

## CITATION TO UNPUBLISHED ORDERS UNDER NEW FRAP RULE 32.1 AND CIRCUIT RULE 32.1: EARLY EXPERIENCE IN THE SEVENTH CIRCUIT

The Honorable Diane S. Sykes\*

Rule 32.1 of the *Federal Rules of Appellate Procedure* (“FRAP”) took effect January 1, 2007, establishing a uniform national rule permitting citation to “unpublished” or otherwise nonprecedential opinions and orders of the federal appellate courts. Prior to the adoption of the new rule, four circuits—my own Seventh Circuit, and the Second, Ninth, and Federal Circuits—prohibited citation to unpublished opinions.<sup>1</sup> Six circuits—the First, Fourth, Sixth, Eighth, Tenth, and Eleventh—discouraged the practice, permitting it only in a limited set of circumstances (most notably, when no published opinion addressed the issue).<sup>2</sup> Three circuits—the Third, Fifth, and D.C. Circuits—freely permitted citation to unpublished opinions.<sup>3</sup> The new citation rule does *not* address the precedential value of unpublished opinions and orders; the Judicial Conference’s Standing Committee on Rules of Practice and Procedure and its Advisory Committee on Appellate Rules expressly declined to take a position on whether unpublished opinions should be treated as precedent.<sup>4</sup> Rather, Rule 32.1 prohibits courts from restricting the citation of unpublished dispositions, thus adopting as a national rule the permissive citation regime that existed in the Third, Fifth, and D.C. Circuits. However, the new rule was given prospective-only effect; only unpublished opinions and orders issued on or after January 1, 2007, are citable.<sup>5</sup>

In December 2006 the Seventh Circuit responded to the imminent arrival of new Rule 32.1 by revising and renumbering our Circuit Rule 53, which had designated unpublished orders as nonprecedential and noncitable in or by any court in the circuit “[e]xcept to support a claim of *res judicata*, collateral

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1. See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1430 (2005).
2. *Id.* at 1430–31.
3. *Id.*
4. Excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Sept. 12, 2005, [http://www.uscourts.gov/rules/supct1105/Excerpt\\_STReport\\_AP.pdf](http://www.uscourts.gov/rules/supct1105/Excerpt_STReport_AP.pdf).
5. See FED. R. APP. P. 32.1(a), which provides: “Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”

estoppel or law of the case.”<sup>6</sup> New Circuit Rule 32.1(b) in part tracks old Circuit Rule 53(b), providing that “[t]he court may dispose of an appeal by an opinion or an order.” The new rule then distinguishes between opinions and orders as follows: Opinions—signed or per curiam—“are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit.”<sup>7</sup> Orders are “‘unsigned,’ are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents.”<sup>8</sup> To conform to the new FRAP 32.1, Circuit Rule 32.1(b) also states: “Every order bears the legend: ‘Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1.’”<sup>9</sup> Reiterating the prospective-only feature of FRAP 32.1, subsection (d) of Circuit Rule 32.1 states: “No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding.”<sup>10</sup>

#### I. EARLY EXPERIENCE WITH RULE 32.1 IN THE SEVENTH CIRCUIT

How has Rule 32.1 fared in our circuit in its first year of existence? For purposes of today’s discussion (and in the absence of a comprehensive study), my law clerks and I kept track of the occasions on which parties made use of the new permissive citation rule in briefs filed in the cases I have been assigned. Because only those unpublished orders issued on or after January 1, 2007, are citable, I began with cases orally argued during the first four months of the 2007–2008 term before panels on which I sat during regular argument sessions. Briefs in cases argued this term would have been filed a few months after the new rule took effect, giving the attorneys time to become acclimated to the permissive citation regime and take note of any relevant unpublished orders filed on or after January 1, 2007.

From the beginning of the 2007–2008 term—the first week of September 2007—to the recess period in mid-December 2007, I was assigned to hear 13 days of oral arguments. (I have excluded our so-called “short argument” sittings and Rule 34 conferences at which cases not orally argued are decided.)<sup>11</sup> We normally hear six cases on each day of oral argument, for a

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6. 7TH CIR. R. 53(b)(2)(iv) (2006) (rescinded 2007).

7. 7TH CIR. R. 32.1(b) (2007).

8. *Id.*

9. *Id.*

10. 7TH CIR. R. 32.1(d).

11. These cases are routed through the office of our Senior Staff Attorney, Michael K. Fridkin, and are prepared by his deputies and staff attorneys.

total of 78 cases. I was also assigned to a panel hearing a death penalty case during this period, which was added to a regular argument sitting in December, bringing the case total to 79. Figuring the typical three briefs per case (there are sometimes more in multiple-party cases), the approximate total number of briefs filed for my assigned oral argument sittings during this period is 237. By my chamber's count, in these 79 cases—approximately 237 briefs—there were *only four* citations to unpublished orders of our court issued on or after January 1, 2007. That amounts to a citation to an unpublished order in one-half of 1% (.05%) of the cases I heard during this period, in less than one-fifth of 1% (.017%) of the briefs filed in those cases. Two of the four citations were contained in a single string cite, and all four citations to unpublished orders were for propositions of law on which there is ample published circuit case law—some of it, in fact, cited along with the citations to the unpublished orders.<sup>12</sup> In short, in cases orally argued before panels on which I sat during the first four months of this term, the use of Rule 32.1 was highly infrequent and plainly unnecessary.<sup>13</sup>

## II. WHY SO LITTLE USE OF THE NEW RULE?

That the new citation rule was invoked so infrequently makes evaluating its impact on the work of the court and counsel difficult; the rule really has not been with us long enough for a meaningful empirical study. Preliminarily at least, there is reason to question whether the attorneys who were surveyed by the Federal Judicial Center (“FJC”) in its study of citation to unpublished opinions substantially overstated their interest in citing them.

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12. See Brief of the United States at 33, *United States v. Christ*, No. 07–1634 (7th Cir. July 5, 2007) (citing *United States v. Cooper*, 224 F. App'x 537, 542 (7th Cir. 2007) (for a routine proposition of evidence law regarding laying a foundation for admission of business records for which published circuit case law exists) (citing *United States v. Lawrence*, 934 F.2d 868, 870–71 (7th Cir. 1991))); Brief of the Plaintiff-Appellee at 20, *United States v. Rogers*, No. 06-3730 (7th Cir. Mar. 30, 2007) (citing *United States v. Brannon*, 218 F. App'x 533, 535–36 (7th Cir. 2007) (for the proposition that ownership of a firearm is irrelevant in felon-in-possession case, which is established in published circuit case law also cited by the government) (citing *United States v. Alanis*, 265 F.3d 576, 590–92 (7th Cir. 2001))); Defendant-Appellant's Reply Brief at 2, *United States v. Cutler*, No. 07–2061 (7th Cir. Sept. 13, 2007) (citing *United States v. Mason*, 233 F. App'x 569, 569 (7th Cir. 2007)); *United States v. Petty*, 239 F. App'x 279, 279 (7th Cir. 2007) (for the proposition that this circuit had not yet decided whether the “reasonableness” or “plainly unreasonable” standard of review applies to revocation cases post-*Booker*, where the question was expressly reserved in published circuit case law also cited by the defendant-appellant) (citing *United States v. Flagg*, 481 F.3d 946, 949 (7th Cir. 2007)).
  13. There were a handful of citations to older (before January 1, 2007) unpublished Seventh Circuit orders and unpublished decisions of other circuits; I have excluded these as outside the scope of Rule 32.1.

In connection with the Judicial Conference's consideration of proposed Rule 32.1, the FJC and the Administrative Office of the Federal Courts were asked by the Advisory Committee on the Federal Rules of Appellate Procedure ("Advisory Committee") to conduct a study on the subject of citation to unpublished opinions. The study included, among other features, a survey of lawyers. The FJC's sample included 384 lawyers who filed briefs in appeals in each federal circuit; the sample was balanced among counsel for appellant and appellee.<sup>14</sup> Based on 343 responses—89% of those surveyed—the FJC reported that this "random sample of federal appellate attorneys expressed a substantial interest in citing unpublished opinions."<sup>15</sup>

More specifically, among other questions, the FJC survey asked: "When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of the court of appeals for *this circuit* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?" Approximately two-fifths—39%—of all attorneys surveyed answered this question "yes."<sup>16</sup> In the Seventh Circuit, the percentage was higher: 45% of attorneys who filed briefs in the Seventh Circuit said they encountered one or more unpublished opinions they would have liked to cite but did not because of the court's noncitation rule.<sup>17</sup> The survey also asked, just slightly differently: "Had this circuit's rules on citations to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of the court of appeals for *this circuit* in your brief or briefs in this appeal?" Nearly half—48%—of all attorneys surveyed answered this question "yes."<sup>18</sup> Again, in the Seventh Circuit, the percentage was higher: fully 60% of attorneys who filed briefs in the Seventh Circuit said they would have cited unpublished opinions had the rule in this circuit been more lenient.<sup>19</sup>

The discrepancy between the survey results and the four-month experience in my chambers certainly is stark; it bears repeating that this early experience is hardly a comprehensive study and may not be representative. But it is not surprising to me that attorneys may have overstated their interest in citing unpublished opinions—perhaps substantially so. My own experience with this issue at the state-court level while a justice on the Wisconsin

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14. ROBERT TIMOTHY REAGAN ET AL., FEDERAL JUDICIAL CENTER, CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS 17 (2005).

15. *Id.*

16. *Id.*

17. *Id.* at 47.

18. *Id.* at 18.

19. *Id.* at 49.

Supreme Court convinced me that the bar had exaggerated the need to convert our state to a permissive citation regime. In 2002 a rules petition was filed with the court seeking to amend the prevailing noncitation rule in Wisconsin. Like Rule 32.1, the proposed amendment to the Wisconsin rule would have permitted citation to unpublished decisions of our state's intermediate court of appeals for their persuasive value. I voted against it, for reasons I explained in an opinion concurring in the court's 5–2 denial of the petition.<sup>20</sup>

As for FRAP 32.1, Patrick J. Schiltz,<sup>21</sup> who served as Reporter to the Advisory Committee when the rule was studied and adopted, thinks “[t]he practitioners who agitate[d] in favor of citing unpublished opinions seem[ed] to be motivated primarily by principle” rather than practical justification.<sup>22</sup> Schiltz, who had a front row seat during the long-running battle over Rule 32.1, has flatly stated that “[t]he argument that Rule 32.1 will provide some practical benefits has always struck me as less than compelling.”<sup>23</sup>

So why all the fuss, if a uniform permissive citation rule was so little needed? Schiltz has some interesting theories. His article in the *Washington & Lee Law Review*, “Much Ado About Little: Explaining the *Sturm Und Drang* over the Citation of Unpublished Opinions,” contains an excellent history of the lengthy and vociferous debate over the citation of unpublished opinions in the federal appellate courts and offers well-informed insight into the reasons behind the controversy over Rule 32.1.<sup>24</sup> I will summarize the history and theories here and add a few observations of my own.

#### A. History of Rule 32.1

In the early 1970s, the Judicial Conference directed the circuits to develop opinion publication plans and to limit the opinions submitted for publication in order “to cope with the exponentially expanding volume of litigation.”<sup>25</sup> Many of the circuit plans limited or prohibited the citation of unpublished opinions, and this remained the norm for about 15 years.<sup>26</sup>

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20. See *In re Amendment of Wis. Stat. § (Rule) 809.23(3)*, 2003 WI 84, ¶¶ 12–41, 2003 Wisc. LEXIS 1029 (July 1, 2003) (Sykes, J., concurring).

21. St. Thomas More Chair in Law, University of St. Thomas (Minnesota) School of Law, and Reporter, Advisory Committee on the Federal Rules of Appellate Procedure.

22. Schiltz, *supra* note 1, at 1466.

23. *Id.*

24. Schiltz, *supra* note 1.

25. Rep. of the Jud. Conf., Comm. on Rules of Practice & Procedure, *supra* note 4; see also Schiltz, *supra* note 1, at 1434–35.

26. Rep. of the Jud. Conf., Comm. on Rules of Practice & Procedure, *supra* note 4; see also Schiltz, *supra* note 1, at 1434–35.

The run-up to the proposal and eventual adoption of Rule 32.1 began in the late 1980s. In 1988 Congress created the Federal Courts Study Committee (“FCSC”) to study the federal judicial system and recommend improvements.<sup>27</sup> It reported in 1990 that the various circuit-level nonpublication policies and noncitation rules created “many problems,” and that one of the primary justifications for noncitation rules—concerns about uneven access to unpublished opinions—was giving way in light of the availability of computerized legal research.<sup>28</sup> The FCSC recommended that the Judicial Conference convene a committee to review the circuits’ policies on unpublished opinions. The Judicial Conference declined to do so.<sup>29</sup>

Shortly thereafter, a committee known as the Local Rules Project, which had been created by the Judicial Conference in 1984 to review conflicting local court rules and identify appropriate areas for national rulemaking, recommended to the Advisory Committee that national rules regarding publication and citation of opinions be established.<sup>30</sup> But the Advisory Committee was at that time consumed by other work, and the matter of unpublished opinions was not taken up until late 1997.<sup>31</sup> The chairman of the Advisory Committee sought input from the chief judge of each circuit; the chief judges were nearly unanimous that the matter should be left to the individual circuits and that the Judicial Conference should not interfere.<sup>32</sup> The chiefs plainly did not support national rulemaking in this area. In April 1998 the Advisory Committee discussed the issue and voted to remove it from its study agenda.<sup>33</sup>

That obviously did not end the matter. In August 2000 came *Anastasoff v. United States*,<sup>34</sup> in which a panel of the Eighth Circuit held that Article III requires federal courts to treat *all* prior decisions, published and unpublished, as precedent. Though quickly vacated as moot by the en banc Eighth Circuit, *Anastasoff* was, needless to say, highly controversial. In January 2001 outgoing Clinton Solicitor General Seth Waxman brought the issue of unpublished opinions back to the Advisory Committee, proposing the adoption of “uniform national standards governing the citation of unpublished court of appeals decisions.”<sup>35</sup> Schiltz reports that the Solicitor General’s concerns

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27. Schiltz, *supra* note 1, at 1435.

28. *Id.* at 1435–36.

29. *Id.* at 1436.

30. *Id.* at 1436–37.

31. *Id.* at 1438.

32. *Id.* at 1439.

33. *Id.* at 1441.

34. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

35. Schiltz, *supra* note 1, at 1441.

were mainly uniformity and clarity; indeed, Waxman did *not* propose a general rule freely permitting citation to unpublished opinions. Instead, the rule he proposed generally conformed to the practice in those circuits that discouraged citation to unpublished opinions; it would have allowed citation only to support a claim of *res judicata*, collateral estoppel, law of the case, other similar doctrines, or in the limited circumstance when the unpublished opinion “persuasively addresses a material issue in the appeal” and “no published opinion of the forum court adequately addresses the issue.”<sup>36</sup> The Advisory Committee debated the proposal in April 2001 but did not reach any consensus on whether or how to proceed.<sup>37</sup>

The Committee’s next meeting was not until April 2002, and by this time Samuel Alito, then Circuit Judge of the Third Circuit Court of Appeals, had become the Committee’s chairman and Theodore Olson had replaced Seth Waxman as Solicitor General.<sup>38</sup> Also, seven months earlier, in September 2001, Judge Alex Kozinski, writing for a unanimous panel of the Ninth Circuit in *Hart v. Massanari*,<sup>39</sup> painstakingly refuted the now-vacated holding in *Anastasoff* and also articulated a strong justification for the Ninth Circuit’s noncitation rule. On the other hand, in late 2001 the Third and D.C. Circuits were in the process of revising their circuit rules to permit citation to unpublished opinions.<sup>40</sup> By the time the Advisory Committee met again, the debate over unpublished opinions clearly had captured the attention of both bench and bar.

The arguments basically lined up this way: The proponents of a permissive national rule, mostly practitioners,<sup>41</sup> noted that the widespread availability of computerized legal research had substantially diminished the original concern about access to unpublished opinions that had motivated local noncitation rules.<sup>42</sup> Proponents of a permissive national rule argued that noncitation rules were antithetical to the rule of law and the common law tradition, which presuppose that parties to litigation may cite a court’s prior decisions and attempt to persuade the court to rule consistently with those decisions.<sup>43</sup> They argued that citation restrictions violate the equal justice principle that like cases should be decided alike.<sup>44</sup> They also maintained that

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36. *Id.* at 1442.

37. *Id.* at 1443.

38. *Id.* at 1444.

39. 266 F.3d 1155 (9th Cir. 2001).

40. Schiltz, *supra* note 1, at 1445.

41. *Id.* at 1465.

42. Rep. of the Jud. Conf., Comm. on Rules of Practice & Procedure, *supra* note 4.

43. *Id.*; see also Schiltz, *supra* note 1, at 1470.

44. Schiltz, *supra* note 1, at 1468–69.

noncitation rules interfered with the professional judgment of lawyers about how best to represent their clients when deciding which arguments to make in court.<sup>45</sup> Some argued that noncitation rules were a prior restraint on speech in violation of the First Amendment.<sup>46</sup>

For their part, opponents of a permissive national citation rule, mostly judges (most prominently, Judge Kozinski), argued that regardless of the ready electronic accessibility of unpublished opinions, permitting their citation—even as persuasive-only authority—is unwise for reasons that strike at the heart of the judicial process. First, the explosion in appellate caseloads simply makes the preparation of a citation-quality opinion or order in every case impossible. The ability to decide some or most cases by unpublished, nonprecedential—and noncitable—disposition is essential to managing the court's extremely heavy caseload and to maintaining the uniformity, clarity, and quality of circuit case law.<sup>47</sup> Generally speaking, an unpublished opinion is merely a summary explanation of the result and rationale of the court's decision. It is addressed to those involved in and already familiar with the case—the parties and the lower court—and therefore details and reasoning that would normally be included in a precedential opinion may be omitted. Unpublished opinions are often prepared by staff law clerks and reviewed by judges to ensure the result and explanation are correct, but are not crafted with the care, reflection, and attention to language, legal nuance, and factual and procedural context that precedential opinions require. Unpublished opinions are therefore not useful as citable authority and are potentially subject to being misconstrued.<sup>48</sup> The whole point of permitting their citation, opponents argued, is to establish them as a form of quasi-precedent. The time-saving value of resolving some cases by unpublished, nonprecedential disposition may be diminished if these opinions could be cited, even for persuasive value; judges may feel the need to pay more attention to their language or perhaps say less in their unpublished opinions in order to avoid being misconstrued. Finally, the opponents of permissive citation argued that the cost of legal research would increase if unpublished opinions were citable.<sup>49</sup>

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45. *Id.* at 1469–70; *see also* Rep. of the Jud. Conf., Comm. on Rules of Practice & Procedure, *supra* note 4.

46. Schiltz, *supra* note 1, at 1467–68; *see also* Rep. of the Jud. Conf., Comm. on Rules of Practice & Procedure, *supra* note 4.

47. *Hart v. Massanari*, 266 F.3d 1155, 1177–78 (9th Cir. 2001); *see also* Hon. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, THE FEDERAL LAWYER, June 2004, at 37–38.

48. *Hart*, 266 F.3d at 1177–79; Kozinski, *supra* note 47, at 37–39.

49. *Hart*, 266 F.3d at 1177–79; Kozinski, *supra* note 47, at 37–39; *see also* In re Amendment of Wis. Stat. § (Rule) 809.23(3), 2003 WI 84, ¶37, 2003 Wisc. LEXIS 1029 (July 1, 2003) (Sykes, J., concurring).



These arguments pro and con were percolating in the legal community by the time of the Advisory Committee's April 2002 meeting. In advance of that meeting, Judge Alito wrote to the chief judges of the circuits asking for their input on the Solicitor General's proposal.<sup>50</sup> This time the results were mixed; undoubtedly the chiefs were influenced by the now full-blown debate over the issue of unpublished opinions. Three chief judges did not respond to Judge Alito's inquiry, three were supportive of the Solicitor General's proposal, five were opposed, one said his circuit was "not inclined to change," and one said her circuit was divided.<sup>51</sup> Judge Alito reported these results to the Committee at its April 2002 meeting; after a lengthy debate, the Committee voted six to three to approve the Solicitor General's proposal in principle, but deferred consideration of specific language of the proposed rule until its next meeting.<sup>52</sup>

At that meeting, held in November 2002, the Committee had before it three alternative drafts. One basically mirrored the Solicitor General's original proposal; another specifically authorized courts to issue nonprecedential opinions and freely permitted their citation; the third said nothing one way or the other about the precedential value of unpublished opinions but simply permitted their citation without qualification.<sup>53</sup> The Committee eventually settled on this third version—the one that freely permitted citation to unpublished opinions but did not address their precedential value.<sup>54</sup> This draft was then forwarded to the Standing Committee with a request that it be published for comment. That request was approved in June 2003 and proposed Rule 32.1 was published for comment two months later.<sup>55</sup>

The foregoing chronology illustrates the tenacity of the proponents of a permissive national citation rule. In 1998 the Advisory Committee was so unmoved by the case for national rulemaking on unpublished opinions that it removed the issue from its agenda; two years later, the issue was brought back from exile by a proposal that would permit citation of unpublished opinions only in very limited circumstances; the following year, this limited proposal was approved in principle; and by 2002 the Committee had approved a national rule permitting unlimited citation to unpublished opinions.

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50. Schiltz, *supra* note 1, at 1444.

51. *Id.* at 1444–45.

52. *Id.* at 1446–47.

53. *Id.* at 1448–49.

54. *Id.*

55. *Id.* at 1450.

Proposed Rule 32.1 received more than 500 written comments, about 90% in opposition to the rule.<sup>56</sup> About 75% were from judges, clerks, and lawyers from Judge Kozinski's Ninth Circuit.<sup>57</sup> In February 2004 a majority of the Seventh Circuit's judges signed a letter to the Committee opposing Rule 32.1; two of our judges wrote separately expressing general support but suggesting slight revisions.<sup>58</sup> The Advisory Committee approved the new rule, with only stylistic changes, and sent it on to the Standing Committee on Rules of Practice and Procedure. After a lengthy debate, the Standing Committee sent Rule 32.1 *back* to the Advisory Committee for further study.<sup>59</sup>

This action did not, Schiltz reports, reflect a lack of support for the new rule among the members of the Standing Committee; to the contrary, none of the Committee members defended no-citation rules and no one spoke in opposition to Rule 32.1 during the Committee debate.<sup>60</sup> Instead, the Committee was concerned about the degree of controversy the proposed new rule had generated, as well as the strength of the opposition to it, especially from federal judges.<sup>61</sup> The Standing Committee believed that returning Rule 32.1 to the Advisory Committee for further study would permit the arguments for and against it to be evaluated empirically.<sup>62</sup>

Accordingly, the FJC, at the request of the chairmen of the Standing and Advisory Committees, designed and conducted a study of citation to unpublished opinions, including the survey of lawyers that I mentioned earlier; the study also included a survey of judges and a review of a sample of briefs filed in each circuit to determine frequency of citation to unpublished opinions.<sup>63</sup> The details of the study are available elsewhere and are beyond

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56. *Id.* at 1450–51.

57. *Id.*

58. Judges Coffey, Cudahy, Evans, Kanne, Manion, Posner, Rovner, Wood, and Williams were opposed to Rule 32.1; their joint letter to the Advisory Committee was dated February 11, 2004. *Available at* [http://www.uscourts.gov/rules/Appellate\\_Comments\\_2003/03-AP-396.pdf](http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-396.pdf). Judges Easterbrook and Ripple were generally in favor; their letters to the Advisory Committee were dated February 13, 2004, and February 12, 2004, respectively, *available at* [http://www.uscourts.gov/rules/Appellate\\_Comments\\_2003/03-AP-367.pdf](http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-367.pdf) and [http://www.uscourts.gov/rules/Appellate\\_Comments\\_2003/03-AP-335.pdf](http://www.uscourts.gov/rules/Appellate_Comments_2003/03-AP-335.pdf). This action predates my arrival at the court. I entered upon duty on July 4, 2004.

59. Schiltz, *supra* note 1, at 1453.

60. *Id.*

61. *Id.* at 1454.

62. *Id.*

63. *Id.*

the scope of this presentation;<sup>64</sup> for our purposes today it is enough to note that the results of the FJC study did *not* support the opponents of Rule 32.1.<sup>65</sup>

When the Standing Committee took up Rule 32.1 again in June 2005, it was approved unanimously and sent on to the Judicial Conference.<sup>66</sup> The Conference amended it to apply prospectively only—that is, to permit citation to unpublished opinions issued on or after January 1, 2007—and approved the new rule on a divided vote.<sup>67</sup> From there it went to the Supreme Court and Congress, and came into effect on January 1, 2007.

#### B. Possible Reasons for the Lack of Use of Rule 32.1

Rule 32.1 has now been with us for a little over a year. And at least as far as my caseload is concerned, the response of the bar to the new permissive citation authority has been underwhelming. This is consistent with Patrick Schiltz’s informed predictions, to which I now return. After the Advisory and Standing Committees had approved Rule 32.1 and sent it on to the Supreme Court, Schiltz extrapolated from the data in the FJC study and offered his opinion that citation rules just “do not seem to make a lot of difference, one way or another.”<sup>68</sup> Judges in circuits with more liberal citation rules had told the FJC that citation to unpublished opinions did “not cause them much work” but also did “not give them much help.”<sup>69</sup> Lawyers reported that they “already research unpublished opinions” and that Rule 32.1 would “reduce or have ‘no appreciable impact’ on their workloads.”<sup>70</sup> Schiltz predicted that Rule 32.1 “will almost surely have little real-world impact.”<sup>71</sup> In the early going in our circuit, he has been right, at least as measured by the extremely infrequent—and indeed irrelevant—citations to unpublished orders in cases I have heard thus far in this term. This may be partially attributable to the legal culture in our circuit and the well-known opposition of a majority of our judges to Rule 32.1. Perhaps the lawyers who practice regularly in our court are reluctant to use the new permissive citation authority because they perceive this circuit to be inhospitable to the practice.

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64. REAGAN ET AL., *supra* note 15. See also Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 30–58 (2005); Schiltz, *supra* note 1, at 1454–56.

65. Schiltz, *supra* note 1, at 1455–57.

66. *Id.* at 1457–58.

67. *Id.*

68. *Id.* at 1465.

69. *Id.* at 1464.

70. *Id.* at 1456.

71. *Id.* at 1465.

But I think the early indifference is just as likely attributable to another factor on which Schiltz offers some insight, to which I referred earlier in this presentation. It is this: the case for a permissive national citation rule was really one of principle, not practicality. There is little demonstrable need for or interest in citation to unpublished opinions; claims to the contrary were probably exaggerated. On the other hand, lawyers strongly resisted, as a matter of principle, the idea of a “second class” of opinions designated by the court as nonprecedential, unpublished, and not citable even for persuasive value.<sup>72</sup> As Schiltz puts it: “The notion that judges can pick and choose, *ex ante*, which of their opinions will count as ‘law’—not just in the sense of being ‘binding,’ but even in the sense of being ‘considered at least relevant’ when the court confronts the same issue in the future—is viewed by many as antithetical to the rule of law.”<sup>73</sup>

I think there is a compelling legal-historical explanation for the distinction between published, precedential opinions and unpublished, nonprecedential opinions, as well as a strong legal-policy justification for maintaining that distinction—and the noncitation rules that went along with it. These were most powerfully articulated by Judge Kozinski in *Hart v. Massanari*<sup>74</sup> and in his testimony and articles in opposition to Rule 32.1.<sup>75</sup> I was persuaded that these arguments, which I have summarized above, weighed in favor of maintaining Wisconsin’s noncitation rule when the issue was before the Wisconsin Supreme Court in 2002–2003. It is not my purpose here to reweigh the arguments pro and con; it is too soon to tell whether citation to unpublished opinions will remain as infrequent as it seems to be now. If so, then the concerns expressed by those who favored retention of noncitation rules—concerns about case management, the integrity of the judicial process, and the clarity, consistency, and quality of circuit case law—will have been allayed.

For my own part, I have not altered my approach to unpublished orders in light of Rule 32.1. Simply put, there are not enough hours in the day for me to give them any more of my time than they received before Rule 32.1. Many of our unpublished orders are prepared by staff law clerks who are supervised by very experienced senior and deputy staff attorneys. Most of these orders are issued in cases not orally argued (among these are cases in which the

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72. *Id.* at 1469. For a discussion of the general criticism of the use of unpublished dispositions, see Stephen H. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 71–75 (2004–2005).

73. Schiltz, *supra* note 1, at 1470.

74. 266 F.3d 1155 (9th Cir. 2001).

75. See Kozinski, *supra* note 47; see also Hon. Alex Kozinski & Hon. Stephen Reinhardt, *Please Don't Cite This!*, CALIFORNIA LAWYER, June 2000.

appellant is not represented by counsel). Many other unpublished orders are issued in cases heard on our so-called “short argument” calendar; these are straightforward, often single-issue but fully counseled appeals. Because we grant oral argument in most counseled cases in which argument is requested, cases falling in this category are given just ten minutes of argument per side and are usually—though not always—decided by an unpublished order prepared by a staff law clerk.<sup>76</sup> Sometimes cases heard on our regular panel argument calendar are appropriate for disposition by unpublished order, but these would be prepared by an elbow law clerk in my chambers.<sup>77</sup> The unpublished orders issued in our on-briefs (Rule 34) cases receive very little editing from me; I give unpublished orders in cases on the “short argument” and regular panel argument calendars somewhat closer attention.<sup>78</sup> But most of my time is spent on the published, precedential opinions I am assigned to write; dissents and concurrences; responding to opinion drafts circulated by my colleagues; and preparing for oral argument. We are fortunate that the quality of the work of our staff attorneys’ office is generally quite high. This makes it possible for me to order my time and energy as I do. It also has a bearing on the substance of the back-and-forth about whether unpublished orders are at all suitable for citation. As far as I can tell (based on my three-and-a-half-year tenure), the concern is not so much that the decisional quality of these orders is lacking in the sense that legal rules are poorly stated or the results are questionable; to the contrary, these orders usually involve well-established rules and straightforward conclusions, and their results are reliable. Rather, it is the very nature of these orders—they are often highly fact-bound and necessarily more summarily reasoned—that makes them usually unhelpful and potentially misleading as citable authority.

Of course I cannot speak to my colleagues’ reactions to Rule 32.1. I do not know whether they have adjusted their own approaches to unpublished orders. I can say that I have not noticed any perceptible change in the content,

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76. According to the September 2007 Federal Court Management Statistics generated by the Administrative Office of the U.S. Courts, the national experience in the courts of appeals regarding the percentage of cases orally argued was 27.3% orally argued to 72.7% submitted on briefs. The average in the Seventh Circuit was 55% orally argued to 45% submitted on briefs. U.S. Courts, Federal Courts Management Statistics, 2007 U.S. Court of Appeals, *available at* <http://www.uscourts.gov/cgi-bin/cmsa2007.pl> (last visited Apr. 15, 2008).

77. According to the September 2007 Federal Court Management Statistics generated by the Administrative Office of the U.S. Courts, the national experience in the courts of appeals regarding the percentage of cases decided by unpublished disposition was 83.5% unpublished to 16.5% published. The average in the Seventh Circuit was 55% unpublished to 45% published. U.S. Courts, *supra* note 76.

78. For a description of the Ninth Circuit’s processes for deciding not-for-publication dispositions, see Wasby, *supra* note 72, at 111–123.

quality, or length of our circuit's unpublished orders during this first year that Rule 32.1 has been with us. Perhaps the FJC at some point will be asked to conduct a study on how the new rule is working across the circuits, and the debate will be revisited.<sup>79</sup> Or perhaps the intense controversy that attended the adoption of Rule 32.1 will fade quietly into history.

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79. Professor Sarah E. Ricks has proposed follow-up circuit-level rulemaking expressly conferring persuasive value on unpublished, nonprecedential opinions and providing, among other things, specific criteria to guide the publication decision. See Sarah E. Ricks, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. APP. PRAC. & PROCESS 17 (2007).