F.3d 501 (9th Cir. 1999) (table).
[137] United States v. Paguio, No. 98-50134, 168 F.3d 503 (9th Cir. 1998) (table).
[138] Valenzuela v. Dir., Office of Workers' Comp. Programs, No. 96-70998, 142 F.3d 447 (9th Cir. 1998) (table).
[139] Interview with Judge Dorothy W. Nelson, in Pasadena, Cal. (Jan. 22, 2002).

The view that an extended fact statement is not needed may lead one judge to suggest to another that a disposition could be shortened by excluding such a statement, as occurred when one judge suggested to the author of a proposed memorandum disposition that a page be omitted "in its entirety. Since the parties know the history of the case and the contentions of the parties, this discussion appears unnecessary."[140] And further recognition of the acceptability of the absence of a fact statement in an unpublished disposition can be seen when a judge's law clerk prepared for transmission to the panel a "Mini Memo/Bench Memorandum" of only seven pages, which began with "Discussion" so it could more easily become a memorandum disposition.

That unpublished dispositions are written for the parties suggests there may be an element of public relations in issuing dispositions containing more than "Affirmed—See Rule 36-1." Because a large proportion of unpublished dispositions are affirmances, the court is trying to convey, particularly to the appellant, that the appeal has been examined. However, a memorandum disposition composed of conclusory statements without explanation of what led the judges to those conclusions may be seen as little more than a gesture, saying "We've looked at the case, noted your claims, and we've rejected them." Brevity may be sufficient if the intent is to communicate to the parties against the background of their knowledge of the underlying facts on which the judges' stated conclusions are based. However, brevity resulting from conclusory statements does not indicate thorough treatment, particularly if the parties wish an explanation that goes beyond simple conclusions to provide a basis for evaluating how the judges reached their decision. One might ask whether appellants are satisfied with such treatment.[141]

There may, however, also be a public relations problem when reversals are released as unpublished dispositions. Use of a memorandum disposition to reverse a lower court or to refuse enforcement of an agency ruling might lead one to ask why a reviewing court that finds it necessary, despite deferential standards of review, to overturn a lower tribunal will not put the disposition out in more open view, counter to an unstated presumption that an explanation for disagreeing with lower court colleagues should be made public. Even if reversal is seen as only error-correction, the reviewing court needs to explain what is error and why the lower court's action was error.

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[140] In another instance, the presiding judge wrote to suggest deletion from a memodispo of "the facts rendition," for which he thought "there is no need" because "the parties and trial judges are aware of the facts." This case was later published. Matney v. Sullivan, No. 91-35164, 967 F.2d 588 (9th Cir. 1992) (table), later published, 981 F.2d 1016 (9th Cir. 1992).

[141] Whether the parties see briefly-stated conclusions as indicating attention to the issues or instead as giving them insufficient attention and "blowing off" the parties' contentions can be determined only by a survey of litigants whose cases have been disposed of by unpublished dispositions. To my knowledge, such a survey has not been undertaken. Requests for redesignation, discussed *infra*, provide only a partial basis for gauging "consumer" satisfaction.

D. PRECEDENT

Another, and probably more important, reason for devoting less writing time to unpublished dispositions is that they cannot be cited as precedent. Given the on-line availability of "unpublished" dispositions, this is now their key distinguishing characteristic. As Chief Judge Martin has noted, "What distinguishes them . . . are citation limits. Without such limits there is virtually no distinction between published and unpublished."[142] As he notes further, this distinction follows from the "need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties."[143] As the Ninth Circuit began to make greater use of unpublished memoranda, the judges discussed language to accompany release of such dispositions to call attention to their non-precedential, non-citable status.[144] The court's own rules made a distinction between opinions and memoranda. Rule 21(a) stated "A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM,"[145] and Rule 21(c) was clear on the non-precedential status of memoranda:

> (c) Disposition as Precedent
>
> A disposition which 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.[146]

The perceived need for a notation to the same effect with each disposition, a matter separate from the rule, led the court's Executive Committee to consider language to be used in all unpublished dispositions. Some judges already had been including a notation about the non-precedential status of these dispositions, as one judge made clear to his colleagues in 1983.[147] For him, it was not the fact of publication that was crucial; at most, publication could only be discouraged, not prohibited. What was important was the need to "remind counsel and pro per litigants, some of whom are not too bright, of the consequences of memorandum dispositions." His view, if publishers of specialized reporters should publish these dispositions, was "So what?" as "[t]he important thing is that the publication itself expressly state that the decision is not citable as

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[142] Martin, *supra* note 1, at 193.
[143] *Id.* at 189.
[144] Recent usage is: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3." The court has adopted a rule, temporary until July 1, 2005, stating that unpublished dispositions "(a) . . . are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel" and may be cited only for law of the case, etc. and "(ii) for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case," and in a request to publish or in a petition for rehearing or rehearing en banc "(iii) . . . to demonstrate the existence of a conflict among opinions, dispositions, or orders." 9TH CIR. R. 36-3.
[145] 9TH CIR. R. 21(a) (revised and renumbered as 9TH CIR. R. 36-1, eff. July 1, 1987).
[146] 9TH CIR. R. 21(c) (revised and renumbered as 9TH CIR. R. 36-3, eff. July 1, 1987).
[147] Judge Charles Merrill to associates (June 6, 1983).

precedent." He wanted to "eliminate any ambiguity that publication may create in the mind of the reader"; that could be done if the disposition "on its face explicitly shows its lack of value or usefulness."[148]

If unpublished dispositions are not precedential, the legal analysis in them requires less development. As one judge stated in arguing against publication of a particular disposition, "our disposition does not appear to provide the kind of thorough reasoned analysis that would be warranted" for publication "if the issue is one of general importance." If, however, an opinion is to be written, Judges Reinhardt and Kozinski observed, "The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future cases"; moreover, "we must explain why we are adopting one rule and rejecting others" because opinions are often written "where the law is unclear."[149] The converse, that an unpublished disposition requires less development, can be seen in the comment of a judge who hoped that the disposition author would be "amenable to a memorandum disposition" as it "would certainly have one side-benefit. It would allow me to expedite my review considerably." Spending less time on memorandum dispositions also means more time for published opinions. As Judges Kozinski and Reinhardt put it, "Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal."[150] It also means that when a case is published, it stands out; as Chief Judge Martin observed, "judicious use of unpublished opinions gives greater emphasis to those that are published."[151]

To give unpublished dispositions precedential value would, said one judge, "require us to spend precious time polishing for publication about 76 percent of our cases on which we spend very little judge time now, but rely on recent graduates of law schools for the writing and most of the editing." As Kozinski and Reinhardt also explain, "If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns."[152] If all cases were published and citable, the quality of analysis in the types of opinions now published might well suffer; in any event, said Judge Kozinski, "This new responsibility would cut severely into the time judges need to fulfill their paramount duties [of] producing well-reasoned published opinions . . . ."[153] Furthermore, one judge suggested that the proposed new Federal Rule allowing citation for

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[148] *Id.* Questions about the notation have arisen at other times, with the dispute perhaps tied to the larger question of retaining non-citation status for presently "unpublished" rulings.
[149] Kozinski and Reinhardt, *supra* note 61, at 43.
[150] *Id.* at 44.
[151] Martin, *supra* note 1, at 191.
[152] Kozinski and Reinhardt, *supra* note 61, at 44. For identical language, *see* Hart v Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001) (Kozinski, J.).
[153] *See Hart*, 266 F.3d at 1178.

persuasive effect would lead to more "Affirmed—See Rule 36" dispositions, with the result that less would be said in the dispositions.[154]

An extensive opinion is said not to be needed if the law to be applied is straightforward, or if a case is heavily fact-specific and thus is of minimal broader applicability. The general notion is that unpublished dispositions are to be used in cases that break no new ground and thus do not pronounce new circuit precedent, and particularly to dispose of cases applying existing law to uncomplicated fact patterns. We can see this in a judge's comment that "the disposition of this appeal requires no more than an unpublished memorandum, as the result reached . . . involves a routine application of our asylum law."[155] If the purpose of publication is to state circuit law and thus to provide precedent for future use, a heavily fact-specific case will, other things being equal, not be seen as a good candidate for publication. As a judge observed in one case, "This seemed to me to be such a fact-specific case that an opinion was not warranted." And, as a judge said in another case in rejecting a colleague's suggestion of publication, "This is a fact specific case that I do not believe would be of precedential value."[156] And, in still another case, the author, who had reported himself as leaning to preparing an unpublished disposition, reported, "The panel was of the opinion that this is such a fact-specific case that we really do not need to publish," although he sent an opinion rather than a memorandum disposition to the panel.

It should be noted that there are some instances where, rather than use an unpublished disposition because of fact-specificity, the judges think the fact situation to be sufficiently unusual that publication is warranted. We can see that in the judge's comment that a case which involved mail fraud related to inflating the value of a horse so as to receive a large insurance payment is "an interesting case that probably justifies publication merely because of its interesting facts,"[157] and his comments in a later case, concerning deportation of a person found not to be a citizen, that "in view of the unusual facts, I suspect it should be published, and so suggest."[158]

In evaluating these comments, one should keep in mind that whether a disposition should be published depends in part on what one views as precedent or as contributing to precedent and stating the law. If this is limited to abstract and theoretical statements of legal rules, less will be published. However, if precedent is seen as developing incrementally through stating the application of a rule to facts which mark out a line, then more is to be published.

Among fact-specific cases that may be thought appropriate for an unpublished disposition are those where the basic question is the

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[154] Interview with Judge Diarmuid O'Scannlain in Pasadena, Cal. (Feb. 3, 2004).
[155] Rivera-Moreno v. I.N.S., 213 F.3d 481, 487 (9th Cir. 2000) (Hawkins, J., specially concurring).
[156] Hermens v. United States, No. 95-35015, 86 F.3d 1162 (9th Cir. 1996).
[157] Judge Alfred T. Goodwin to panel (Aug. 5, 1992) (United States v. Mosesian, Nos. 91-10188, 91-10197, 972 F.2d 1346 (9th Cir. 1992) (table).
[158] Judge Alfred T. Goodwin to panel (Jan. 18, 1996) (Gutierrez-Tavares v. I.N.S., No. 94-70210, 92 F.3d 1192 (9th Cir. 1996)).

sufficiency of the evidence. One can see this regularly when the appellant in a criminal case claims that evidence was not sufficient to sustain a conviction.[159] An unpublished disposition was used even when a majority of a court of appeals panel, providing a paragraph of explanation, reversed for *in*sufficiency of the evidence, over a dissent in which the dissenting judge spelled out at length why the evidence was sufficient to sustain the conviction.[160] While one might question not publishing a disposition containing a dissent that was also a reversal, use of such a disposition might be appropriate where the disagreement is not over the applicable law but only over the sufficiency of the evidence. Use of unpublished dispositions where sufficiency of the evidence is at issue also occurs in civil cases, such as those concerning Social Security disability benefits.[161] In one such case early in the use of unpublished dispositions, the judges, in a statement clearly intended for the parties, recognized the harshness of the result and expressed their sympathy to the appellant, but said the result was required by the law.[162]

E. USE BY JUDGES

The rule that unpublished dispositions are not to be cited would lead us to expect judges not to mention them; the rules against using unpublished rulings, even if highly relevant, should severely constrain all, including the judges who have issued the specific memorandum disposition which might be relevant. The constraint can be seen in Judge Malcolm Marsh's statement, "I will not categorically go against an unpublished decision. I might be familiar with an unpublished disposition in one of my cases. The public defender and the U.S. Attorney know it. No one can cite it. Is there a fiction everyone tries to get around?"[163] Yet during the sentencing council held by the district judges in Judge Marsh's own district, a judge who had been reversed in an unpublished ruling would call it to others' attention, and the disposition would affect others' sentencing,[164] indicating that they are used even when not directly cited. One might suggest here that if other judges find an unpublished ruling to be relevant to their work, they might suggest that the panel publish it. This, however, would be impractical if more than a short time had elapsed since the ruling was issued.

In some instances, unpublished dispositions have been mentioned because the court's rules so permitted, at least at the time the disposition was issued. Thus, in a Fifth Circuit ruling in 2001, there was such a

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[159] *See* Polk v. United States, No. 72-3020 (9th Cir. 1973).

[160] United States v. Chapman, 72-1451 (9th Cir. 1973), *see also* United States v. Mora-Romero, No. 73-1790 (9th Cir. 1973) (explaining that the outcome was controlled by a line of published Ninth Circuit cases, which were cited).

[161] Martin, *supra* note 1, at 183 ("[F]rom my experience, prime candidates for unpublished opinions are Social Security [and] Black Lung" cases, to which he added "criminal cases as well as prisoner petitions.").

[162] Triller v. Richardson, No. 71-2762 (9th Cir. 1973).

[163] Ninth Circuit Judicial Conference, Open Forum on Court of Appeals (Aug. 17, 1997) (notes on file with author).

[164] Ninth Circuit Judicial Conference, Breakfast with the Bench (Aug. 17, 1997) (notes on file with author).

citation to a case in which "[t]his court addressed a similar claim" and publication of the previous "unpublished" disposition as an appendix to the current ruling.[165] In a related instance, in a case from Guam, the Ninth Circuit cited two cases from the Appellate Division of the District of Guam. Judge Canby noted that "[a]lthough neither has been published, we are satisfied that [they] constitute authoritative statements of Guam law to which we must defer."[166] He added that "[u]nlike this circuit, the Guam courts afford the same respect to published and unpublished decisions," and the court below had in its rules "no provision analogous" to the Ninth Circuit's "non-citation rule."[167] Another instance of use for "law of the case" was an ERISA case; in preparing the opinion, the writing judge said with respect to citing an unpublished disposition, he would include a footnote indicating the citation was done "as a specific exception to our long-standing rule that unpublished dispositions may not be cited otherwise 'to or by this court.'" The judge also noted, "The purpose of the footnote is to make clear what otherwise might be misunderstood by many readers as a letdown in our rule against citing unpublished material."[168]

Somewhat related to such "law of the case" use occurred when, in one memorandum disposition, the majority on a Ninth Circuit panel relied on an unpublished disposition in an earlier, related case, saying that they found no abuse of discretion in denying withdrawal of a guilty plea "[f]or the reasons expressed in our memorandum disposition in the companion case of *United States v. Manukian*, 16 Fed.Appx. 715 (9th Cir. 2001)."[169] The judge writing a separate opinion, pointing out the majority's reliance, relied as well on his dissent in that earlier case: "I respectfully dissent from this holding for the reasons I stated in my dissent in *Manukian*."[170]

The rules intended to preclude citation to unpublished dispositions have not eliminated references to them by lawyers, or by judges in published opinions. Certainly, if the parties are seeking certiorari for the court of appeals' ruling, their lawyers must mention the cases. As Justice Stevens noted in a case in which he criticized the use of unpublished dispositions, one in which certiorari had been sought, "The petition for certiorari submitted the Ninth Circuit's opinion as it was issued, with the footnote explaining that the opinion could not be published or cited."[171]

Some usage is permitted in relation to "the law of the case" and related doctrines. Thus, in some circuits, "counsel may refer to unpublished

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[165] Baldwin v. Daniels, 250 F.3d 943, 946 (5th Cir. 2001) "Unpublished opinions issued before January 1, 1996, have precedential value. *See* 5th Cir. R. 47.5.3."
[166] People of Territory of Guam v. Yang, 800 F.2d 945, 947 n.2 (9th Cir. 1986), rev'd *en banc*, 850 F.2d 507, 514 (9th Cir. 1988).
[167] Id.
[168] Judge Alfred T. Goodwin to panel (Dec. 26, 1995) (San Francisco Culinary, Bartenders & Serv. Employees Welfare Fund v. Lucin, 94-16091, 76 F.3d 295 (9th Cir. 1996)). He added, "Unfortunately, the erosion of the rule is proceeding apace, as nearly every calendar finds us reading briefs citing unpublished memoranda." *Id.*
[169] United States v. Satamian, 40 Fed. App. 405, 406 (9th Cir. 2002). Arthur Hellman considers this more like collateral estoppel.
[170] *Id.* at 407 (Gould, J., concurring in part, dissenting in part).
[171] County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting).

dispositions when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant."[172] A district judge in Maryland, in deciding a case brought by a prison inmate who regularly sued everyone imaginable, mentioned the Fourth Circuit's ruling affirming his earlier order barring filing of any court document "'that contain threats, obscenities, or excrement',"[173] attached that unpublished disposition to his published opinion dismissing the present claim with prejudice.

At times, however, judges' mention of unpublished dispositions goes beyond noting them for "law of the case" or res judicata purposes. During consideration of a case on the discipline of a lawyer, which resulted in an unpublished disposition, the visiting circuit judge who had the writing duties raised with his colleagues the question of whether he could mention an unpublished disposition by an earlier Ninth Circuit panel that had put the lawyer on notice of his possible disbarment for vexatious conduct. "It seems to me relevant and if possible should be cited," he noted. The two other judges agreed on the relevance of the earlier case and the appropriateness of referring to it; however, one suggested, "We should state that the Gaskell case is an unpublished disposition in a related case so people won't get the idea that we're unaware of our rule." Indeed, the disposition contained a footnote which said of the earlier case, "This is an unpublished decision in a related case, and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3."[174]

In a Tenth Circuit case, the author, in stating the position taken by the majority of courts of appeals to speak to the search-and-seizure point, said, "This court has recently agreed in an unpublished decision," which he then cited.[175] In another Tenth Circuit case, this one on sentencing, Judge McKay, in pointing out that "every circuit to have considered the issue has held that § 924(c)'s plain language prohibits sentences imposed under that statute from running concurrently with state sentences," noted that "most of these opinions have not been published," and then cited two published opinions and three unpublished ones (from the Fourth, Seventh, and Ninth Circuits).[176]

Judges on a Ninth Circuit panel openly recognized a large number of unpublished dispositions in one area of the law when they attempted to resolve whether, when someone had been charged with illegal reentry after deportation, the Supreme Court's ruling in *Almendarez-Torres v. United States*[177] required correcting the judgment of conviction or instead required resentencing. Judge Alarcon noted that "[v]arious three-judge panels of our court . . . have issued a number of unpublished memorandum decisions

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[172] Introduction to listing of "Decisions Without Opinions" from the U.S. Court of Appeals for the District of Columbia Circuit," referring to its Local Rule 11(c).
[173] Gantt v. Maryland Div. of Corr., 894 F. Supp. 226, 227 (D. Md. 1995) (quoting George W. Gantt, No. 94-7384, 1995 WL 378591 (4th Cir. June 27, 1995)).
[174] Canatella v. City & County of San Francisco, No. 94-16571, 74 F.3d 1245 n.1 (9th Cir. 1996) (table). The earlier case was Canatella v. Gaskell, 50 F.3d 14 (9th Cir. 1995) (table).
[175] Valdez v. McPheters, 172 F.3d 1220, 1224 (10th Cir. 1999).
[176] United States v. Gonzales, 65 F.3d 814, 819 (10th Cir. 1995).
[177] 523 U.S. 224 (1998).

taking different approaches to resolving the question."[178] He added that these "conflicting mandates undoubtedly have created no small amount of confusion for district judges who serve in border districts," in part because of their on-line availability.[179] This problem had led the panel to ask the attorneys at oral argument "to submit a list of the unpublished dispositions of this court that have confronted the issue." While Judge Alarcon restated the standard position that "[u]nder our rules, these unpublished memorandum dispositions have no precedential value," he then listed them, arranged by the approaches taken, "so that counsel and the district courts will know that each of them has been superseded today" by the published opinion, which "now reflects the law of the circuit."[180]

In what amounted to an act of civil disobedience concerning the non-publication non-citation rules, Judge Krupansky of the Sixth Circuit attached the text of a majority memorandum[181] to his published dissent because an unpublished disposition "is virtually invisible to the scrutiny of the public and members of the bar because it is without precedential value and because [it] effectively avoids the legal consequences of an intracircuit precedent conflict capable of implicating the integrity of the appellate process," and because he felt the case before him "addresses issues of continuing concern to both bench and bar."[182]

These instances certainly do not indicate rampant use of unpublished dispositions by judges. However, the greater the use allowed of "unpublished" dispositions, the less difference between them and "official" published opinions. One judge has observed that the "realist faction" on his court, recognizing the reality created by electronic availability, would repeal the unpublished-published distinction.[183] And rules could be amended to allow greater mention of unpublished dispositions. Thus, at the suggestion of its Advisory Rules Committee, the Ninth Circuit's Rule 36-3 was changed to allow "citation of unpublished dispositions or orders . . . in requests for publication and in petitions for panel rehearing and rehearing en banc,"[184] but the revision of the rule "still [does] not allow[] persuasive citation despite the recommendation of the circuit's Judicial Conference and Rules Advisory Committee that it do so."[185]

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[178] United States v. Rivera-Sanchez, 222 F.3d 1057, 1062 (9th Cir. 2000).
[179] *Id.* at 1063.
[180] Id.
[181] Klein v. Stop-N-Go, 816 F.2d 680 (6th Cir. 1987).
[182] Klein v. Stop-N-Go, 824 F.2d 453 (6th Cir. 1987) (Krupansky, J., dissenting).
[183] If availability of unpublished memorandum dispositions on Westlaw does erode the difference between unpublished memoranda and published opinions, then perhaps the Third, Fifth, and Eleventh Circuits "had it right"; that is, they more clearly maintained the difference by not making unpublished dispositions available.
[184] David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365, 370 (2000).
[185] Braun, 84 JUDICATURE 90, *supra* note 28, at 94.

F. AVAILABILITY OF RULINGS

Part of the justification for non-published dispositions was the assumption that they would be available on only a limited basis—provided to the parties and accessible at the court library. Others might see them, and some offices, including government agencies, might collect sets of them, and the likelihood of uneven access was offered to support the non-citation rule. The parties who could cite them, for matters like collateral estoppel, would, of course, have received them. Beyond that, it was alleged that, within the community of those who use the courts, those who do so more frequently ("haves" and "repeat players") would collect these rulings and would benefit from what they conveyed about a court's inclinations and direction, while those whose court contact was infrequent ("one-shotters," "have-nots," and "underdogs") would be at a disadvantage.

When use of memorandum dispositions began, they were released as slipsheets. In addition to being provided to the parties, they were also available in court libraries and on request. They were not published in the *Federal Reporter.* The next step, however, was listing them there in tabular form with case name, docket number, district court or agency, and disposition (affirmance or reversal). In these slipsheets, the authors of the memorandum disposition is not shown, just as the writing judge is not indicated for published opinions designated "per curiam," nor was that information later to become available on Westlaw. A noted dissent does reduce the possibilities of authorship from three to two, but the writing judge remains (relatively) anonymous.[186] Judges who believe that the author, to whom they may have deferred, should be identified because that judge had more to do with the opinion's language and thus should accept the responsibility for the opinion, may for that reason support re-designation as a signed opinion, and the writing judge may likewise recognize this in saying, "I'll put my name on it to protect the innocent."

Even in the early days of their use, memorandum dispositions, although designated "not for publication," were in fact published. In pre-Westlaw days, West Publishing Co., the publisher of the *Federal Reporter*, "respect[ed] our decision to forego publication," but that was not true of legal newspapers and specialized reporting services. A judge noted that the *Los Angeles Daily Journal* had published two of the court's memorandum dispositions,[187] and another judge observed, "Prentice-Hall now publishes all our tax decisions, including memorandums,"[188] with the same holding true in other fields. Nor could the court do anything to stop publication. As one judge has observed, "Under the First Amendment we can't stop

[186] There are rare instances in which the author can be determined. In a dissent, Judge Hufstedler indicated that Senior District Judge Solomon (D.Or., sitting by designation) was the memorandum's author. United States v. English, 76-1646 (9th Cir.). In another case, Judges Chambers and Hufstedler respectively concurred with and dissented to the unsigned memorandum, which therefore likely was authored by Second Circuit Senior Circuit Judge Moore (sitting by designation). United States v. Hernandez-Martinez, 74-3327 (9th Cir. 1975). *See* Wepsiec & Wasby, *supra* note 52.

[187] Judge Warren Ferguson to Judge Alfred Goodwin (Nov. 19, 1980).

[188] Judge Charles Merrill to associates (June 6, 1983).

anyone from printing the memos but we can discipline lawyers who cite them."[189]

Indeed, the issue of lawyer citation was to be before the court years later, making clear that discipline was a real possibility if a lawyer violated the no-citation rules. A Ninth Circuit panel issued a show-cause order based on violation of the court's rules when a lawyer cited an unpublished disposition in a reply brief to support an argument that a particular jury instruction sought by appellant was not required. The panel majority made clear that citing an unpublished disposition to "provid[e] 'notice' to the court of the existence or absence of legal precedent" was impermissible. Citing an unpublished disposition "for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case," as Rule 36-3(b)(ii) provided, was acceptable; such situations, said the panel, "will almost always involve one or both of the parties to the pending case." However, "[i]f a precedent were a 'fact' for purposes of the exception, then the exception would swallow up the rule."[190]

Accepting the lawyer's statement of having misunderstood the scope of the exception, the panel ultimately decided that this particular rule violation did not warrant imposing sanctions. Indeed, in its concluding paragraph, the majority observed that "we may bear part of the responsibility" and "tempt lawyers to cite [unpublished dispositions] as precedent" by having issued unpublished dispositions "that violate General Order 4.3a," which provided: "Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result."[191] Somewhat later, in his *Hart v. Massanari* opinion, which focused more directly on the constitutionality of the non-precedential status of unpublished dispositions, Judge Kozinski also excused counsel's citation of an unpublished disposition, saying it did not warrant a sanction, because the court's rules "are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality," and *"Anastasoff* may have cast doubt on our rule's constitutional validity."[192]

In considerable contrast to the earlier situation of limited availability, unpublished memorandum dispositions of almost all courts of appeals are now available on Westlaw and Lexis.[193] Such electronic availability of

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[189] Judge Alfred T. Goodwin, handwritten note on memo from Judge Warren Ferguson (Nov. 19, 1980).

[190] Sorchini v. City of Covina, 250 F.3d 706, 708 (9th Cir. 2001) (Judge Tallman dissented without opinion).

[191] *Id.* at 709 n.1. The ruling was issued as a per curiam, but, as one member of the majority was a district judge, the opinion was likely written by Judge Kozinski, who had elsewhere argued for brief, concise memorandum dispositions.

[192] Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001).

[193] It may, however, be somewhat exaggerated to say that "thousands of unpublished table decisions on Westlaw and LEXIS do provide more information about the courts' decisionmaking process than is available in the *Federal Reporter*." Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROC. 199, 212 (2001).

See Wendy R. Leibowitz, *'Dog' Cases Get Around on the 'Net'*, 19 NAT'L L.J. 7, Oct. 14, 1996, at A11 (providing a brief treatment of availability elsewhere on the Internet of unpublished dispositions,

unpublished dispositions is relatively recent; it produces the improbable phenomenon, the "published unpublished ruling," a verbal difficulty that could be avoided by calling them "non-citable dispositions." Such availability did not occur until at least a decade after unpublished dispositions came into use, although some rulings from prior years were added to the database later.[194] The first of the circuits allowing Westlaw coverage was the Sixth Circuit, in January 1985, followed by the District of Columbia Circuit in April 1988 and the Ninth Circuit in September 1989. Coverage of unpublished dispositions from the other circuits which make them available through Westlaw did not begin until 1990 (First and Seventh Circuits, July 1990) or later (Tenth Circuit, February 1991; Eighth Circuit, April 1992; Second Circuit, September 1995; and the Fourth Circuit, August 1996).[195] The Third, Fifth, and Eleventh Circuits lagged behind the other circuits in making available the *texts* of their unpublished dispositions to Westlaw, and in posting them on their websites.[196] The Fifth Circuit did not do so until July 2003, leaving "the Eleventh Circuit as the last holdout refusing to put its unpublished opinions online."[197] Such laggard behavior would soon become irrelevant under the E-Government Act of 2002, which "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.'"[198]

A substantial number of unpublished dispositions have been available on Westlaw.[199] The numbers through mid-July 2000 ranged upward from roughly 2,500 cases each in the First Circuit, the smallest court of appeals, and the District of Columbia Circuit, which makes infrequent use of them, through roughly 4,200 cases in the Second Circuit; 5,500 cases each in the Seventh and Eighth Circuits; and almost 10,700 cases in the Tenth Circuit,

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making the point that on the Internet, there is a diminished distinction between published and unpublished dispositions).

A report for the Federal Rules of Evidence Committee makes the useful distinction between "reporter publishing" and "internet publishing." *See* William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002).

It should also be noted that for many of the "table cases" (those listed in *Federal Reporter*) from the mid-1980s, the *texts* of those rulings are not available on Westlaw, nor is the panel composition, although basic information such as disposition and Keycite history is available.

[194] Memorandum dispositions from the early years of their use cannot be located on Westlaw. Included are Ninth Circuit unpublished dispositions from 1973 through 1976 cited in this article.

[195] E-Mail from Susan Sipe to Kurt Gruebling (July 19, 2000) (noting that these dates are those when the attempted coverage began "officially").

[196] A law librarian who said that "a very large number of unpublished opinions from these three circuits are in fact recorded on Westlaw" and finds that roughly one-third of the unpublished dispositions in the Westlaw CTA database are from those three circuits did concede that "the vast majority of them do not contain opinion text." Hannon, *supra* note 193, at 211.

[197] Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROC. 473, 476 (2003).

[198] Id.

[199] Comparison of electronically available "unreported" rulings with the *Federal Reporter* tables of "unpublished" dispositions would also allow determination of the extent to which Westlaw reported all such rulings or missed a nontrivial amount of them. As the Westlaw staff has noted, courts are requested to send their unpublished cases but Westlaw is "unable to guarantee that all do make it to us." E-Mail from Susan Sipe, *supra* note 195.

to the much higher figures for the Sixth Circuit (almost 28,800 cases), the Fourth Circuit (33,279 cases), and the Ninth Circuit, the largest circuit, with over 34,500 cases.[200]

It is now the case that "'unpublished' opinions generally are as readily available as those designated as 'published',"[201] and Barnett says "the entire controversy over unpublished opinions may be laid" to Internet availability.[202] The presence of unpublished dispositions on electronic databases, and now in published volumes, has changed the factual basis for the assumption of limited availability. The ease with which relevant case law can be retrieved has also undercut the purported problem of inability to stay in touch with the law, as the need for reading and absorbing cases as they appear has diminished. Because widespread use of the internet thus makes the dispositions easily available to those with a computer and a subscription to the relevant service, there has come a leveling in access to materials of this sort; although law firms do vary in the size of staff with time to analyze such dispositions.

In September 2001, the distinction between "published" opinions and "unpublished" memorandum dispositions was further erased when West began to publish the *Federal Appendix*, a series of bound volumes containing selected "unpublished" dispositions, for all courts of appeals except the Fifth and Eleventh, which then still precluded access to them. West then ceased publishing the lists of not-for-publication dispositions.[203] An instance of what these volumes contained can be seen in 29 *Federal Appendix*. A more complete picture requires looking at several volumes, as this particular volume did not contain dispositions from the District of Columbia, First, Fourth, and Fifth Circuits, and contained fewer than 25 each for the Seventh, Eighth, and Federal Circuits. The next volume (30 *Federal Appendix*) also contained no First Circuit dispositions or Fifth Circuit listing, and there were a small number from the District of Columbia Circuit, while "unpublished" dispositions for the Eleventh Circuit were only in table form, as were roughly half those from the Third Circuit. Publication of the *Federal Appendix* prompted changes in terminology from "unpublished" to "precedential" and "non-precedential"; adoption of references to dispositions "not published in the *Federal Reporter*," along with the allowed use of memoranda for purposes of persuasion, may serve to break down what had begun as the strong distinction between published precedential opinions and unpublished non-precedential memorandum dispositions.

Judges are well aware of the greater availability of unpublished rulings and advert to it, as Judge Arthur Alarcon did in saying that "we are mindful

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[200] Hannon, *supra* note 193, at 209 tbl.4.
[201] Oversight Hearing on Unpublished Judicial Opinions Before the Subcomm. on Courts, the Internet, and Intellectual Prop., House Comm. on the Judiciary, 105 Cong. 63 (2002) (Statement of Arthur D. Hellman).
[202] Barnett, *supra* note 197, at 19 (2002).
[203] The last "tables" for other than the Fifth and Eleventh Circuits appeared in 248 F.3d, covering early 2001 cases.

of the fact that they are readily available in online legal databases such as Westlaw and Lexis."[204] Knowing that their memorandum dispositions are going to be published in some fashion, judges might be less likely to use such rulings or might give greater attention to developing these rulings than when they were available only in slipsheet form at court and were collected only by the persistent few who sought them.[205] Judges' self-consciousness about what appears in print, as a published opinion, evident in willingness to concur in an unpublished memorandum but not in a published opinion, might suggest a similar self-consciousness about what sees the light of day even without the formal cachet of a precedential opinion. However, it is quite likely that caseload pressures to dispose of cases, coupled with standard chambers routines in which clerks play a large part, will mean that any possible judge or clerk self-consciousness as to the availability of their "deathless prose" will be submerged and thus will have little effect on publication patterns and on what these dispositions look like.[206] As one observer noted, what is likely is an attitude that could be stated as, "Yes, technically they are published, but they don't know who wrote it, and I still have more important things to worry about."[207] It may, however, be less the availability of these dispositions than the lawyers' ability to cite them as persuasive that would lead judges to show more concern about them. Indeed, Chief Judge Martin opposes citation because, if the cases are cited back to the judges, preparing them instead of precedential opinions would not save time; judges would have to prepare a memorandum disposition as if it were a published opinion.[208]

In early 2000, the judges learned that their supposedly unpublished rulings, with the name of the putative author attached to case docket numbers, might be obtainable on-line through an archive developed by staff of the Administrative Office of the U.S. Courts (AO). The judges' concern was that anyone with access to the AO site could match up authors with particular unpublished dispositions, thus opening judges to criticism for underdeveloped work product. The AO continues to decline to release such identifiers for any of its publicly available databases,[209] but feelings about the AO, never a favorite of the judges, are not likely improved by the suspicion that the AO collects this information for statistical purposes to show work loads, and, by extension, the productivity not only of particular courts but also of individual judges. In any event, as noted *supra*, on-line availability will again increase under the requirements of the E-Government Act of 2002.

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[204] United States v. Rivera-Sanchez, 222 F.3d 1057, 1063 (9th Cir. 2000).

[205] Were that so, it would introduce an element of uncertainty into comparisons of pre-Westlaw memorandum dispositions with those immediately available on-line, and of either set of cases with those appearing initially in *Federal Appendix*.

[206] The author's impression, based on extended exposure to Ninth Circuit unpublished dispositions and examination of recent ones in *Federal Appendix*, is that such change has not occurred.

[207] Todd Lochner, personal communication to Stephen L. Wasby (n.d.).

[208] Martin, *supra* note 1, at 196.

[209] This has plagued scholars wishing to conduct research using that material.

V. STAGES OF THE PROCESS

We finally turn to the decisional process by which courts of appeals develop not-for-publication dispositions, paying greater attention to the judges' decision in those cases which go to regular argument calendars. Throughout, it should be kept in mind that at all these stages, in their decisions as to whether to write an opinion for publication or to utilize an unpublished memorandum disposition, the judges are guided by a set of formal criteria provided in a court rule and by additional norms. Those guidelines and the degree to which the judges follow them are discussed in a separate article.

There are several stages in the process by which the decision is made to publish a disposition. The first stage for cases in the court of appeals is that central staff attorneys assign weights to them. The easiest cases, those with the lowest weights, are sent to a screening panel with either a bench memorandum or, more often, a draft memorandum disposition for the judges' consideration prepared by the staff attorney. These "light-weight" cases usually result in an unpublished disposition. Any judge can reject a case from the screening process, sending it to a regular calendar. This is done, according to one judge's estimate, in from two percent to more than ten percent of these cases. If a judge on a screening panel thinks that a case is sufficiently important to require greater treatment, perhaps including argument and a published opinion, the judge may reject it from screening. However, even after being sent to a merits panel, most of these cases will likely be submitted on the briefs rather than argued, and an unpublished ruling will result.

There are instances in which, even when a screening panel believes a case contains an issue of note, the panel will dispose of a case itself rather than send it to a merits panel. In one screening case in which a state sentence for probation revocation was challenged as double jeopardy, the lead judge's law clerk had suggested sending the case to an argument panel, but the judge suggested publication because of the lack of Ninth Circuit law on the subject. Judges may, however, shy away from reaching the merits on an important issue in a screening case. In one such instance, a Sentencing Guidelines case, the lead judge reported "that there is currently no Ninth Circuit law on the issue whether a court may depart [from a Guideline sentence] based on uncounted juvenile sentences," but he thought reliance on the Guidelines would "be sufficient to justify not publishing," and he later observed, "I have always been reluctant to publish screening decisions on first impression issues for the circuit."[210] However, after another judge's suggestion that "[s]omebody is waiting for it"—publication on that issue—and that the government would seek

[210] Judge Alfred T. Goodwin to panel (Alarcon-Duarte v. INS, 95-60452, 87 F.3d 1317 (9th Cir. 1996)). This perhaps was part of the more general concern, stated by a judge in another case, of not publishing where "the point was not very well briefed and not argued."

redesignation of a memorandum disposition, the author agreed to publish, because "we have clear guidance from other circuits."[211]

In a slightly later case, the same lead judge, in finding "no Ninth Circuit precedent on partial filing fees" required for a prisoner to file an *in forma pauperis* action, said, "That may mean returning the case for assignment to a regular panel," but the judge also noted, "On the other hand, the issue is fairly straightforward, and oral arguments are precluded because the *pro se* plaintiff is a prisoner." [212] While he proposed a memorandum disposition, he agreed with a colleague who suggested that it be made an opinion "since we have no precedent of our court on the subject."[213]

A. ORAL ARGUMENT

Cases assigned directly to regular panels but nonetheless ordered submitted without argument are somewhat more likely than screened cases to be disposed of by published opinion. However, in general, if oral argument is not heard, a case is not likely to receive a published opinion; when argument is heard, the likelihood that the case will receive a published opinion increases.[214] Data for the Ninth Circuit in 1998 show that publication occurs in forty percent of orally-argued cases but in only three percent of those submitted on the briefs, and in one-fourth of counseled cases but only two percent of pro se matters.[215] Nonpublication may also be related to oral argument in another way: If a court is overburdened with cases, and must take some "short-cuts," the judges may use the savings in time provided by unpublished dispositions to maintain oral argument. This argument was made by the chief judge of the Second Circuit, the court of appeals with the strongest tradition of holding oral argument.[216]

Even if argument is held, criteria for publication may lead to disposition of the case in a not-for-publication memorandum, and this has become more likely as the overall proportion of published opinions has decreased. And even where judges know from the beginning that a case is sufficiently routine that oral argument would not affect the outcome and that they will dispose of the case in an unpublished memorandum, in at least some instances, they may feel that oral argument is necessary. Criminal cases fall into this category for some judges, as they feel it important that the court demonstrate that the defendant's position had been publicly heard. Other judges have suggested that Social Security and immigration cases should likewise receive oral argument, even if only ten

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[211] United States v. Beck, 992 F.2d 1008 (9th Cir. 1993).
[212] Alexander v. Carson Adult High Sch., 9 F.3d 1448 (9th Cir. 1993).
[213] Id.
[214] McKenna, Hooper, & Clark, *supra* note 5, at 19 ("Oral argument is strongly associated with opinion publication overall."). The presence of counsel in an appeal, even without argument, also increased the likelihood of a published ruling. *Id.*
[215] *Id.* at 19 (Table 11).
[216] Wilfred Feinberg (Chief Judge, Second Circuit), letter to the editor, *U.S. Appeals Court: Separating the Significant from the Trivial*, N.Y. TIMES, Feb. 28, 1983, at A14.

minutes per side.[217] A Ninth Circuit judge who has observed that "[i]n some cases, the court hears cases (that is, grants oral argument) for 'public relations' reasons," said, "The judges want the parties—for example, a tribal group in Alaska—to know that their case had been *heard*, even if the judges knew the law was clear and the result was preordained."[218]

B. CONFERENCE

At their post-argument conference, judges on merits panels consider both argued and unargued cases. For most of these cases, a clerk in one judge's chambers will have prepared a bench memorandum, which is sent to all panel members. The judges' chambers divide this work.[219] Increasingly, however, for unargued cases that are obviously going to result in a not-for-publication disposition, clerks, instead of preparing a bench memorandum, circulate a draft memorandum disposition in advance of calendar week.[220] The judges often react to those proposed dispositions before they meet, so that at their conference, the judges simply confirm any suggested changes and order the disposition filed.

For the remaining cases, at conference, in addition to determining the result, the judges make the decision whether to publish the disposition, perhaps on the basis of the clerk's benchmemo recommendation. The basic assumption has been that the panel will make a determination as to whether to publish its disposition before the disposition is drafted, because this early decision affects what is written and the amount of effort expended. The importance of an early decision on whether to publish the disposition is particularly clear for those courts that use AWOP (affirmed without opinion) dispositions. In courts that have disposed of a high proportion of cases in this manner, if it is decided at the post-argument conference that no written disposition is required, the presiding judge sends the clerk an AWOP order citing the court's rule authorizing such dispositions.

The decision on publication is reflected in the presiding judge's post-conference assignment memo: "Judge Doe will prepare a disposition for publication." At times, the decision on publication is left to the writing judge in language like "probably an opinion" or "maybe a memorandum." Or matters may be left completely open, as when, in recent cases, the assignment memo said, "Judge X will draft an opinion or a memorandum disposition in his discretion"; "Judge Y to write. Publication at his option"; or "Judge Z will ultimately prepare a disposition in whatever form seems appropriate." As this language suggests, panel members often give substantial deference to the writing judge as to whether a disposition will

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[217] Ninth Circuit Judicial Conference Judge, Open Forum on Court of Appeals (comment by Mary Schroeder) (Aug. 17, 1997) (notes on file with author). Judge Schroeder also said, "Oral argument is important even when you know from the beginning it's going to be a non-published ruling." *Id.*

[218] Interview with Judge Jerome Farris in Toronto, Ont. (Aug. 1, 1998).

[219] *See* Cohen, *supra* note 59, at 91–109 (providing a particularly thorough examination of bench memoranda, particularly if shared among chambers).

[220] A Ninth Circuit judge who sits as a visiting judge in a circuit that operates without shared bench memoranda has his clerks prepare a draft opinion to serve as the equivalent of a bench memorandum.

be published. However, there are times when members of a panel disagree over publication; when they do, it is likely to occur in the post-conference period. They may disagree because a judge does not believe an issue needs to be reached in order to decide the case and would prefer an unpublished disposition based on simpler grounds, or it may result when a judge is willing to go along and concur if the disposition is unpublished but would feel compelled to dissent were the ruling published. Such disagreements are likely to arise in the post-conference period. As Brudney and Ditslear put it, "the subtle interactive process among three repeat players" that characterizes within-panel interaction in the courts of appeals means that "appellate judges may occasionally agree that if an opinion remains unpublished they will forgo their inclination to dissent."[221] Former D.C. Circuit Chief Judge Patricia Wald has said that "'wily would-be dissenters go along with a result they do not like as long as it is not elevated to a precedent'."[222]

In the situations where the panel has left the decision on publication to the writing judge, that judge can recommend publication after drafting the disposition, perhaps because the clerk working on the disposition has so recommended, although the ultimate decision is one for the entire panel. We saw this when a judge wrote to his colleagues that, "Although I've prepared this as a memorandum disposition, I'm inclined to think that it should be published as an opinion," indicating that if they agreed, he'd do the necessary alterations."[223] Movement in the reverse direction—from a decision to publish to a decision that a memorandum disposition is sufficient—is also possible, as when the author said, "I realized that we discussed the possibility of an opinion, but after further review I am less convinced that publication is necessary," and an unpublished disposition resulted.[224] There are, however, instances when the proposed disposition is not the type reflected in the presiding judge's conference memorandum and no explanation accompanies the author's change.[225]

A panel may choose to issue two dispositions: a published opinion covering matters of greater importance or of first impression in the circuit, and a memorandum disposition treating the remainder of the issues that are routine and do not as directly implicate the development of precedent.

The writing judge may proceed to prepare both dispositions and submit them to the panel, as one judge did, saying, "I have drafted an opinion and a memorandum disposition vacating the dismissal. I think we have to publish on the heightened pleading issue but need not publish on the others."[226] An early example is a 1986 Fifth Circuit ruling, which carried

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[221] James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC'Y REV. 564, 582 (2001).
[222] *Id.*, at 582 n.36.
[223] *See* United States v. Earl, 27 F.3d 423 (9th Cir. 1994) (per curiam).
[224] United States v. Mosesian, No. 91-10188, 972 F.2d 1346 (9th Cir. 1992).
[225] For example, in Nordhorn v. Ladish Co., 9 F.3d 1402 (9th Cir. 1993), the author wrote to the panel, "Publication is not warranted," but then sent a proposed opinion without explanation of the shift.
[226] Housley v. United States, 35 F.3d 400 (9th Cir. 1994) (the unpublished disposition is recorded at 35 F.3d 571 (9th Cir. 1994)).

the *Federal Reporter* notation, "Partial Publication." At the end of the published opinion, the court inserted this note: "The remainder of the opinion is not printed in compliance with Local Rule 47.5: '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.'"[227]

A Ninth Circuit example is a Section 1983 case by an inmate against a correctional officer. In its published opinion, the court ruled that the plaintiff had a cause of action against one correctional officer; in a footnote, Judge Reinhardt stated that dismissal of the cases against the other defendants had been affirmed in an unpublished ruling: "We have, in an unpublished memorandum disposition issued today . . . ."[228] The Ninth Circuit also disposed of *Leatherman Tool Group v. Cooper Industries* in two rulings. The published opinion dealt with the injunction the district judge had issued against certain false advertising, while a not-for-publication memorandum affirmed the district court's award of punitive damages.[229] Interestingly, the Supreme Court accepted the unpublished disposition for review, requiring courts of appeals to use de novo review of district court punitive damage awards rather than the more deferential abuse of discretion standard.[230]

In a case in which the appeals court affirmed a denial of federal habeas after a first-degree murder conviction was affirmed on direct appeal, it published its decision on the retroactivity of a Supreme Court ruling on collateral review. However, the court used a memorandum disposition to deal with challenges to evidentiary rulings, a claim of failure to give certain jury instructions, alleged prosecutorial misconduct, sufficiency of the evidence, and cumulative error. The panel referred to the memorandum in its published opinion: "Shults's remaining claims are addressed in an unpublished memorandum disposition filed concurrently with this opinion."[231]

In a prisoner's Section 1983 suit for interest on his bank account, in which the court reversed the district court's grant of summary judgment for defendant prison officials, both an opinion and a memorandum resulted, with the two dispositions cross-referencing each other. The opinion said, "We address this claim [as to use of funds] in a separate, unpublished memorandum disposition."[232] The memorandum reported the opinion, saying, "In a published opinion filed concurrently with this memorandum . . . ."[233] In this case, there was considerable debate about whether to

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[227] United States v. Jackson, 781 F.2d 1114, 1115 (5th Cir. 1986).
[228] Wakefield v. Thompson, 177 F.3d 1160, 1161 n.3 (9th Cir. 1999).
[229] *See* Leatherman Tool Group, Inc. v. Cooper Indus. Inc., 199 F.3d 1009 (9th Cir. 1999), and Leatherman Tool Group Inc. v. Cooper Indus. Inc., Nos. 98-35147, 98-35415, 205 F.3d 1351 (9th Cir. 1999) (table).
[230] *See* Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).
[231] Shults v. Whitley, 982 F.2d 361, 362, n.1 (9th Cir. 1992). The unpublished memorandum is listed at 981 F.2d 1259 (9th Cir. 1992).
[232] Tellis v. Godinez, 5 F.3d 1314 (9th Cir. 1993).
[233] Tellis v. Godinez No. 91-16296, 8 F.3d 30 (9th Cir. 1993) (table).

publish, but the panel moved from the suggestion "to dispose of this case with a collection of unpublished memoranda" to publishing "the portion of the disposition dealing with the interest question," while treating the question of the prisoner's access to his money in an unpublished memorandum.[234]

C. POST CONFERENCE

During subsequent consideration of a case, the initial decision about publication may be altered, and this is not an infrequent occurrence, as we have seen. The writing judge may determine that a published opinion rather than a memorandum disposition is necessary, for example, "when research reveals that the question being written on is one of first impression."[235] Or the author may express some doubt about the course of action—publication or an unpublished disposition—to be taken and seek advice from panel colleagues. In the post-conference give-and-take, another member of the panel may suggest why a memodispo should instead become a published opinion; here, the clerk working on the disposition may weigh in on the suggestion. In one instance, the writing judge accepted a suggestion from a panel member that the ruling be published "because it acknowledges the change in INS policy" involved in the case, and the disposition became a published opinion.[236] Discussions between the two majority judges in another case led to an agreement that one would write to the author suggesting minor changes and also suggesting that it be published, so that the third judge, who disagreed with them, could publish his dissent.[237]

In another immigration case, involving an alien's attempt to adjust his status and the INS's efforts to deport him, the author had prepared a memorandum disposition but had noted that petitioner "managed to raise some interesting and intricate issues that had to be dealt with." This led another member of the panel to suggest that although the case had not been argued, publication was in order because of citations to out-of-circuit cases and because "the facts and discussion of law are interesting and might be helpful if similar cases arise."[238]

Decisionmaking about publication, in extending beyond a disposition's initial release, may affect even a court's decision to rehear a case en banc.[239] This is because, with respect to requests for en banc rehearing, at least some unpublished dispositions appear to be treated differently from

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[234] Judge Alfred T. Goodwin to panel (July 20, 1993); Judge Jerome Farris to panel (July 20, 1993); Judge Harry Pregerson to panel (July 22, 1993).
[235] E-Mail from Judge Alfred T. Goodwin to Stephen L. Wasby (Feb. 9, 2000).
[236] Dielmann v. I.N.S., No. 92-70544, 34 F.3d 851 (9th Cir 1994). Judge Alfred T. Goodwin to panel (Aug. 3, 1994) (suggesting publication).
[237] Yao v. I.N.S., 2 F.3d 317 (9th Cir. 1993).
[238] Judge Alfred T. Goodwin to Judge Ruggero Aldisert (Jan. 9, 1992) (United States v. Anders, No. 90-10558, 956 F.2d 907 (9th Cir. 1992)).
[239] Unpublished dispositions are not likely to be reheard en banc, but it can happen. *See, e.g.*, GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977); Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (en banc).

published opinions. In releasing a published opinion, a panel notifies the entire court of its action in denying rehearing en banc, at which point other members of the court can call for a vote to rehear en banc. However, a motions panel apparently has full authority to deny an en banc rehearing petition without such referral, and if its ruling comes in an unpublished disposition, the matter is even less known by the whole court. This matter arose in June 2001, in connection with a ruling by a motions panel which granted the government a writ of mandamus leading to reincarceration of a convicted murderer released by Federal Judge Marilyn Hall Patel (Northern District of California). However, in this particular instance, the motions panel decided to publish its ruling, making it possible for other judges to call for an en banc vote.[240]

D. REDESIGNATION

Just as the panel's initial decision on publication is not always its ultimate one, the panel's filing of a not-for-publication disposition does not necessarily end the process. Although off-panel judges who monitor their colleagues' work could question why the ruling is not being issued as a published opinion, most often the parties are the stimulus for redesignation of an unpublished ruling. However, others interested in the ruling, usually lawyers specializing in its subject matter or trade associations, at times request redesignation.

Although a panel may easily reach agreement on redesignation, at times the judges' decision on whether to honor a request for redesignation is contentious. Thus, in a case on insurance coverage,[241] the panel quickly reached agreement on an unpublished disposition. Yet, after a request for redesignation was received, more words were expended on that request than had been spent discussing the substance of the ruling itself, although the ruling was ultimately left unpublished. All three judges seemed to prefer less publication over more, at least in the abstract, and two of them, including the author, thought this ruling should remain unpublished. However, one judge thought the citation of cases from other circuits required publication of the disposition, which he said "seems to be a well-researched and well-written effort," thus apparently meeting his standards for what an opinion should be.[242]

At times, the argument from those seeking redesignation is highly developed. We can see this in a case in which the Ninth Circuit used a memorandum disposition to affirm a conviction under the Clean Air Act for "knowingly" violating Environmental Protection Agency work practice standards for asbestos removal.[243] In so doing, it had dealt with the criminal intent required by the statute, drawing on the circuit's rulings on

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[240] Roe v. United States Dist. Ct. for the N. Dist. of Cal. 257 F.3d 1077 (9th Cir. 2001). *See* Jason Hoppin, *Nickerson Asks Court to Review Its Rule*, THE RECORDER, June 27, 2001, at 8; Jason Hoppin, *Nickerson Case Gets Curiouser and Curiouser*, THE RECORDER, July 31, 2001, at 5.
[241] Lincoln Tech. Inst. of Ariz., Inc. v. Fed. Ins. Co., 76 F.3d 387 (9th Cir. 1996).
[242] Judge Alfred T. Goodwin to panel (Apr. 9, 1996).
[243] United States v. Tomlinson, No. 99-30020, 189 F.3d 476 (9th Cir. 1999).

the same questions under the Clean Water Act. Arguing that only one other circuit had addressed the question under the Clean Air Act and that the Ninth Circuit "has no published opinions regarding the interpretation of" that statute, so that its memorandum disposition "establishes a rule of law for this statute," the government sought publication, "[g]iven the importance of this issue to cases in this Circuit and elsewhere in the United States."[244]

In another instance of an extended argument for redesignation, in a case in which the panel had affirmed enhancement of a sentence for obstruction of justice, the United States Attorney sought publication. In his principal argument, he said, "A number of the issues raised by this appeal have either not been addressed in this circuit or have not received the attention to permit their citation as authority . . . . This court's carefully formulated treatment of these matters . . . should unquestionably become part of the jurisprudence of the circuit." That would "provide some much needed guidance to trial courts and counsel."[245] He then spoke of specific points in the disposition, one of which he said was "a matter of first impression in this circuit and, to the Government's knowledge, other circuits as well. The importance of the point should not be lost." With respect to some other points, he noted that "only one other circuit had addressed them, so that they were 'clearly worthy of being made part of the law of this circuit'."[246]

One can see from these instances a number of recurring elements used to support a redesignation request. Indeed, some seem to be almost formulaic. One is that the issues have not been previously addressed in the circuit, as in the comment, "This is the first and only ruling by the Ninth Circuit Court on this very important issue."[247] Another might be that the unpublished disposition conflicts with other dispositions, but until July 1 2000, the dispositions involved in the alleged conflict could not be cited. When the Ninth Circuit's Rule 36-3 was amended to allow citation of unpublished dispositions in requests for publication "to demonstrate the existence of a conflict," there was not a shift to the use of such a reason in the requests. Of 110 requests for publication from July 1, 2000, through October 15, 2002, most still sought publication because the disposition "establishes or clarifies Ninth Circuit law on an important issue, not that there was an intracircuit inconsistency requiring resolution." Indeed, of these requests, "None . . . identifies a legitimate conflict among unpublished dispositions."[248]

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[244] Helen J. Brunner, Asst. U.S. Attorney, W.D. Wash. to Clerk of Court, Ninth Circuit (July 19, 1999).
[245] Charles Turner, U.S. Attorney D. Or. to Clerk of Court (May 27, 1992). What is interesting about this request is that it was made after Turner had talked to the district judge who decided the case below; the judge had agreed on the need to publish. *See* United States v. Jackson, No. 91-30228, 974 F.2d 104, 106 (9th Cir. 1992) (redesignated as a published opinion).
[246] Turner, *supra* note 245.
[247] General Counsel, Region X, Dept. of Health and Human Services, to Clerk of Court, (discussing Matney v. Sullivan, No. 91-35164, 967 F.2d 588 (9th Cir. 1992), *published at* 981 F.2d 1016 (9th Cir. 1992)).
[248] Paul Keller and Kathleen Butterfield to Cathy Catterson (Oct. 15, 2002).

Another reason offered for redesignation is that the issue is a recurring one, indeed one on which the lower courts and lawyers need, or could use, guidance that a published opinion would provide, as in this statement in a Social Security disability case: "The ALJs, as well as plaintiffs' bar, need just this sort of concrete guidance as to what is, or is not, a 'specific and legitimate' factor to consider as part of the analysis of plain complaints."[249] That the guidance provided by a published opinion would preclude additional cases, thus assisting both the district courts and courts of appeals, is another theme, as we can see in the suggestion that "publication will reduce the workload of the court," and the observation, "Appellants should not be permitted to take up the court's time with repeated appeals concerning this same issue."[250] Such an argument may appeal to judges, who may be interested in taking actions which might serve to reduce their caseload. Their concern about limiting the number of cases can be seen in other contexts, as when one judge argued against publication of a ruling allowing an inmate's *Bivens* suit over an improper search and seizure to go forward.[251] Saying that prisoners could not be sanctioned for filing frivolous suits, he argued that, as such might be the result of this ruling, "We should not publish an opinion encouraging them to do so."[252]

At times, requests for redesignation are opposed. Thus, in the just-noted ERISA case, appellant argued that the memorandum disposition was "an application of law to fact in a particular case, not a declaration of the law applicable in all cases and under all circumstances involving ERISA."[253] In the sentencing enhancement case, opposition was based on a claim that the memorandum disposition "rested on a factual foundation" and "analyze[d] the case based on the specific facts before it," with discussion, except for one issue, resting "on the specific findings of the trial court in the case before it."[254]

As occurred in the environmental case discussed above, many publication requests are denied. From time to time, however, as in the sentencing enhancement case, judges are persuaded to alter the disposition's publication status to that of an opinion, although they may be lukewarm about it, or a member of the panel may resist. This can be seen in a suit by an insured against an insurer for a bad faith breach of contract, which one judge had argued should not receive a published disposition "as it does not involve any novel questions of federal law and simply involves interpreting state insurance law," something he felt should be left "in the

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[249] General Counsel, *supra* note 247.

[250] Appellee's request for publication (Jan. 13, 1993). Trs. of Electric Workers Health and Welfare Trust v. Marjo Corp., No. 91-16150 *and related cases*, 979 F.2d 856 (9th Cir. 1992), *published at* 988 F.2d 865 (9th Cir. 1993) (re-designated as a published opinion).

[251] *See* Housley v. United States, 35 F.3d 400 (9th Cir. 1994).

[252] Judge Alfred T. Goodwin to panel (June 7, 1994).

[253] Appellant's Resp., Trustees of Elec. Workers Health and Welfare Trust, No. 91-16150, 988 F.2d 865 (9th Cir. 1993).

[254] Nancy Bergeson, Ass't Fed. Pub. Defender, D. Or. to Clerk of Ct. (June 5, 1992), United States v. Jackson, 974 F.2d 104 (9th Cir. 1992).

state courts where possible."[255] When the prevailing party sought publication of the panel's memorandum disposition, the judge complained, "We are being used once again by the insurance lawyers to write California insurance law," but he conceded publication "after all the fine tuning that went into this first impression opus."[256]

There was even an instance of redesignation noted by Justice Stevens when he said, "Two days after the petition for certiorari was filed, the Ninth Circuit panel issued an order, as part of the publication of the slip opinion, that 'redesignated' the earlier decision as 'an authored opinion.'"[257] And considerable additional evidence is found in orders in the *Federal Reporter* indicating that the previously unpublished memorandum in such-and-such a case is hereby designated a published opinion authored by Judge X. One such instance was *Fairbank v. Wunderman Cato Johnson*, in which, slightly more than two weeks after the panel had filed a memorandum disposition,[258] it filed the following order redesignating the disposition: "The panel hereby orders the memorandum disposition filed April 17, 2000 in this matter re-designated, with minor modifications, as an authored opinion by Judge Goodwin."[259]

In this employment discharge case, the defendant employer, after having been granted summary judgment in state court on all but one claim, had removed the case to district court and was successful in obtaining summary judgment there on the remaining claim. The Ninth Circuit panel affirmed in an unpublished memorandum, but an off-panel judge wrote to "suggest that this case is worthy of publication." While noting that "there is a lot of state law here"—which would weigh against publication—the judge said there was an important "procedural point about the power of a federal district judge to revisit decisions made earlier in the same case by a different district judge," a point that "affects all federal courts." Moreover, the judge said, the Ninth Circuit cases the panel had cited were not recent. All of this led the off-panel judge to the conclusion that "a published reminder might be in order." This led the disposition's author to develop some points more fully, and a published opinion was filed.

Often, as in this last instance, the modifications in connection with redesignation are minor, and at times there are none, so that the unpublished disposition and the subsequent published opinion are essentially identical.[260] Modifications are likely to be minor if the disposition had received substantial earlier attention from the clerk and

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[255] Judge Alfred T. Goodwin to panel, Dec. 7, 1993, Lunsford v. Am. Guar. & Liab. Ins. Co., No. 91-16356, 18 F.3d 653 (9th Cir. 1994).
[256] Judge Alfred T. Goodwin to panel, Dec. 10, 1993.
[257] County of Los Angeles v. Kling, 474 U.S. 936, 938 n.2 (1985) (Stevens, J., dissenting). The Ninth Circuit's redesignated opinion is at Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir. 1985).
[258] No. 98-17298, 2000 WL 452002 (9th Cir. Apr. 17, 2000).
[259] Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 530 (9th Cir. 2000). *See also* Pac. Group v. First State Ins. Co., 70 F.3d 524, 525 (9th Cir. 1995) ("The memorandum decision filed on July 28, 1995, 62 F.3d 1425, is redesignated as an authored opinion by Judge Kleinfeld with minor modification.").
[260] *See, e.g.*, United States v. Hoff, 22 F.3d 222 (9th Cir. 1994).

judge, but sometimes the changes are minor because no one particularly wishes to revisit the disposition. If extended language from the clerk's or staff attorney's bench memorandum is left in the ruling, so that the reasoning is less solid than if the judge had known initially the case was to be published, difficulties can be created. As one judge put it, a redesignation order "leaves a footnote that causes us trouble later"—that is, it calls particular attention to the case. Likewise, the same problem will occur if insufficient reasoning has been supplied to support the result. Often, however, redesignation of an unpublished disposition requires the author to write more, and one judge commented that when the panel decides to publish a previously unpublished disposition, "we rewrite them as full opinions," but then added, "eighty percent [of the judges] do, although some only modify slightly."

E. DEPUBLICATION

If the courts of appeals may decide, on request, to redesignate an unpublished memorandum disposition as a published opinion, is it possible to redesignate a published opinion as an unpublished disposition, thus removing its availability as citable precedent?[261] While most movement is from unpublished to published dispositions, but one does find the reverse. In *United States v. Salinas*,[262] the government had requested that the opinion be withdrawn and redesignated as a not-for-publication memorandum, perhaps because the ruling was adverse to the government. Actual depublication came in *Shewfelt v. Alaska*,[263] which was "redesignated as a memorandum."[264]

One instance in which the panel considered whether to "depublish"[265] the case came in a rare instance when the person contacting the court to raise questions about a ruling was neither a litigant nor related through business ties to the litigants, but simply a knowledgeable individual who wished to note an error or raise a concern about a case. The case involved a suit against the carrier of a container-load of shoes for damages for loss of the container, and the plaintiff had obtained a judgment, which the Ninth Circuit affirmed.[266] On seeing the published opinion, a lawyer specializing in maritime and transportation law wrote "to respectfully request a modification of the Court's opinion, . . . to avoid problems likely to arise from a misstatement of law" concerning the Carmack Amendment to the

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[261] Such "depublication" in California has been the subject of considerable controversy. *See, e.g.*, Steven B. Katz, *California's Curious Practice of "Pocket Review,"* 3 J. APP. PRAC. & PROC. 385 (2001), and Robert S. Gerstein, *"Law By Elimination": Depublication in the California Supreme Court*, 67 JUDICATURE 293 (1984).

[262] United States v. Salinas, 940 F.3d 392 (9th Cir. 1991).

[263] 228 F.3d 1088 (9th Cir. 2000).

[264] Shewfelt v. Alaska, 238 F.3d 1215 (9th Cir. 2001) (table).

[265] "Depublishing" changes the status of a published opinion to "unpublished," to preclude its use as a precedent.

[266] Neptune Orient Lines v. Burlington N. & Santa Fe Ry. Co., 213 F.3d 1118 (9th Cir. 2000). Initially, the opinion had begun as a proposed memorandum disposition but had been changed into a published opinion because the proposed memorandum disposition cited a number of out-of-circuit cases but no Ninth Circuit law.

Interstate Commerce Act, a misstatement that would, said the writer, apply to more federal lawsuits because it expanded district court jurisdiction.[267] Although they did not receive the letter until well after the mandate had issued in the case, the panel members exchanged a number of memoranda about what they might do. Because of the difficulty of revising the published opinion at this late point in the history of the case, the opinion's author recommended redesignation as an unpublished memorandum. The other panel members also debated the proper reading of the relevant statutory provisions and a case from another circuit which dealt with a related bill of lading situation. All of this led one judge to conclude that the panel's opinion, as written, did not provide sufficiently complete reasoning to support its language about the Carmack Amendment.[268] Ultimately, the panel, while on the brink of depublishing, decided to "leave this alone."

Depublication was considered in still another case as part of the question of whether one case, already released as a published opinion, should be withdrawn and reissued as a memorandum opinion so that another panel's ruling on the same issue could be published as the circuit's precedent. The case involved sentencing on the basis of Sentencing Guidelines not in effect until after the defendant was sentenced to supervised release, which was later revoked.

The disposition—that there was no ex post facto violation—had been published "because there is no dispositive precedent in this circuit, and because the issue (or closely analogous ones) likely will recur." After an off-panel judge had communicated with the judges about his panel's related case, one of the judges would have been willing to defer, letting the other panel's opinion become "the leading case on the subject." He reasoned that "it is a subject not likely to recur very often in the future," and withdrawal of the opinion would not "create any conflict in the law of the circuit and would achieve a just result in our case." However, in the end, the opinion stood, and the other panel adopted a suggestion that differentiated the cases.[269]

A Tenth Circuit case provides another interesting instance of depublication. After appearing in the *Federal Reporter* Advance Sheets, it was withdrawn from the bound volume and included in the table of unpublished dispositions. However, the "published" version of the "Order and Judgment" had a footnote saying, "This Order and Judgment is not binding precedent, except . . . The court generally disfavors the citation of orders and judgments . . . ." Thus its appearance as a published disposition, showing the author's name, may have resulted from simple mistake—perhaps the court's failing to put the "Not for Publication" tag on the disposition.[270]

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[267] Michael Lodwick, Haight Brown & Bonesteel LLP, to Chief Judge Procter Jug, Jr. (June 8, 2000).
[268] Wrote the author, in mock exasperation, "I'm sorry I ever heard of the Carmack Amendment." Judge Alfred T. Goodwin to panel (Aug. 17, 2000).
[269] United States v. Schram, 9 F.3d 741 (9th Cir. 1993).
[270] Merritt v. United States Parole Comm'n, 219 F.3d 1145 (10th Cir. 2000).

The possibility of depublication is also illustrated in a recent occurrence in the Ninth Circuit. A law firm sought a ruling on the validity of a state grand jury subpoena that would allegedly have compelled disclosure of confidential client information. The district court dealt with the case *in camera* to protect the confidential information, and to continue the protection, the briefs in the appeal from the district court's order of dismissal were also filed under seal. However, apparently ignoring the previously sealed nature of the case, the court of appeals released an opinion, to be published, with the law firm's name in the case caption. The lawyers representing the law firm immediately filed an emergency motion to seal the opinion and to depublish it. The court granted the order, withdrawing the original opinion from publication; however, it then substituted a published opinion in which "Does & Associates Law Offices" was substituted for the real firm's name in the caption and text of the opinion.[271] Because the electronic services, including Westlaw and Lexis, refused to take the original opinion off-line until after the Ninth Circuit's depublication, the original opinion was public for about six weeks and was cited in other decisions. Once the depublication order was received, the electronic services did remove the original decision.

VI. CONCLUDING COMMENT

This in-depth examination of aspects of so-called unpublished dispositions has been provided to give a more complete picture of this generally low-visibility practice at a time of continued controversy over its use and to provide those interested in the work of U.S. courts of appeals greater understanding of the dispositions used for over three-fourths of those courts' cases. The article began with some history about the use of these rulings, discussion of the criticism leveled at them, and a summary of the limited knowledge provided by prior studies. Justifications for their use were then examined. The article's key aspect was an examination of the stages of the decisional process at which decisions are made on whether or not to publish.

Given the tradition-based expectation that full treatment, which includes a published precedential opinion, will be given to each case, use of unpublished rulings will inevitably draw criticism. Yet it is important to recognize that unpublished dispositions perform an important function, particularly in providing appellate judges a running start at keeping abreast of their caseload. We have seen that the judges are self-critical about their actions, and are concerned that clerks play a large role over which the judges may not be sufficiently watchful. The judges do not make decisions to release unpublished memorandum dispositions absent-mindedly, but make conscious decisions about whether or not to publish. Although judges often defer to each others' choices about publication, they do

[271] In a footnote, Chief Judge Schroeder observed, "Plaintiff-appellant filed this appeal under seal, and we have granted its motion to substitute 'Doe & Associates Law Offices' for its actual name." Doe & Assocs. Law Offices v. Napolitano, 252 F.3d 1026, 1027 n.1 (9th Cir. 2001).

communicate with each other about the action to be taken and take into account the criteria established for publication.

Perhaps the picture presented here will allay some concerns and will lower the decibel level of discussion of the subject. Even if those objectives are not achieved, this article should provide an understanding of these dispositions, and thus a firmer basis for evaluating proposals to amend the rules concerning their use.