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Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals

Federal Judicial Center

UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS

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Federal Judicial Center

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Introduction

In the search for more efficient ways to dispose of the expanding appellate caseload, the U.S. courts of appeals have, over the past decade, adopted a variety of procedural innovations designed to reduce the time judges spend on many cases. Thus, in most circuits central staff attorneys now screen cases before they are assigned to a judicial panel; the screening duties these attorneys perform vary across the circuits, but a common practice is for them to make recommendations to the judges concerning the need for oral argument. After the recommendations have been reviewed, the judicial panel may decide that argument is unnecessary. In addition, several circuits have adopted appeals expediting procedures by which some cases may be placed on a shorter briefing schedule, while other courts have set up preargument conference programs, in which attorneys for the parties meet with staff counsel to resolve procedural problems, refine the briefs, or discuss settlement.[1]

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1. For a description of the Ninth Circuit's screening program, see J. S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project ch. 5 (Federal Judicial Center 1985). The Fifth Circuit's screening procedure is described in Bell, Toward a More Efficient Federal Appeals System, 54 Judicature 237 (1971). The Eighth Circuit's appeals expediting calendar is described in Lay, A Blueprint for Judicial Management, 17 Creighton L. Rev. 1065-67 (1984). Evaluations of several appeals expediting programs are available: L. C. Farmer, Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures (Federal Judicial Center 1981); J. E. Shapard, Appeals Without Briefs: Evaluation of an

Of the recent innovations, none has been more controversial than the practice of disposing of some cases without a published decision, a practice that has been adopted to some extent by all federal appellate courts. This paper describes several aspects of the circuits' publication policies and discusses some of the implications of these policies. The focus is on two questions: Who has access to the unpublished decisions? And how may these decisions be used?[2] The centrality of these two questions will become clearer in the later discussion of the history of the efforts to limit publication.[3]

Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984). For two discussions of preargument conference programs, see A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); Rack, Pre-argument Conferences in the Sixth Circuit Court of Appeals, 15 U. Tol. L. Rev. 921 (1984). A general discussion of several appellate innovations can be found in P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal chs. 2 & 3 (1976).

2. The words decision and disposition, which are used throughout this report, refer to all possible forms by which the court's decision in a case is made known. Thus, opinions, memoranda, and orders are subsumed under these words.

3. Among the other issues raised by researchers and commentators have been questions about the precedential value of the unpublished decisions, the increase in productivity that may be attributed to limited publication, and the ability of judges to foresee that a decision is nonprecedential. For a discussion of the precedential value of unpublished decisions, see Foa, A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule, 39 U. Pitt. L. Rev. 309 (1977); Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981). For an examination of the productivity question, see Reynolds & Richman, supra, at 604. The ability of the judges to decide which decisions are nonprecedential is evaluated in Shuchman & Gelfand, The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?, 29 Emory L.J. 195 (1980). These issues are not discussed in this paper, nor are several other questions that frequently arise in discussions of publication policy: (1) the justifications for limiting pub-

The core issue in the debate over access and use is fairness: Is the material equally available or equally restricted to all the participants in the litigation process? And are all participants equally restricted in the use they may make of these decisions? The two questions are closely related. Because of concerns over fairness of access, use--in the form of citation--is usually prohibited.[4] The argument is as follows: If access is restricted but citation is freely allowed, only those attorneys with the time and resources to search for unpublished material or those who regularly practice in the court (e.g., the U.S. attorney) will benefit, an outcome unfair to the less well situated attorney; therefore, citation should be prohibited. This justification for prohibiting citation has, however, been countered by another problem in fairness: Barring citation will not prevent attorneys or judges from using either the information found in the unpublished decisions or their familiarity with the trend of such decisions; it will simply enable them to use the information without acknowledging the source of their reasoning.[5]

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lication; (2) the quality of the unpublished decisions; (3) the guidelines for writing opinions as opposed to memoranda or orders; (4) the relationship between limited publication and limited argument.

4. The question of fairness of access is essentially a question of distribution: To whom are the unpublished decisions routinely distributed, and where are the materials generally available? The distribution policies of the circuits are discussed in the second section. The question of use, on the other hand, is primarily a question of citation. The circuits' citation rules are discussed in the third section.

5. See Reynolds & Richman, The Non-Precedential Precedent--Limited Publication and No-Citation Rules in the

Several possible conclusions follow from this argument: (1) Citation should not be prohibited; (2) access should not be restricted; or (3) publication should not be limited. Restrictions on access, then, seem to lead to inequalities in the use of unpublished material, whether or not citation is prohibited.[6]

Unrestricted access to the unpublished decisions, however, also creates problems. If access is unlimited and citation is prohibited, the issue of unacknowledged use again arises. On the other hand, if access is unlimited and citation is also unrestricted, use of the unpublished material will be made equitable, but the cost savings to the court, litigants, and publishers will be lost.[7]

The circuit courts have responded to these issues in a num-

United States Courts of Appeals, 78 Colum. L. Rev. 1167, 1196-99 (1978). It can be argued in response that unpublished decisions do not contain reasoning or a restatement of facts and therefore would not be helpful. While this argument might apply to unpublished orders, it is less likely to be valid for unpublished opinions or even lengthy memoranda.

6. Id. at 1195. For another view on the issue of fairness--an approach emphasizing system fairness--see J. O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 40 Rec. A.B. City N.Y. 12 (1985). Summary decision and publication measures may affect the overall fairness of the litigation system by enabling greater access by more litigants through economical use of judge time.

7. A second justification for restrictions on citation, centering on costs in time and money, has often been offered: If citation is allowed, the time saved by judges in not writing polished prose will be lost because they will feel compelled to write decisions of higher literary quality; the time saved by attorneys in not having to research this body of law will also be lost; and the costs saved in not having to publish and buy these materials will be lost because private publishers will feel compelled to print the unpublished decisions that can be cited. These concerns are not addressed in this paper. They are discussed briefly in Reynolds & Richman, supra note 5, at 1194.

ber of ways, which are reflected in the rules and procedures they have adopted. To develop a picture of current practices regarding access and citation, this report examines (1) written rules and policies contained in court documents and (2) unwritten practices as described in interviews with court staff.[8]

The paper is divided into six sections. To provide a context for the discussion of current practices, the first section reviews the history of the publication debate, with particular attention to the access and use issues. The next two sections discuss the distribution and citation policies of the courts. The fourth section takes a brief look at the circuits' criteria and procedures for deciding which decisions do not warrant publication. Next is a presentation of numerical data that summarize the number and types of cases whose decisions were not published during statistical years 1981 to 1984. The final section offers a brief conclusion.

I. History of the Publication and Citation Rules: The Debate over Access and Use

Although there have been periodic suggestions during the last fifty years that publication of decisions be limited, the debate about restricting publication intensified in the mid-

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8. Interviews were conducted by telephone. In most of the circuits the clerk was the primary respondent; in several other circuits the chief deputy clerk answered the questions; and in a few courts other deputy clerks, such as the opinion clerk, provided some additional answers to the questions.

1960s.[9] In 1964 the Judicial Conference of the United States called on the federal courts to limit the number and length of published opinions. Citing "the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities," the Conference adopted a resolution asking the appellate and district court judges to "authorize the publication of only those opinions which are of general precedential value."[10]

The Conference's action was followed, several years later in 1971, by a Federal Judicial Center report, which noted that there was by this time "widespread agreement that too many opinions are being printed and published," but "not, however, any consensus about how to limit publication."[11] The following year, based on an examination of the various rules and procedures in use in the federal and state courts, the Center recommended in a report to the Judicial Conference that the Conference ask each circuit to review its publication practices and make modifications aimed at reducing the number of opinions published and restricting cita-

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9. For the early history of the debate, see Reynolds & Richman, supra note 5, at 1168 n.12, 1169 n.13. That article includes an extensive review of the efforts to limit publication of opinions as well as a thorough discussion of the arguments for and against limited-publication policies.

10. Reports of the Proceedings of the Judicial Conference of the United States 11 (1964).

11. Federal Judicial Center, 1971 Annual Report 7-8.

tion of unpublished decisions.[12] The Conference, in turn, voted to circulate the Center's report to the circuits and requested that the circuits develop and submit to the Conference plans for limiting the publication of opinions.[13]

At the same time, the Advisory Council on Appellate Justice, a group of lawyers, law professors, and judges brought together by the Center in 1971 (and subsequently supported by grants administered through the National Center for State Courts), began a study of appellate processes. In 1973 the council published its report Standards for Publication of Judicial Opinions,[14] which has been described as the "seminal document in the movement toward an official policy of limiting publication."[15] In the report the council proposed four specific standards by which to determine whether a decision should be published. It also recommended that unpublished opinions not be cited as precedent, acknowledging the difficult questions of access that arise from a policy of limited publication.

In recommending a no-citation rule, the council wrote, "It

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12. Board of the Federal Judicial Center, Recommendation and Report to the April 1972 Session of the Judicial Conference of the United States on the Publication of Courts of Appeals Opinions (1972).

13. Reports of the Proceedings of the Judicial Conference of the United States (October 1972).

14. Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice (Federal Judicial Center 1973) (hereinafter cited as Standards for Publication).

15. Hoffman, Nonpublication of Federal Appellate Court Opinions, 6 Just. Sys. J. 406 (1981).

is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable."[16] At the same time, the council recognized that other types of unacknowledged use could be made of the unpublished material: "The non-citation rule does not preclude the use of reasoning and ideas taken from an unpublished opinion that may happen to be in the possession of counsel."[17] The council concluded, however,

> Nothing proposed in this report will overcome the discrepancy that exists today and will continue to exist between lawyers continually litigating specific types of matters before a court, and the lawyer who only occasionally appears on such matters. The first lawyer may have a better idea as to the way the judges think and the likelihood of success. We believe this proposal does not accentuate this problem and perhaps minimizes it by preventing the knowledgeable lawyer from citing the unpublished opinions to the court.[18]

The model rule offered by the council included a prohibition on citation of unpublished decisions.[19]

By early 1974 the circuits had submitted to the Judicial Conference their plans for restricting the publication of opinions. Although each court had to some extent followed the 1972 Federal Judicial Center recommendations, the plans indicated a a substantial amount of experimentation across the circuits. The

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16. Standards for Publication, supra note 14, at 19.

17. Id. at 18-19.

18. Id. at 19-20.

19. Many circuits later adopted this model rule or a modification of it. The section of the rule on citation stated simply, "Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other material presented to any court." Id. at 23.

Conference, while registering its hope that the circuit plans would eventually become more uniform, decided to accept the experimentation, requiring only that the circuits submit yearly statistical reports on the operation of their plans. The Conference decided as well that the plans and yearly reports should be made widely available to members of the legal community, to "encourage them to make their contribution to the resolution of this difficult and persistent problem."[20]

The legal community was provided with a forum for its views the following year. The Commission on Revision of the Federal Court Appellate System, created by act of Congress to study several problems concerning the appellate courts, held hearings in ten cities during 1974 and 1975.[21] In addition to the judges who testified, numerous attorneys and law professors expressed their views on limited publication and on citation of unpublished opinions. During these hearings it became clear that the rules circumscribing publication of opinions were not nearly as problematic and controversial as the rules prohibiting the citation of unpublished decisions. A majority of the legal community agreed that not every case warrants a published opinion, and it was

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20. Reports of the Proceedings of the Judicial Conference of the United States 12 (March 1974).

21. The commission was created by Pub. L. No. 92-489, 86 Stat. 807 (1972), as amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974). The text of the commission's hearings is in Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase, vol. 1 (1974), vol. 2 (1975) (hereinafter cited as Hearings). (The commission is frequently referred to as the Hruska Commission, a reference to its chairman, Senator Roman L. Hruska.)

clear to many that limiting the number of opinions published could bring substantial relief to both the judiciary and the bar. Proponents of this position noted that limited publication would reduce the pressure on judges to write polished prose and the burden of restating the facts, as well as reduce the costs attorneys incur in purchasing the reports and in researching an ever-increasing body of law.

With regard to citation of unpublished decisions, however, many noted the difficulties that arise either when citation is prohibited or when it is permitted. The discussion revolved, essentially, around issues of access.[22] It was clear from the testimony that whether or not citation were restricted, claims of unequal access and unfair advantage could be made. If citation of unpublished material were allowed, those attorneys with abundant resources to search for the material or those who appeared routinely before the appellate court (e.g., the U.S. attorney) would have an advantage over other members of the bar.[23] However, if citation were not allowed, there would be a risk of the development of a "hidden body of law," known and possibly relied upon by judges and some litigators but unknown to the majority of

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22. Other issues were, of course, raised. Many who testified recognized, for example, that if citation were allowed, the time and money savings realized from nonpublication would be defeated: Judges would spend more time polishing their prose, an alternative press would emerge to market the "unpublished" decisions, and attorneys would feel compelled to research the material. See, e.g., the testimony of Charles R. Haworth, associate professor of law, George Washington University, in Hearings, vol. 2, supra note 21, at 931.

23. See, e.g., the testimony of Robert Stern, former acting solicitor general, id. at 1072.

the bar.[24] Those who argued this point favored a policy permitting citation because it would compel judges and attorneys who used unpublished material to make this material known, through citation, to those who would otherwise be unaware of the decisions.

The debate over access was sharply delineated during the testimony of Judge Robert Sprecher of the Seventh Circuit, in what has become a widely cited exchange. Out of concern about the issue of consistency in decisions, Judge Sprecher suggested that judges would soon have to develop an intracourt index of unpublished decisions "even though they [could] not be cited by the court or to the court."[25] An attorney then asked him, "Do you think that the possibility that there should be some conflict within the circuit . . . is sufficient to have you keep a file of those things and look at them when I do not have a chance to look at them?" To which Judge Sprecher replied, "I think we are zeroing in, now, on the heart of it."[26] The issue, however, was left unresolved.

The commission's final report reflected the difficulties inherent in a no-citation policy. In summarizing the testimony on nonpublication practices, it focused on the "fundamental prob-

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24. See, e.g., the testimony of Willard J. Lassers, on behalf of the Illinois chapter of the American Civil Liberties Union, in Hearings, vol. 1, supra note 21, at 556-57.

25. Id. at 536.

26. Id. at 537.

lems" in no-citation policies, concluding,

> Whether or not unpublished opinions may be cited by litigants, judges may feel the obligation to maintain consistency between cases presenting essentially the same legal issues. For the judges to attempt consistency by examining their own prior judgments, while denying counsel the right to cite such cases[,] compounds the difficulties, whether counsel's purpose is to distinguish the cases or to urge that they be followed.[27]

Finally, the commission declined to make a recommendation "that might foreclose that further study which the problem deserves" and--describing the Judicial Conference as "the appropriate forum"--passed the problem on.[28]

The subsequent conclusions of the Judicial Conference, however, differed little from the commission's. While the commission was holding its hearings around the country the circuits continued their experimentation with the publication plans they had adopted. Between 1973 and 1977 they submitted yearly statistical reports to the Judicial Conference about the operation of their plans, and in 1978 the Conference issued its final statement on these plans. The Conference subcommittee in charge of the publication issue determined from the reports that although the number of cases filed had climbed and the number of judgeships had not increased between 1973 and 1977, the number of terminations had gone up. At the same time, the number of published opinions had declined, which led the subcommittee to conclude that limited publication had resulted in increased disposi-

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27. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 51 (1975).

28. Id. at 52.

tions.[29] Despite this seemingly positive result the subcommittee, like the commission, was unable to make a definitive statement about publication and citation. It concluded,

> Initially your committee hoped that it would be possible to distill five years of experience under eleven different circuit opinion publication plans into one model that might be adaptable throughout the Federal Judiciary. That desire has not been attained and perhaps at present is unattainable. . . .
>
> At this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that continued experimentation under a variety of plans is desirable.[30]

The Conference has not spoken on these issues since the subcommittee issued its final report. The circuits continue their experimentation, and the debate persists as well.

The academic legal community, in particular, has kept the issues alive in a number of articles in law reviews and other journals. For the most part, this community has been skeptical of, if not hostile toward, restrictions on citation. In a thorough discussion, W. L. Reynolds and W. M. Richman examine the arguments for a no-citation rule and conclude that it is more unfair to restrict citation than to permit it. Their concern centers on the unacknowledged use that may be made of unpublished material, particularly by litigants who appear frequently in the appeals court and by district and appellate judges, who in many

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29. Opinion Publication Plans in the United States Courts of Appeals 10 (1978) (report of the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States).

30. Id. at 12-13.

circuits routinely receive copies of unpublished decisions.[31]

At least one segment of the practicing legal community has also spoken recently on the issue of restricted citation. The Association of the Bar of the City of New York writes,

> [W]e believe that a [no-citation] procedure under which the court can place over two-thirds of its decisions outside of the normal reach of the bar, commentators, and the principles of stare decisis, is an unacceptable means of saving judicial time. ... .
>
> [W]e do not believe that the Second Circuit should have a rule that precludes a lawyer from calling to its attention, or to the attention of any other court, what it actually did and said in one of its prior cases.[32]

The debate has, in a way, ended where it began. Out of concern for the delay and attendant injustice caused by rising caseloads, the courts adopted limited-publication policies to increase judicial efficiency. Then, because the unpublished decisions were not uniformly available to all litigants, the courts established limitations on citation of these decisions. Now, under criticism for promoting yet another kind of unfairness through these practices, the courts are being called on to re-evaluate their policies. It is in the context of this continuing debate that the current distribution, citation, and publication rules and practices of the appellate courts are examined.

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31. Reynolds & Richman, supra note 5, at 1195-99.

32. Committee on Federal Courts, Rule 0.23 of the United States Court of Appeals for the Second Circuit, 38 Rec. A.B. City N.Y. 259 (1983).

II. Distribution Rules and Practices

In the following discussion of the circuits' distribution of unpublished decisions, several questions are addressed: (1) Has each circuit made a formal statement, in its rules, its plan for publication of opinions, or its internal operating procedures, about its distribution practices? (2) Who routinely receives the unpublished materials? (3) Are the unpublished decisions accessible to those who do not receive them from the court as a matter of course? Also examined are the possible effects of these rules and practices on the issues raised in the debate over publication, in particular the different access of the bench and the bar.

A series of tables, which are contained in the Appendix, have been prepared to make comparison among the courts somewhat easier.[33] These tables present the current rules and practices of the circuit courts, as found in written policies and as described by court staff.[34] The discussion in the present section is based on tables 5 and 6.

The first and most obvious conclusion that can be drawn from

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33. Tables 5 and 9 summarize the courts' policies and practices, and tables 6 through 8 and tables 10 and 11, respectively, provide the more detailed information on which tables 5 and 9 are based. Copies of the local rules, internal operating procedures, and publication plans from which the tables are derived can be obtained from the Center's Information Services, 1520 H Street, N.W., Washington, DC 20005. (Committees in the Second and D.C. Circuits are currently reviewing their courts' publication policies.)

34. The tables show that practice, as described in the interviews, does not always conform to written policy. This discrepancy is not unexpected, since practice often responds more quickly to changing events than do formal rules.

these tables is that the written policies in most circuits either do not answer or answer in only a very limited way the question about distribution, and therefore one cannot easily determine who routinely receives unpublished material or how widely available it is. Only two circuits have detailed distribution policies; seven provide a limited statement, and four have no written policy.

Of the two circuits (the Fourth and Seventh) with detailed policies, the Seventh Circuit's statement is the most comprehensive, noting the routine recipients of both published and unpublished material. Distribution is, according to the rule, quite limited: Only the appellate judges of the circuit and the district judge and parties in the case receive an unpublished decision; other district judges and litigants do not. The Fourth Circuit's rule does not specify who receives the published material, but does state unequivocally that distribution of unpublished decisions is limited to the district judge of the case and the parties. The district and appellate judges in the circuit do not, according to the court's written policies, receive the unpublished decisions.

Seven circuits (the Third, Fifth, Ninth, Tenth, Eleventh, D.C., and Federal) make only limited statements about distribution.[35] Regarding unpublished decisions, six of these circuits

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35. These statements are described as limited for two reasons. First, it is unlikely that the circuits send published decisions to as few recipients as are mentioned in the rules; common sense tells one, for example, that these decisions are routinely sent to the parties and publishers. Second, the interviews with court staff disclosed that both published and unpub-

indicate only that a list of unpublished decisions is sent periodically to West Publishing Company for inclusion in the Federal Reporter.[36] The Tenth Circuit's local rule, by comparison, states that an index of decisions unpublished between August 1972 and December 1983 is available to attorneys. The rule does not indicate, however, whether those decisions rendered and not published since December 1983 are distributed to publishers or other recipients. From the limited statements made by these seven circuits, then, one cannot determine whether publishers alone receive the unpublished decisions or, if not, who the other recipients might be.

The four remaining circuits (the First, Second, Sixth, and Eighth) make no statement at all on distribution. Their rules, publication plans, and internal operating procedures give no indication of who receives copies of either published or unpublished decisions or where these might be available to interested persons.

It is clear from this review of the circuits' written policies that few have systematically and comprehensively addressed the question of distribution. The concerns raised by some over the issue of fair access thus seem to be warranted; in most circuits an attorney cannot determine from the rules who routinely

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lished materials are much more widely disseminated than the rules suggest, as discussed below.

36. While it may seem anomalous to call anything sent to West an "unpublished" decision, the adjective is commonly and appropriately used. Only the style and outcome (e.g., "affirmed") are included in the list; the text of the decision, where there is one, is not published.

receives or has access to the circuits' unpublished decisions and therefore cannot easily determine who might be using them.

In some circuits, moreover, the findings disclose that actual practices deviate substantially from written policies.[37] Policy and practice closely mirror each other only in the Seventh Circuit, while in several circuits there are notable discrepancies between the rules and the actual distribution practices. Although unstated in their rules, five circuits (the Fourth, Eighth, Ninth, D.C., and Federal) routinely send unpublished decisions to all appellate judges in the circuit. The Seventh Circuit follows this practice as well, but states the practice in its rule. In the Eleventh Circuit the practice is to send the unpublished dispositions to all the appellate judges, but only about half the judges actually receive them; the remaining judges have indicated that they do not want to receive these decisions.

Several circuits distribute the unpublished dispositions to individuals outside the appellate court. The Ninth Circuit sends these decisions to chief judges of district courts in the circuit if they request copies, while the Eighth Circuit routinely sends them to all the district judges in the circuit. The Fourth Circuit, whose distribution is the most extensive, sends the unpub-

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37. The interviews revealed that all the circuits automatically send copies of the unpublished decisions to the parties and to the district judge or agency that decided the case. Although not necessarily stated in the circuits' rules, these practices are to be expected and are not discussed further here. The practice in most circuits of sending the unpublished decisions to the district or agency case file, either via the clerk or as part of the mandate, also is not discussed.

lished decisions to all district judges, bankruptcy judges, and magistrates in the circuit, as well as to the U.S. attorney, public defender, and district and appellate clerks.

Although the wide distribution of unpublished material in the Fourth Circuit might be cause for alarm among members of the private bar in that circuit, the court also allows subscription to the unpublished decisions, thus making the material available to the bar as well.[38] The Ninth Circuit, which distributes unpublished decisions to all the appellate judges and to the chief district judges at their request, also accepts subscriptions from the bar. Only one other circuit, the Sixth, provides a subscription service. The circumstances in this circuit are, however, quite different from those in the Fourth Circuit. In the Sixth Circuit neither the appellate nor the district judges routinely receive the unpublished decisions, and therefore the question of equitable access for litigants may not be as pressing. In addition, the texts of the unpublished decisions in this circuit are available on LEXIS, making the material readily accessible to both judges and attorneys. No other circuit routinely sends unpublished decisions to the bar in general, either on its own initiative or by subscription.[39]

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38. The availability of a subscription service may to some extent alleviate concern about access; it does not, however, address the discrepancy between a rule that clearly states that distribution of unpublished materials is narrowly circumscribed and a practice that in fact makes these decisions widely available.

39. From August 1972 through December 1983 the Tenth Circuit compiled an index of its unpublished decisions. This index is available for purchase and at designated libraries throughout

This review of the courts' unwritten practices shows that six circuits (the Fourth, Seventh, Eighth, Ninth, D.C., and Federal) send unpublished decisions to all the appellate judges within the circuit and one (the Eleventh) sends them to some of the appellate judges. Extensive distribution of unpublished material to judges is not the norm, however. The other six circuits do not send these decisions to appellate judges, and ten do not send them to district judges (the Fourth and Eighth send them to all district judges, and the Ninth makes them available to the chief district judges). Furthermore, in the Fourth Circuit, where distribution to judicial officers and institutional litigants (e.g., the U.S. attorney and public defender) is the most extensive, a subscription service is provided for attorneys. Thus, in most of the district courts and in half the appellate courts, judges and attorneys appear to have equally limited access to unpublished decisions.[40]

In nine of the ten circuits that do not currently provide a subscription service, litigants who are interested in unpublished decisions have only one (official) way to find out about these

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the circuit. When the circuit suspended use of decisions marked "Not for Routine Publication," it also stopped preparing the index. The Tenth Circuit's former practice, which not only provided easy access but also allowed citation, has been hailed by critics of limited-publication plans. See, e.g., Reynolds & Richman, supra note 5, at 1205.

40. This conclusion does not, of course, speak to the concern that routine players in the court who frequently litigate the same types of cases--for example, the U.S. attorney--may know of and use unpublished arguments, while opposing counsel may not know that they exist.

dispositions: the list published in the Federal Reporter.[41] However, only three of these circuits (the Third, Fifth, and Eighth) include all unpublished decisions in the list that is sent to West. The remaining six (the First, Second, Seventh, Eleventh, D.C., and Federal) submit a list containing only those cases decided on the merits, leaving out those disposed of for procedural or jurisdictional defects. Thus, in these six circuits, a portion of the courts' decisions remain unavailable and unknown, but the scope of the list is probably less important in the three circuits (the Fourth, Sixth, and Ninth) that otherwise make unpublished dispositions available--by routine distribution or by subscription--to the bench and the bar.

Although a majority of the circuits limit access to unpublished decisions, the principal concern from the point of view of the bar is not the existence of limits per se, but whether these limits are imposed equally on all participants in a case, including both parties and judges. From this perspective, the few circuits that make the material available to everyone and the majority that make it available only to the parties and judges in the case have devised the most equitable practices. Those circuits, however, that send unpublished dispositions to all appellate judges or district judges, without making this material available to litigants, are vulnerable to criticism from the bar.

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41. The Tenth Circuit does not provide a list to West for the Federal Reporter. The court publishes all decisions except judgment orders, which apparently are not made available through any mechanism to anyone but the district judge and parties of the case.

Finally, all but one of the circuits do not have a clear and explicit statement of their distribution policy, leaving judges and litigants guessing about who has seen the unpublished decisions.[42]

III. Citation Rules and Practices

This section addresses several questions about the circuits' citation policies: (1) Have the circuits adopted citation rules? (2) Under what circumstances is citation prohibited or permitted? (3) Are attorneys required to provide opposing counsel with copies of any unpublished decisions they cite? (4) Why have the circuits adopted their particular citation policies? Also discussed is the correspondence between the circuits' distribution and citation practices, which appear to contradict one another in a number of circuits. The following description of the circuits' practices is based on tables 5, 7, and 8 (contained in the Appendix).

Two circuits, the Third and Eleventh, have not adopted a written statement on citation. Most of the eleven circuits that have adopted a policy have restricted citation to narrow circumstances.

Three circuits permit unrestricted citation. The Third and Eleventh Circuits, with neither written statements nor unwritten policies, leave the decision to cite unpublished material to the

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42. The concern of those who do not have access to unpublished dispositions may be tempered somewhat if the decisions left unpublished are unimportant. This question is taken up in the fourth section.

judges and attorneys; the Tenth Circuit, in contrast, has a rule specifically stating that citation is allowed. The rules of two additional circuits, the Fourth and Sixth, are somewhat permissive: They state that citation is "disfavored" but that an unpublished decision may be cited when no better precedent is available. The rules of the remaining eight circuits (the First, Second, Fifth, Seventh, Eighth, Ninth, D.C., and Federal) are much more restrictive, stating that citation is not permitted except in related cases, to support a claim of res judicata or collateral estoppel, or to establish the law of the case.[43]

Seven circuits (the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C.) provide a mechanism by which attorneys who cite an unpublished decision can at the same time ensure that opposing counsel have access to it. These circuits have adopted, by either rule or convention, the practice of attaching the text of the unpublished decision to the brief in which it is cited. All but one of the circuits that are least restrictive of citation have adopted this practice, thus establishing a mechanism for making the material that is cited available to all the parties in a case.[44]

Two circuits, the Fourth and the Eighth, have set up addi-

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43. Despite its restrictive rule, the Fifth Circuit in fact allows citation "if the attorneys can find the decision." The issue of availability is an important component of the citation question, as discussed below.

44. The Third Circuit has no ready mechanism for such a requirement because it has no rule on citation. The Eleventh Circuit, however, which also has no rule, has adopted the practice by convention.

tional checks on the use of unpublished dispositions: In the former the judges closely question attorneys about their reasons for using an unpublished disposition, and in the latter attorneys must file a motion to justify citation of an unpublished decision.

Court staff report that the circuits' restrictions have successfully prevented citation of unpublished decisions. In the circuits that prohibit citation, judges and attorneys reportedly never cite the decisions. To what extent they use these decisions without citing them cannot be determined.

The courts' reasons for adopting no-citation rules can to some degree be inferred from the rules themselves. For example, the requirement in some circuits that counsel attach a copy of any unpublished decision they cite to the brief suggests these courts are concerned about fair access to the material. Other requirements, such as a motion to justify citation of an unpublished decision, imply that the courts consider such material nonprecedential. In fact, both arguments can be found in the rules of the five circuits that explicitly give a rationale for their policy. In two of these circuits, the First and Eighth, citation is restricted because the unpublished material is not uniformly available, whereas in two other circuits, the Ninth and D.C., citation is limited because the unpublished dispositions are not considered precedential. The remaining circuit, the Second, restricts citation because unpublished decisions are

neither uniformly available nor precedential.[45] No circuit has, at least in its written policy, responded to the argument that no-citation rules, because they allow unacknowledged use of unpublished decisions, are equally as unfair as policies that allow unlimited citation.[46]

An interesting question that can be asked about the citation rules is whether there is a correlation between these rules and the courts' distribution practices. Do the courts that allow citation also make sure the unpublished decisions can easily be found? Conversely, do the courts that restrict citation also restrict the circulation of the unpublished material?[47] Table 1

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45. The Second Circuit rule states that a decision may be made by unpublished summary order when the judges agree that the decision serves "no jurisprudential purpose." This phrase can be interpreted to mean that the decision has no precedential value. Decisions rendered under this standard may not be cited.

46. One could argue that the circuits that freely allow citation have accepted the argument that restricted citation is unfair, but no circuit has made an affirmative statement to this effect. Note that only the written rationale for restricting citation--and not the unwritten reasons behind the rule--is reported here. A complete statement of reasons would require interviews with judges, a task beyond the scope of this paper.

47. These seem to be the two most logical alternatives. The other two alternatives lead to some of the problems discussed in the first section. To make unpublished decisions easily accessible while prohibiting citation to them would invite the unacknowledged use feared by the bar; on the other hand, restricting access while allowing citation would provoke concerns about the advantage thus given to judges or to litigants with greater resources. The two most logical alternatives do not solve all the problems, however. Easy access to unpublished material and unrestricted citation may obviate the savings of time and resources promised by limited publication, whereas restrictions on both raise the question of unacknowledged use of unpublished material.

TABLE 1

CIRCUIT POLICIES ON DISTRIBUTION AND CITATION OF UNPUBLISHED DECISIONS

Circuit	Restrictive Distribution[1]	Restrictive Citation[2]
1st	X	X
2nd	X	X
3rd	X	
4th		
5th	X	
6th		
7th		X
8th		X
9th		X
10th	X	
11th[3]		
D.C.		X
Fed.		X

1. A circuit's distribution policy is defined as restrictive if circulation is limited to only the parties, the district judge and panel that decided the case, and the Federal Reporter. Circuits that distribute unpublished decisions to judges or subscribers throughout the circuit are not considered to have a restrictive circulation policy, even if only appellate judges receive the material. This narrow definition was chosen because of the concern some have voiced that appellate judges may build up an index of unpublished decisions for their own use and thus develop a body of law unknown to district judges and attorneys.

2. A circuit's citation policy is defined as restrictive if citation is permitted only in related cases or to support a claim of res judicata or collateral estoppel, or the law of the case. Circuits that allow citation if the unpublished case is relevant or if no better precedent is available are not considered to have a restrictive citation policy.

3. In the Eleventh Circuit half the appellate judges receive the unpublished decisions and half have chosen not to receive them, making the circuit difficult to classify in this schema; therefore, the circuit has been omitted from the discussion.

shows the correspondence between the circuits' distribution and citation policies.

The correspondence is clearly weak. In only four circuits do the policies reinforce each other. In the First and Second Circuits both the availability of unpublished material and the right to cite it are restricted, whereas in the Fourth and Sixth Circuits citation is permitted and unpublished decisions are widely available to both bench and bar. The citation and distribution policies in several of the remaining circuits seem to be contradictory. The Third, Fifth, and Tenth Circuits restrict the availability of unpublished decisions yet allow citation; although the judges have no more access to the unpublished decisions than does the bar, this discrepancy between distribution and citation practices is likely to increase the anxiety felt by attorneys without the resources to obtain the unpublished materials. In the Third Circuit this problem is compounded by the absence of a requirement that attorneys provide opposing counsel with a copy of any unpublished decision they cite. In the Seventh, Eighth, Ninth, D.C., and Federal Circuits, on the other hand, citation is restricted, but the unpublished dispositions are circulated to appellate judges. This policy may raise concerns among attorneys that the court will rely on arguments or trends gleaned from unpublished decisions that remain unavailable and unusable to litigants.

Before concluding that the circuits should examine and possibly modify their rules, however, one must address another set of questions. Are the unpublished decisions important to the

wider legal community? Is the attorney or judge who does not know about these decisions--when others do--necessarily at a disadvantage? Reynolds and Richman argue passionately that the naive attorney is substantially handicapped by ignorance of unpublished material.[48] Others, however, argue that unpublished decisions are, or ought to be, so unimportant that knowledge of them would be of little benefit to anyone.[49] How can the practicing attorney be sure that unpublished decisions are in fact insignificant and need not be researched? Why should the bar "trust the judges"?[50]

IV. Publication Rules and Practices

Throughout the debate over limited publication critics have raised questions about the types of decisions that are not published and about judges' ability to decide whether a case is nonprecedential.[51] It could be argued that if a court's publication policy were explicit, and if it prescribed publication in certain critical instances, judges' discretion would be narrowed and the

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48. See Reynolds & Richman, supra note 5, at 1199.

49. See, e.g., Dunn, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L. Rev. 128, 146 n.115 (1977).

50. See the testimony of Charles Haworth in Hearings, vol. 2, supra note 21, at 939. Professor Haworth was asked, "How do you meet the argument that . . . if you permit unpublished opinions, . . . a circuit is really building up a body of law that is not known by the trial lawyers." He answered, "I think we have to trust the judges."

51. See, e.g., Reynolds & Richman, supra note 3, at 606; Shuchman & Gelfand, supra note 3.

bar might have more reason to believe that decisions on publication were being made with care and with uniformity across the court. Although the limited scope of this report precludes testing of this assertion, it is possible to examine the circuits' publication rules and practices to determine how many and what kinds of safeguards the courts have built into their decision-making processes.

A number of questions are addressed in this regard: (1) Is there a presumption against or in favor of publication? (2) Has the court adopted specific criteria by which to evaluate whether a decision should be published? (3) How is the publication decision made? (4) May attorneys request that an unpublished decision be published? (5) What are the publication criteria used by the courts? As in the previous two sections, both the courts' written rules and their unwritten practices are discussed.[52] The discussion is based on tables 9 through 11 (contained in the Appendix).

All the appellate courts have adopted written statements on publication of dispositions. The content of these statements varies across the circuits, but several generalizations can be made. First, most circuits indicate whether the court favors or disfavors publication. Sometimes the court's position is implied

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52. The clerks' responses to the questions regarding unwritten criteria for publication are based on the practices they have heard discussed or observed in use in their courts. It should be recognized that they may not know the unwritten criteria, if any, the judges use when deciding whether to publish an opinion. Thus, there may be discrepancies between the information presented in this report and the courts' actual practices; these discrepancies should not be attributed to the clerks.

rather than explicitly stated, but a presumption in one direction or the other can usually be discerned in the statement. A general presumption against publication is found in only the First and Fourth Circuits, whereas a presumption for publication is found in only the Fifth Circuit. The most common position, taken by seven circuits (the Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh), is that certain types of dispositions (typically, signed opinions) will usually be published while other types (typically, unsigned orders) will not.[53] The rules of the remaining three circuits (the Eighth, D.C., and Federal) suggest neither a presumption for nor a presumption against publication.

The second generalization pertains to the specificity of the courts' publication criteria, which although varying substantially in wording, generally fall into three groups. Those courts in the first group (the First, Third, and Federal Circuits) make only a general statement, to the effect that the court should weigh the precedential value of a disposition before publishing it. Those in the second group (the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits) list specific criteria a decision should meet before being pub-

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53. In these circuits the panel's decision about what kind of disposition to use determines whether that disposition will be published. This can be looked at another way, of course: If the judges want to issue an unpublished decision, they confine themselves to a particular type of disposition. This policy makes some categories of decisions generally available to attorneys and other categories unavailable to them. To the extent that the categories remain stable and are defined in a way the bar accepts, this type of rule may ease some of the concerns attorneys express.

lished.[54] The rules of the two remaining circuits (the Second and Eleventh) state that certain kinds of dispositions are accorded a particular publication status. The Second Circuit's policy, which is found in its rule on dispositions by summary order, states that summary orders are not formal opinions and therefore are unreported. The Eleventh Circuit plan for publication of opinions states that all opinions will be published.[55]

The courts that provide explicit criteria for publication have set up substantially greater controls on judicial discretion than have the circuits that make general statements about publishing only where it is warranted. The strongest safeguard a court could erect, aside from publishing all dispositions, would be to couple a general presumption for publication with a set of specific criteria by which to decide when a case should not be

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54. In contrast to a rule that makes a general statement that the court should weigh the precedential value of a decision before publishing it, a rule that lists explicit criteria for publication provides detailed guidelines by which to make the decision on publication. Among the criteria stated in such rules are the following: (1) The decision establishes or explains a rule of law in the circuit; (2) the decision criticizes existing law; (3) the decision reverses a lower court decision; (4) the decision resolves or creates conflict in the law.

In addition to the specific criteria stated in its rule, the Fourth Circuit has adopted the practice of not publishing decisions in cases disposed of without oral argument unless all the active judges on the court agree that the decision should be published. Note that the criteria mentioned in the discussion that follows apply only to cases that have been orally argued to the court.

55. Although these two circuits specify the types of dispositions that should be published, they are not classified as courts that provide explicit criteria for publication because they do not provide guidelines for deciding when a decision should be issued as an opinion and when it should be issued as a memorandum or order.

published. Only the Fifth Circuit has such a rule. Another rigorous test would be to favor publication of dispositions defined as opinions and then to provide explicit criteria for determining when an opinion should be written. The Seventh, Ninth, and D.C. Circuits have adopted this type of rule.

In addition to the specificity of the criteria for publication, the number of judges required to issue a decision on nonpublication may be of importance to attorneys. From the attorneys' perspective, a unanimous decision by the panel deciding the case might give greater justification for nonpublication than would a majority vote. The rules in most circuits specify one or the other requirement. Three circuits (the Second, Fifth, and Federal) require that a panel be unanimous in its decision not to publish a disposition. In six circuits (the First, Third, Fourth, Sixth, Seventh, and Eighth) a majority of the judges on the panel may designate a case for nonpublication; however, in three of these circuits (the Fourth, Seventh, and Eighth), a single judge may make either his or her decision or the panel's decision available for publication, in effect overruling the panel's decision. The latter practice is permitted in the Tenth and Federal Circuits as well. The rules in the Ninth and D.C. Circuits state only that the judges must agree, specifying neither a majority nor a unanimous decision. The Eleventh Circuit does not describe the way in which the decision on publication is made.

Another type of safeguard courts can adopt is a provision that allows attorneys to request that an unpublished decision be

changed to a published decision. Only five circuits (the Fourth, Fifth, Seventh, Ninth, and Federal) make this provision in their local rules; the remaining circuits, however, have made it known that they permit this practice even though it is not mentioned in their rules.

The existence of explicit criteria for publication does not by itself ensure that the unpublished dispositions will be unimportant. The nature of these criteria must also be considered. Table 11 (in the Appendix) lists several criteria that have been proposed as important and indicates which are included in the existing circuit rules and which are followed in practice.[56]

The first of these seven criteria provides that the appellate decision be published if the decision below has been published. Seven circuits (the Second, Third, Fourth, Fifth, Eleventh, D.C., and Federal) make no statement on this matter in their written policies; however, according to the clerks in the Eleventh and D.C. Circuits, the judges in practice publish a decision when the decision below was published. The remaining six circuits (the First, Sixth, Seventh, Eighth, Ninth, and Tenth) have adopted a written policy regarding publication if the lower court decision was published. The presumption in these courts seems to be in favor of publication in this instance, but several

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56. See Reynolds & Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 807; Reynolds & Richman, supra note 3, at 627. Table 11 does not include a number of criteria that are widely accepted as important, such as whether the decision establishes a new rule of law or alters an existing rule of law or whether the decision is of significant public interest.

have qualified their rules; for example, the Seventh Circuit requires publication of the appellate decision when it reverses the published decision below, and the Eighth Circuit makes appellate publication contingent on rejection of the rationale of the lower court's published decision.

A second consideration is whether the decision reverses the decision below. None of the circuits unequivocally requires publication when the decision is a reversal of a lower court or agency decision. Although five circuits (the First, Fifth, Sixth, Seventh, and Eighth) state in their rules that the appellate decision will be published when it reverses the lower court's decision, each has made the rule conditional, requiring publication only if the lower court's decision has also been published (the First, Seventh, and Eighth), if the panel decides it should be (the Fifth), or if additional criteria are met (the Sixth). The remaining circuits (the Second, Third, Fourth, Ninth, Tenth, Eleventh, D.C., and Federal) make no special provision in their rules for publication of decisions that are reversals. Interviews with the clerks revealed, however, that in the Third, Fourth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits the judges do not necessarily designate these decisions for publication; the practice in the Second Circuit, in contrast, is to publish decisions that reverse the lower court.

A number of commentators have suggested that publication should be automatic when the panel decision on the merits is not unanimous. In fact, only five circuits (the Second, Fifth, Sixth, Ninth, and D.C.) require by rule that decisions accompa-

nied by a concurrence or dissent be published. Five additional circuits (the Third, Fourth, Seventh, Eighth, and Eleventh) in practice publish such decisions, while the remaining courts (the First, Tenth, and Federal) do not necessarily publish split decisions.

Likewise, few circuits (the Fifth, Sixth, and Seventh) require a decision to be published in a case that has been remanded from the Supreme Court. The clerks in four other circuits (the Eighth, Tenth, Eleventh, and Federal) reported that this criterion is followed in practice in their courts, whereas the clerks in the six remaining circuits (the First, Second, Third, Fourth, Ninth, and D.C.) indicated that the judges in these courts do not necessarily publish a decision on a remand from the Supreme Court. Several of the clerks qualified their answer--whether it was yes or no--stating that the publication decision would generally depend on the nature of the remand; thus, if the Supreme Court, for example, returned a case to the appeals court for simple ministerial action as directed by the Court, the appellate decision would almost certainly be left unpublished.

An issue of great concern throughout the debate on publication has been the extent to which unpublished decisions create or hide conflict in intracircuit and intercircuit law. It was Judge Robert Sprecher's concern that such conflict would develop within a court that led him to suggest that appellate judges keep an index of their decisions, a suggestion that provoked dismay among

attorneys about unequal access to an important body of law.[57] Half the circuits (the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C.) speak to this issue in their rules, requiring publication when a decision may resolve or create conflict in the law. The remaining six circuits have not adopted a written policy with regard to this issue, but all are reported to have adopted such a policy in practice.

Many proponents of limited publication have argued that cases involving application of established law should not be published. These cases, they assert, are nonprecedential and contribute little to the development of the law. A number of critics, however, argue that if a case is an application of established law to new facts, precedent is being set and the decision should be published. Only four circuits (the Fifth, Sixth, Eighth, and D.C.) have specified in their rules that a decision should be published in this instance. Three additional circuits (the Second, Tenth, and Eleventh) reportedly have adopted the practice of publishing decisions that apply established law to new facts, whereas four others (the Fourth, Seventh, Ninth, and Federal) do not necessarily publish these decisions. The practices of the First and Third Circuits are not known.

A final possibility is a provision allowing publication of only that part of a decision that meets the criteria for publication. This practice has the virtue of making the important part of the decision public while retaining the savings that can be

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57. Hearings, vol. 1, supra note 21, at 537.

realized from limited publication. Three circuits (the First, Tenth, and D.C.) have adopted written rules allowing this form of publication, and two circuits (the Fifth and Ninth) have adopted it in practice.

The summary of the circuits' publication rules presented in table 9 (in the Appendix) gives a clear picture of their use of these various criteria for publication. Five of the seven recommended criteria have been adopted either by rule or in practice in a majority of the courts. Eight circuits publish a decision when the decision below was published; ten publish a decision when it is accompanied by a concurrence or dissent; seven publish a decision when the case has been remanded from the Supreme Court; all publish a decision that resolves or creates conflict in the law; and seven publish a decision that applies established law to new facts. When a decision reverses the lower court's decision, however, more than half the circuits do not necessarily publish it. Finally, fewer than half the circuits have adopted the practice of publishing only the portion of a decision that is considered precedential.

For many courts the written rules do not reflect the actual standards used by the court. From the rules, for example, one cannot determine the criteria used by the Second, Third, and Eleventh Circuits, yet in practice these courts have adopted many of the safeguards urged by critics of limited publication. The Fifth and Sixth Circuits, on the other hand, have incorporated into their rules and follow in practice most of the seven recommended criteria. Table 9 indicates that even among the courts

that have adopted a publication rule listing explicit criteria, many of the suggested safeguards may be missing from the rule. It is also clear from the table, however, that many of these safeguards are observed in practice.

V. Rates of Nonpublication

This section presents data on the number, percentage, and types of dispositions that are not published. The purpose in presenting these data, however, is not to evaluate the impact of the circuits' publication rules and practices on publication rates; not only is that task outside the scope of this study, but a direct relationship between policy and publication rates would in any case be difficult to demonstrate.[58] Given the complexity of judicial decision making, as well as conditions unique to each circuit, the tables that follow are provided only to show the trends in the publication rates over the past several years and to support a brief discussion of the implications of the rates of nonpublication for the question of access.

Table 2 shows the overall percentage of unpublished dispositions for the statistical years (SY) 1981 through 1984; table 3 shows the number of cases in which the decision was to reverse,

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58. The decision whether to publish a disposition rests on many factors, and the judges making the decision must weigh a number of potential outcomes--both positive and negative--for themselves, the attorneys and litigants in the case, and the appellate process in general. Publication rates may also be affected by local conditions and habits, such as a high proportion of cases decided without argument or a high number of prisoner petition filings.

vacate, or deny the lower court or agency decision and the percentage of such decisions that were not published; and table 4 shows the number of cases in which either a concurring or a dissenting opinion was written and the percentage of these decisions that were not published.[59] The last two tables are included here because critics of limited publication have suggested that, at the very least, the two types of decisions presented in tables 3 and 4--which indicate that the judges disagree about the outcome of a case--ought to be published.

Table 2 shows that the nonpublication rate varies substantially across the circuits; in SY 1984, for example, the rate ranged from 17 percent in the Eighth Circuit to 77.1 percent in the Third Circuit. Only the First, Fifth, Eighth, and D.C. Circuits have generally published more than 50 percent of their decisions over the past four years. Six circuits (the Second, Third, Fourth, Sixth, Ninth, and Eleventh) have designated for nonpublication nearly 60 percent or more of their decisions. Trends from year to year within each circuit are not readily

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59. The data presented in the tables were extracted from data provided by the Administrative Office of the United States Courts (AO). A statistical year runs from July 1 through June 30. Only cases disposed of by oral argument or after submission without hearing are included in the tables. Original proceedings are not included, but the lead cases of consolidated or joined cases are.

The Eleventh Circuit first began to report separate data on October 1, 1981 (the middle of SY 1982). The Statistical Reports and Analysis Division (SARD) of the AO reports that because of the way the Fifth and Eleventh Circuits coded their data in SY 1981-82, SARD was able to allot cases to the correct circuit and that the SY 1982 data it provided are therefore an accurate reflection of the Eleventh Circuit's caseload for the entire statistical year. Data were not available for the Federal Circuit.

TABLE 2

UNPUBLISHED DISPOSITIONS AS A PERCENTAGE OF ALL CASES DISPOSED OF BY ORAL ARGUMENT OR AFTER SUBMISSION WITHOUT HEARING

Circuit	1981	1982	1983	1984
1st	41.5	44.0	39.0	39.8
2nd	65.2	64.8	62.7	58.7
3rd	68.8	72.0	71.6	77.1
4th	61.7	55.9	54.7	62.0
5th	46.0	45.6	47.6	52.6
6th	71.8	68.8	70.5	67.9
7th	62.7	52.7	43.3	49.3
8th	16.6	25.6	22.2	17.0
9th	59.5	63.5	63.3	63.6
10th	46.6	58.3	56.3	54.0
11th	--	45.6	54.8	59.1
D.C.	45.7	52.6	44.5	33.0
Average	48.8	54.1	52.5	52.8

NOTE: See note 59 in the text for a definition of the cases included in the table.

apparent. Only in the Second Circuit has there been a clear decrease in the percentage of dispositions that are not published, whereas in the Fourth and Seventh Circuits the trend appears to have been downward, but jumped up significantly in SY 1984. By contrast, in the Third, Fifth, and Eleventh Circuits the trend has been toward an increase in the percentage of unpublished dispositions. The Eighth, Tenth, and D.C. Circuits exhibit a third pattern in nonpublication rates: a sharp increase between SY 1981 and SY 1982 in the proportion of unpublished dispositions and then a noticeable downward trend since SY 1982.

It is clear from table 2 and the earlier discussion of the circuits' distribution practices that in some circuits a sizable proportion of appellate decisions are generally unavailable to the district bench and the bar. For example, four of the six circuits with above-average rates of nonpublication in SY 1984 (the Second, Third, Ninth, and Eleventh) do not distribute the unpublished decisions to district judges or attorneys (although the Third, Ninth, and Eleventh Circuits do provide a complete list of these dispositions to West Publishing Company for inclusion in the Federal Reporter). By contrast, both the Fourth and the Sixth Circuits, also with above-average rates of nonpublication in SY 1984, distribute unpublished decisions to all judges and provide a subscription service for the bar.

The data in table 3 show substantial diversity among the circuits in the nonpublication rate for decisions that reverse, vacate, or deny a lower court or agency decision; in SY 1984, this rate ranged from 6.3 percent in the Eighth Circuit to 41.9

TABLE 3

TOTAL NUMBER OF DECISIONS TO REVERSE, VACATE, OR DENY AND PERCENTAGE OF TOTAL UNPUBLISHED

Circuit	1981		1982		1983		1984	
	No.	%	No.	%	No.	%	No.	%
1st	30	6.7	7	0.0	77	26.0	101	25.7
2nd	165	15.2	129	16.3	154	9.7	194	7.7
3rd	170	23.5	135	11.9	162	22.2	176	27.3
4th	129	24.0	153	25.5	136	25.0	195	37.9
5th	558	17.4	284	20.8	288	22.2	322	25.5
6th	206	44.7	215	49.3	247	46.2	260	41.9
7th	175	38.3	179	29.1	154	14.9	149	24.2
8th	122	9.0	134	6.0	109	5.5	144	6.3
9th	379	34.6	343	38.5	362	35.6	337	38.0
10th	101	22.8	152	17.1	97	26.8	148	21.6
11th	--	--	206	18.9	234	19.7	207	29.5
D.C.	105	17.1	89	13.5	62	4.8	84	10.7
Average		21.1		20.6		21.6		24.7

NOTE: See note 59 in the text for a definition of the cases included in the table.

percent in the Sixth Circuit. The Sixth Circuit stands out because it has consistently designated for nonpublication nearly half the decisions that reverse, vacate, or deny a lower court or agency decision. The Fourth and Ninth Circuits have also generally left an above-average proportion of these decisions unpublished. Although trends are difficult to discern, in several circuits there seems to have been an increase in the proportion of these decisions that were not published; in the First, Fourth, and Eleventh Circuits there have been recent sharp increases, whereas in the Fifth Circuit the increase has been more gradual. In contrast, the trend has been downward in the Second and Eighth Circuits; the trend appears to have been downward in the Seventh and D.C. Circuits as well, except for recent sharp increases in these circuits in SY 1984 in the nonpublication rates for decisions that reverse, vacate, or deny a lower court or agency decision.

The data in table 4 indicate that the appellate courts usually publish the disposition in cases in which the panel decision includes a concurring or dissenting decision. The percentage of these decisions left unpublished has varied greatly, however, and in SY 1984 ranged from 0 in the Second, Eighth, and Eleventh Circuits to 52.4 in the Ninth Circuit.[60] The Third, Fourth, Sixth, and Ninth Circuits have consistently designated for nonpublica-

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60. The figures for the Ninth Circuit in SY 1983 and SY 1984 are so out of line with those for the previous years for that circuit and with the figures for the other courts in SY 1983 and SY 1984 that they should be viewed with caution. Whether the figures accurately reflect the court's practice or whether they are due to a problem such as coding error is unknown.

TABLE 4

TOTAL NUMBER OF CASES IN WHICH CONCURRING AND/OR DISSENTING OPINIONS WERE WRITTEN AND PERCENTAGE OF TOTAL UNPUBLISHED

Circuit	1981		1982		1983		1984	
	No.	%	No.	%	No.	%	No.	%
1st	12	8.3	9	0.0	11	0.0	13	7.7
2nd	70	1.4	65	0.0	64	0.0	76	0.0
3rd	49	10.2	76	15.8	55	9.1	60	15.0
4th	50	12.0	73	15.1	53	17.0	43	16.3
5th	96	2.1	51	3.0	83	4.8	65	4.6
6th	42	21.4	82	23.2	91	22.0	116	19.0
7th	61	14.8	84	17.9	86	4.7	97	7.2
8th	41	0.0	53	1.9	55	0.0	68	0.0
9th	78	17.9	82	22.0	193	50.3	294	52.4
10th	63	1.6	30	10.0	46	8.7	53	11.3
11th	--	--	46	2.2	58	1.7	60	0.0
D.C.	62	7.4	62	8.1	54	5.6	49	2.0
Average		8.0		10.0		10.3		11.3

NOTE: See note 59 in the text for a definition of the cases included in the table.

tion an above-average proportion of these dispositions, whereas the Second, Eighth, and Eleventh Circuits have published virtually all of them. As with tables 2 and 3, it is difficult to find a trend in the figures in table 4. The Ninth Circuit stands out because of the recent sharp increase in the number of split decisions in that court and in the proportion of those decisions the court has designated for nonpublication (again, the figures for this court should be interpreted with caution), whereas the Seventh Circuit stands out because of the substantial drop in SY 1983 in the proportion of split decisions that were not published. The proportion of unpublished decisions accompanied by a concurring or dissenting decision appears to be increasing in the Fourth and Fifth Circuits, whereas it appears to be decreasing in the Sixth and D.C. Circuits.

Generally, the appellate courts are more likely to designate for nonpublication a decision that reverses, vacates, or denies a lower court or agency decision (SY 1984 average = 24.7% unpublished) than a decision that includes a concurrence or dissent (SY 1984 average = 11.3% unpublished). In either instance, however, some courts leave a substantial proportion of these decisions unpublished and generally unavailable to the bench and bar. For example, with regard to decisions that reverse, vacate, or deny a lower court or agency decision, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits leave a quarter or more of these decisions unpublished and also do not distribute them to district judges or attorneys. Notably, the Fourth and Sixth Circuits, which have among the highest nonpublication rates for this

type of decision, routinely make all unpublished decisions available to both bench and bar. The Fourth and Sixth Circuits also have the highest nonpublication rates for split decisions (excluding the Ninth Circuit), but, again, make them generally available. By contrast, the Third, Ninth, and Tenth Circuits, which also leave a substantial proportion of these decisions unpublished, do not distribute them to district judges and attorneys.

One can ask what the impact on the courts would be if, as the critics of limited publication propose, the courts published all decisions including either a concurrence or a dissent, as well as all decisions that reverse, vacate, or deny a lower court or agency decision. In view of the trends in recent years, in most appellate courts publication of all decisions in which a panel member writes a concurring or dissenting opinion would not substantially increase the number of decisions that are published. However, publication of decisions that reverse, vacate, or deny a lower court or agency decision would significantly increase, in many circuits, the number of cases published. Nine courts designated at least 20 percent of the latter type of decision for nonpublication in SY 1984; in some circuits--for example, the Sixth and Ninth--publication of all such decisions would have meant more than one hundred additional published decisions in SY 1984.

VI. Conclusion

Recognizing that not all appellate decisions need to be published and threatened by ever-increasing caseloads, a rising tide of paper, and mounting costs in both time and dollars, the federal courts of appeals have adopted policies limiting publication. Having accepted such policies, however, the courts have faced another problem: equitable access to unpublished material. Convinced that some members of the bar, and possibly the bench, would be able to obtain the unpublished decisions and then use them to the disadvantage of those who could not find the material, most courts have also adopted policies prohibiting citation of unpublished dispositions. These policies have, in turn, provoked protests that no-citation rules do not restrict use, but only promote unacknowledged use.

In fact, any combination of restrictions or freedoms with regard to distribution and citation leads to problems for either the courts or the bar. If both distribution and citation are restricted, unpublished decisions may be used without acknowledgment. If distribution is restricted while citation is permitted, those who have the resources to find the unpublished decisions have an unfair advantage. Yet, if distribution is freely made while citation is restricted, the problem of unacknowledged use again arises. Finally, if both distribution and citation are unrestricted, free and fair access and use are ensured, but the savings in resources are lost. The issues in the publication debate are complex and the choices before the courts are difficult.

Appendix: Tables 5 to 11 (Summary Tables of Circuit Rules and Practices)

TABLE 5

SUMMARY OF DISTRIBUTION AND CITATION
RULES AND PRACTICES

CIRCUIT	STATEMENT ON DISTRIBUTION?	DO ALL DISTRICT JUDGES RECEIVE UNPUBLISHED DECISIONS?	DO ALL APPELLATE JUDGES RECEIVE UNPUBLISHED DECISIONS?	LISTED IN FEDERAL REPORTER?	LIST INCLUDE ALL UNPUBLISHED DECISIONS?	STATEMENT ON CITATION?	NATURE OF STATEMENT	DOES THE STATEMENT ADDRESS JUDGES?	DOES THE STATEMENT ADDRESS ATTORNEYS?	ATTACH DISPOSITION TO BRIEF OR SERVE ON COUNSEL?	DO JUDGES CITE UNPUBLISHED DECISIONS?	DO ATTORNEYS CITE UNPUBLISHED DECISIONS?	CIRCUIT
1st	No	No	No	Yes	No	Yes (rule, plan)	Related cases only	No	No	No	No	No	1st
2nd[1]	No	No	No	Yes	No	Yes (rule)	Related cases only	No	No	No	No	No	2nd
3rd	Limited[2] (IOP)	No	No	Yes	Yes	No	Anything may be cited	N/A	N/A	No	No	Yes	3rd
4th	Yes (IOP)	Yes[3]	Yes[3]	Yes	No	Yes (IOP)	Res, etc.[4] No better precedent	Yes	Yes	Yes	No	Infre-quently	4th
5th	Limited (IOP)	No	No	Yes	Yes	Yes (rule)	Res, etc. Related facts	No	Yes, by impli-cation	Yes	No	Infre-quently	5th
6th	No	No	No	Yes	Yes	Yes (rule)	No better precedent	No	Yes	Yes	No	Infre-quently	6th
7th	Yes (rule)	No	Yes	Yes	No	Yes (rule)	Res, etc.	Yes	No	Yes	No	No	7th
8th	No	Yes	Yes	Yes	Yes	Yes (plan, rule)	Related cases	No	Yes	No	No	No	8th
9th	Limited (rule, IOP)	No[5]	Yes	Yes	Yes	Yes (rule)	Res, etc.	Yes	Yes	No	No	No	9th

(continued)

TABLE 5 (Continued)

CIRCUIT	STATEMENT ON DISTRIBUTION?	DO ALL DISTRICT JUDGES RECEIVE UNPUBLISHED DECISIONS?	DO ALL APPELLATE JUDGES RECEIVE UNPUBLISHED DECISIONS?	LISTED IN FEDERAL REPORTER?	LIST INCLUDE ALL UNPUBLISHED DECISIONS?	STATEMENT ON CITATION?	NATURE OF STATEMENT	DOES THE STATEMENT ADDRESS JUDGES?	DOES THE STATEMENT ADDRESS ATTORNEYS?	ATTACH DISPOSITION TO BRIEF OR SERVE ON COUNSEL?	DO JUDGES CITE UNPUBLISHED DECISIONS?	DO ATTORNEYS CITE UNPUBLISHED DECISIONS?	CIRCUIT
10th	Limited (rule)	No[6]	No[6]	No	N/A	Yes (rule)	If relevant	No	Yes	Yes	Seldom	Often	10th
11th	Limited (plan, IOP)	No	Yes[7]	Yes	No	No	No better precedent	N/A	N/A	No[8]	Rarely	Rarely	11th
D.C.[9]	Limited (plan)	No	Yes	Yes	No	Yes (plan, rule)	Res, etc.	Yes	Yes	No[8]	No	No	D.C.
Fed.	Limited (rule)	No	Yes	Yes	No	Yes (rule)	Res, etc.	Yes	Yes	No	No	No	Fed.

NOTE: This table is a summary of the more detailed information given in tables 6-8. The column headings are more fully explained in those tables. N/A = not applicable; IOP = internal operating procedures; plan = plan for publication of opinions.

1. A committee in the Second Circuit is reviewing the court's publication policies.

2. In all instances, "limited" means the plan, rule, or internal operating procedures mention a few recipients of the disposition--mainly parties and publishers--but do not give the detail the clerks provided in interviews.

3. The circuit's internal operating procedures specify that only the trial court and the parties are to receive the text of the unpublished disposition; in fact, these dispositions are routinely sent to all judges (including bankruptcy judges and magistrates) in the circuit.

4. In all instances, "Res, etc." means the unpublished disposition may be cited to support a claim of res judicata or collateral estoppel, or the law of the case.

5. The Ninth Circuit does not routinely send unpublished material to the district judges in the circuit, but these decisions are sent to chief district judges if they request them.

6. Before the Tenth Circuit changed its policy in December 1983 and stopped using decisions marked "Not for Routine Publication," the appellate and district judges in the circuit received all unpublished decisions.

7. The Eleventh Circuit's practice is to send all appellate judges the unpublished decisions, but about half the judges have asked not to receive them.

8. The clerk reports that in practice attorneys do attach the text of the unpublished disposition they are citing, although the rules do not require this practice.

9. A committee in the D.C. Circuit is reviewing the court's publication policies.

TABLE 6

DISTRIBUTION RULES AND PRACTICES

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
1st	No	In practice: Appellate judges District judges Parties Subscribers Bankruptcy judges Magistrates District clerks Appellate clerks U.S. attorneys Public defender Publishers	In practice: Parties Panel District judge or agency of case District case file List to West for Fed. Reporter	List includes only those that are decided on the merits; those dismissed for lack of prosecution and so forth are not included
2nd[3]	No	In practice: Appellate judges District judges Parties Bankruptcy judges Magistrates District clerks Appellate clerks U.S attorneys Public defender Subscribers Publishers	In practice: Parties District judge or agency of case Panel District case file List to West for Fed. Reporter	List includes only those decided on the merits
3rd	Yes (IOP ch. 5, §§ F.1 & F.4)	By rule: Publishers (IOP ch. 5, § F.1) In practice: Parties District judges Appellate judges District clerks Magistrates Bankruptcy judges U.S. attorneys Appellate clerks Subscribers Publishers	By rule: List to publishers (IOP ch. 5, § F.4) In practice: Parties Panel District judge or agency of case District case file List to publishers	List includes all unpublished cases: judgment orders, unpublished per curiam opinions, and unpublished signed opinions (IOP ch. 5, § F.4)

(continued)

TABLE 6 (Continued)

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
4th	Yes (IOP 36.4)	In practice: Parties District judges Appellate judges Bankruptcy judges Magistrates Subscribers[4] Publishers Appellate clerks Public defender U.S. attorneys District clerks	By rule: Unpublished opinions sent only to district judge or agency of origin and to parties; available in clerk's office; list published in Fed. Reporter (IOP 36.4) In practice: Parties District judges Appellate judges Bankruptcy judges Magistrates District case file Subscribers[4] Public defender U.S. attorneys District clerks Appellate clerks Publishers	List includes unpublished signed and unsigned opinions; does not include orders
5th	Yes (IOP, p. 126)	By rule: Press Attorneys (IOP, p. 126) In practice: Parties Appellate judges District judges Bankruptcy judges Magistrates U.S. attorneys Public defender Subscribers Appellate libraries Publishers	By rule: All unpublished dispositions are listed in the Fed. Reporter (IOP, p. 126) In practice: Parties District judge or agency of case Panel Court library District case file List to West for Fed. Reporter	By rule: "All non-published opinions" (IOP, p. 126) In practice: All unpublished dispositions[5]

(continued)

TABLE 6 (Continued)

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
6th	No	In practice: Parties District judge or agency of case Appellate judges Appellate libraries Subscribers, including all district and bankruptcy judges, magistrates, state and fed. offices, and private parties District clerk, U.S. attorney, and public defender of the case Publishers	In practice: Parties District judge or agency of case Panel District case file List to publishers Subscribers (many fewer than for published dispositions; district judges usually are not on this list)[6]	List includes all unpublished dispositions; full text on LEXIS
7th	Yes (rule 35.b)	By rule: All judges in circuit Publishers Subscribers U.S. attorneys Press (rule 35.b.1.ii) In practice: Parties Appellate judges District judges Bankruptcy judges Magistrates Subscribers U.S. attorneys Public defender District clerks Appellate clerks Publishers	By rule and in practice: Parties Appellate judges District judge or agency of case Press (rule 35.b.2.ii) List to West for Fed. Reporter (rule 35.b.2.iii) District case file	List includes all unpublished cases decided on the merits

(continued)

TABLE 6 (Continued)

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
8th	No	In practice: Parties District judges Appellate judges Bankruptcy judges Magistrates Subscribers District clerks U.S. attorneys Press Publishers	In practice: Parties District judges Appellate judges District case file List to West for Fed. Reporter	List includes all unpublished dispositions
9th	Yes (rule 21.f; IOP I.3)	By rule: Parties District judge of case Public Subscribers (IOP I.3) In practice: Parties District judges Appellate judges Bankruptcy judges Magistrates District clerks Appellate clerks Public defender Subscribers Publishers	By rule: A list of all cases decided by written unpublished disposition is sent to publishers (rule 21.f) Trial judge Parties (IOP I.3) In practice: Parties Appellate judges District judge or agency of case Chief district judges, if they request them[7] District case file Subscribers List to West for Fed. Reporter	List includes all unpublished dispositions

(continued)

TABLE 6 (Continued)

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
10th	Yes (rule 17.c)	In practice: Parties District judges Appellate judges Bankruptcy judges Magistrates District clerks U.S. attorneys Public defender Subscribers Appellate libraries Publishers	By rule: Index of unpublished opinions, from Aug. 1972 through Dec. 1983, available at designated law libraries in the circuit and by subscription (rule 17.c) (The index contained the decisions marked "not for routine publication." When the court suspended use of this type of decision, it also stopped compiling the index. The court continues to issue unpublished orders and judgments, which are sent to the parties, the panel, and the district judge or agency of the case, but not to West.)	Not applicable (no list is sent)
11th	Yes (plan, pt. III; IOP V.B)	By rule: Press Parties (IOP V.B.4) In practice: Parties District judges Appellate judges Magistrates U.S. attorneys Public defender Subscribers Appellate libraries Press Publishers	By rule: Judgments and orders are published by list in Fed. Reporter (plan, pt. III; IOP V.B.3) In practice: Parties District judge or agency of case[8] Appellate judges District case file List to West for Fed. Reporter Press	List includes "all non-published opinions and affirmances without opinion" (IOP V.B.3)

(continued)

TABLE 6 (Continued)

Circuit	Is There a Statement on Distribution?[1]	Who Receives the Published Dispositions?	Who Receives the Unpublished Dispositions?	Are All Unpublished Dispositions Listed in Fed. Reporter?[2]
D.C.[9]	Yes (plan, p. 2)	By rule: Publishers Subscribers (plan, p. 2) In practice: Parties District judge or agency of case Appellate judges District clerks (sufficient number of copies for district and bankruptcy judges and magistrates) Appellate libraries Subscribers Publishers	By rule: "Identifying elements" of judgments and orders sent to publishers (plan, p. 2) In practice: Parties District judge or agency of case Appellate judges List kept at court for use by press List to West for Fed. Reporter	List includes all decisions on the merits; does not include orders (which give no explanation for the decision)
Fed.	Rule 18.a: "All decisions, and opinions accompanying decisions, of this court shall be provided to the parties, shall be public records of the court, and shall be accessible to the public." This rule does not distinguish between published and unpublished dispositions	By rule: Parties Subscribers (Proc. Handbook, § 25.b) In practice: Parties District judge or agency of case Appellate judges Subscribers All publications on patents	By rule: List sent to West and Bureau of National Affairs (Proc. Handbook, § 23) In practice: Parties District judge or agency of case Appellate judges District case file Copy for public available at court List to publishers	By rule: List includes all unpublished opinions (Proc. Handbook, § 23.b) In practice: List does not include orders

NOTE: Where sources are not cited, the information was obtained in an interview. IOP = internal operating procedures; plan = plan for publication of opinions. Unless otherwise indicated, the judges, magistrates, district clerks, U.S. attorneys, and public defenders referred to in the table are those within the circuit.

1. The content of the statement on distribution is given in one or both of the next two columns.

2. The full question here is, Are all unpublished dispositions included in the list that is sent to West for the Federal Reporter?

(continued)

TABLE 6 (Continued)

3. A committee in the Second Circuit is reviewing the court's publication policies.

4. Subscribers may ask for only the published decisions, only the unpublished decisions, or both. Most ask for either only the published or both, rarely for only the unpublished. Typically, subscribers are attorneys.

5. Those that are an affirmance or enforcement of a decision below are marked by a symbol, so attorneys can track the case.

6. The court is working on a distribution statement to be included in the internal operating procedures. When adopted, the IOP will limit the subscription list for unpublished decisions to publishers only.

7. On Jan. 1, 1985, the court ceased its wide distribution of unpublished dispositions, which had included subscribers, district judges, and the U.S. attorney, and began the limited distribution described in the table.

8. The court's practice is to send all the appellate judges the unpublished decisions, but about half the judges have asked not to receive them.

9. A committee in the D.C. Circuit is reviewing the court's publication policies.

TABLE 7

CITATION RULES AND PRACTICES: PART 1

Circuit	Is there a Statement on Citation?	Nature of the Statement	Statement Addressed to Court?	Statement Addressed to Attorneys?
1st	Rule 14	Unpublished opinions and memoranda of this and other courts "are never to be cited in unrelated cases" (rule 14).	No	No
	Plan, b.6	"Only published opinions may be cited" (plan, b.6).		
2nd	Rule 0.23	The oral dispositions and summary orders "shall not be cited or otherwise used in unrelated cases" (rule 0.23).	No	No
3rd	No	No formal statement. In practice anything, published or unpublished, may be cited.	N/A	N/A
4th	IOP 36.5	The court will not cite unpublished dispositions unless there are unusual circumstances. Citation of unpublished dispositions by attorneys "is disfavored" except for res judicata, for collateral estoppel, for the law of the case, or if no better precedent is available (IOP 36.5).	Yes (IOP 36.5)	Yes (IOP 36.5)
5th	Rule 47.5.3	An unpublished opinion should be cited only for res judicata, for collateral estoppel, to establish the law of the case, or if the case involves related facts (rule 47.5.3).	No	By mention of briefs, it includes attorneys (rule 47.5.3)

(continued)

TABLE 7 (Continued)

Circuit	Is There a Statement on Citation?	Nature of the Statement	Statement Addressed to Court?	Statement Addressed to Attorneys?
6th	Rule 24.b	Citation of unpublished decisions by counsel "is disfavored" except for res judicata, estoppel, or the law of the case. Counsel may cite an unpublished disposition if it "has precedential value and there is no published opinion that would serve as well" (rule 24.b).	No	Yes (rule 24.b)
7th	Rule 35.b.2.iv	Unpublished orders shall not be cited except for res judicata, collateral estoppel, or the law of the case (rule 35.b.2.iv).	Yes. Not to be cited by any court in the circuit (rule 35.b.2.iv)	No
8th	Rule 8.i Plan	No party may cite opinion not intended for publication by any court "except when the cases are related" (rule 8.i; plan, ¶ 3).	No	Yes (rule 8.1)
9th	Rule 21.c	Unpublished dispositions shall not be cited except for res judicata, collateral estoppel, or the law of the case (rule 21.c).	Not to be cited by the court (rule 21.c)	Not to be cited to the court (rule 21.c)
10th	Rule 17.c	"Unpublished opinions, although unreported, can nevertheless be cited, if relevant, in proceedings before this or any other court" (rule 17.c).	No	Counsel mentioned in the rule (rule 7.c)
11th	No	No formal statement. In practice unpublished dispositions may be cited if there is no published opinion to set the precedent.	N/A	N/A

TABLE 7 (Continued)

Circuit	Is There a Statement on Citation?	Nature of the Statement	Statement Addressed to Court?	Statement Addressed to Attorneys?
D.C.	Rule 8.f Plan, p. 2	Unpublished orders are not to be cited in briefs or memoranda of counsel as precedent; they may be cited for res judicata, collateral estoppel, or the law of the case (rule 8.f; plan, p. 2). Orders, judgments, and memoranda may not be cited as precedent, even when published (plan, p. 1). In practice, attorneys may ask for special leave to cite an unpublished disposition.	Yes (plan, p.2)	Yes (rule 8.c; plan, p. 2)
Fed.	Rule 18.a	"Opinions designated as unpublished shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case" (rule 18.a).	Yes (rule 18.a)	Yes (rule 18.a)

NOTE: Where sources are not cited, the information was obtained in an interview. Additional citation rules and practices are given in table 8. N/A = not applicable; IOP = internal operating procedure; plan = plan for publication of opinions.

TABLE 8

CITATION RULES AND PRACTICES: PART 2

Circuit	May Not Cite to Which Courts?	Attach to Brief or Serve on Opponent?[1]	Do Judges Cite?[2]	Do Attorneys Cite?[2]	Why Has the Court Adopted This Citation Policy?[3]
1st	No statement	No	No	No	Unpublished dispositions are not to be cited because they "fail to disclose fully the rationale of the court's decision" and are not uniformly available (rule 14).
2nd	This court or any other court (rule 0.23)	No	No	No	Citation is not allowed because unpublished dispositions serve no jurisprudential purpose and because they are not formal court opinions, are not reported, and are not uniformly available (rule 0.23).
3rd	N/A	No	No	Yes	N/A
4th	This court and district courts in the circuit (IOP 36.5)	Serve on counsel by attaching to brief (IOP 36.5)	Whether district judges should cite has been discussed at conferences. There is general fidelity to the no-citation policy.	Very infrequently. The court questions them closely on their use of unpublished dispositions.	No rationale given

(continued)

TABLE 8 (Continued)

Circuit	May Not Cite to Which Courts?	Attach to Brief or Serve on Opponent?[1]	Do Judges Cite?[2]	Do Attorneys Cite?[2]	Why Has the Court Adopted This Citation Policy?[3]
5th	No statement	Attach to brief (rule 47.5.3)	No	If attorneys can find the unpublished dispositions, they are allowed to cite them, despite what the rule states. In general, however, they obey the rule.	No rationale given
6th	This court and district courts in the circuit (rule 24.b)	Serve on counsel by attaching to brief (rule 24.b)	No	Infrequently	No rationale given
7th	The courts in this circuit (rule 35.b. 2.2.iv)	Attach to brief (rule 9.d)	No	No	No rationale given
8th	The courts in this circuit (plan, ¶ 3)	No	No, "as a matter of policy"	No. Court requires an attorney to file a motion to justify citation of unpublished dispositions.	Unpublished opinions are not to be cited, "since they are unreported and not uniformly available to all parties" (plan, ¶ 3).
9th	The courts in this circuit (rule 21.c)	No	No	No	An unpublished disposition shall not be cited, because it is not regarded as precedent (rule 21.c).
10th	N/A	Serve on counsel (rule 17.c)	Seldom	Often	No rationale given
11th	No statement	No, but in practice they attach a copy to the brief.	Rarely	Rarely	N/A

(continued)

TABLE 8 (Continued)

Circuit	May Not Cite to Which Courts?	Attach to Brief or Serve on Opponent?[1]	Do Judges Cite?[2]	Do Attorneys Cite?[2]	Why Has The Court Adopted This Citation Policy?[3]
D.C.	The courts in this circuit (plan, p. 2)	No, but in practice they attach a copy to the brief.	No	No	Orders and memoranda may not be cited as precedent because these forms of disposition are used only for "a mere application of one or more settled rules" (plan, p. 2).
Fed.	No statement	No	Rule is generally observed	Rule is generally observed	No rationale given

NOTE: Where no sources are cited, the information was obtained in an interview. This table is a continuation of the citation policies reported in table 7. N/A = not applicable; IOP = internal operating procedures; plan = plan for publication of opinions.

1. The full question here is, Do the rules require attorneys to attach to their brief a copy of the unpublished disposition they are citing or in some other way serve a copy on the opposing party?

2. The full question here is, Do judges or attorneys cite the unpublished disposition? (The answers are the impressions of the interviewees.)

3. Only the court's written policy is reported here. A complete statement of court policy would have required interviews with the circuit judges, a task that was beyond the scope of this project.

TABLE 9

SUMMARY OF PUBLICATION RULES AND PRACTICES

CIRCUIT	STATEMENT ON PUBLICATION?	PRESUMPTION FOR OR AGAINST?	NATURE OF STATEMENT	WHO MAKES PUBLICATION DECISION?	PROVISION TO CHANGE PUBLICATION STATUS?	PUBLISH IF PUBLISHED BELOW?	PUBLISH IF REVERSAL?	PUBLISH IF SPLIT DECISION?	PUBLISH IF REMAND FROM SUPREME COURT?	PUBLISH IF CREATES OR RESOLVES CONFLICT IN LAW?	PUBLISH IF ESTABLISHED LAW IS APPLIED TO NEW FACTS?	PARTIAL PUBLICATION?	CIRCUIT
1st	Yes	Against (plan)	General	Majority	Yes*	Yes	Yes[1]	No	No	Yes*	D/K	Yes	1st
2nd[2]	Yes (rule)	Both[3]	General	Unanimous	Yes*	No	Yes*	Yes	No	Yes*	Yes*	No	2nd
3rd	Yes (IOP)	Both	General	Majority	Yes*	No	No	Yes*	No	Yes*	D/K	No	3rd
4th[4]	Yes (IOP)	Against	Explicit criteria	Author or majority[5]	Yes	No	No	Yes*	No	Yes	No	No	4th
5th	Yes (rule)	For	Explicit criteria	Unanimous	Yes	No	Yes	Yes[6]	Yes	Yes	Yes	Yes*	5th
6th	Yes (rule)	Both	Explicit criteria	Majority	Yes*	Yes[7]	Yes	Yes[6]	Yes	Yes	Yes	No	6th
7th	Yes (rule)	Both	Explicit criteria	Majority[5]	Yes	Yes[8]	Yes[1]	Yes*	Yes	Yes	No	No	7th
8th	Yes (plan)	Neither	Explicit criteria	Majority[5]	Yes*	Yes[9]	Yes[1]	Yes*	Yes*	Yes	Yes	No	8th
9th	Yes (rule, order)	Both	Explicit criteria	Judges agree	Yes	Yes[10]	No	Yes[6]	No	Yes*	No	Yes*	9th

(continued)

TABLE 9 (Continued)

CIRCUIT	STATEMENT ON PUBLICATION?	PRESUMPTION FOR OR AGAINST?	NATURE OF STATEMENT	WHO MAKES PUBLICATION DECISION?	PROVISION TO CHANGE PUBLICATION STATUS?	PUBLISH IF PUBLISHED BELOW?	PUBLISH IF REVERSAL?	PUBLISH IF SPLIT DECISION?	PUBLISH IF REMAND FROM SUPREME COURT?	PUBLISH IF CREATES OR RESOLVES CONFLICT IN LAW?	PUBLISH IF ESTABLISHED LAW IS APPLIED TO NEW FACTS?	PARTIAL PUBLICATION?	CIRCUIT
10th	Yes (rule)	Both	Explicit criteria	Panel decides[5]	Yes*	Yes	No	No	Yes*	Yes	Yes*	Yes	10th
11th	Yes (plan)	Both	Only opinions published	Not stated	Yes*	Yes*	No	Yes*	Yes*	Yes*	Yes*	No	11th
D.C.[11]	Yes (plan)	Neither	Explicit criteria	Panel decides	Yes*	Yes*	No	Yes[6]	No	Yes	Yes	Yes	D.C.
Fed.	Yes (rule)	Neither	General	Unanimous[5]	Yes	No	No	No	Yes*	Yes*	No	No	Fed.

NOTE: This table is a summary of the more detailed information given in tables 10 and 11. The column headings are more fully explained in those tables. An asterisk next to a "yes" response indicates that the criterion is used in practice even though the court's local rule does not specify the practice. A "no" response indicates that the court's rule does not specify the standard and that the judges do not necessarily follow it in practice. D/K = don't know, i.e., the respondent did not know the judges' practice; IOP = internal operating procedures; plan = plan for publication of opinions.

1. The decision reversing the lower court's decision is published if the lower court's decision was published.

2. A committee in the Second Circuit is reviewing the court's publication policies.

3. In all instances, "both" means the rule, IOP, or plan states that certain kinds of dispositions (usually signed opinions) should be published, while other kinds (usually orders) should not be published.

4. The Fourth Circuit does not publish the decision in a case disposed of without argument unless all the active judges agree that it should be published. Thus, the circuit's publication rules and criteria apply in effect only to the decisions rendered in cases that are orally argued to the court.

5. In these circuits a single judge may have his or her opinion published or may ask that the opinion in a case be published.

6. The decision is published if accompanied by either a concurring or a dissenting opinion.

7. The rule does not make an affirmative requirement, but states that the publication status below should be considered.

8. The disposition should be published if it reverses the published decision below.

9. The disposition should be published when it does not accept the rationale of the published decision below.

10. The disposition should be published unless the panel decides publication is unnecessary.

TABLE 10

PUBLICATION RULES AND PRACTICES

Circuit	Is There a Statement on Publication?	Presumption for or Against Publication?	Nature of the Statement on Publication	How Is the Publication Decision Made?	May Publication Status Be Changed?[1]
1st	Plan (app. B to rules)	Against	Every disposition is subject to "scrutiny and an affirmative justification for publication." The test is whether courts or litigants would "benefit from the opportunity to cite the opinion" (plan, a).	Discussed at conference and agreement reached; during writing, assigned judge may decide otherwise; if so, or if no agreement was reached at conference, opinion writer makes recommendation in draft decision and majority vote determines publication (plan, b)	Not by rule, but in practice attorneys and judges may request that status be changed
2nd[2]	Rule 0.23	For: opinions Against: summary orders	Where the decision is unanimous and the written opinion serves no jurisprudential purpose, disposition may be by summary order or oral disposition. These dispositions are not formal opinions and are unreported (rule 0.23).[3]	Each judge must agree that the decision will be by summary order (rule 0.23).	Not by rule, but in practice attorneys may move that status be changed
3rd	IOP ch. 5, § F	For: signed opinions Against: per curiam opinions (IOP ch. 5, § F.3)	Signed or per curiam opinions are published if they have "precedential or institutional value" and are "ordinarily not" published if of value "only to the trial court or the parties." Judgment orders are never published (IOP ch. 5, §§ F.1 & F.2).	Decided at conference or opinion writer may later make suggestion; majority vote determines publication (IOP ch. 5, § F.3)	Not by rule, but in practice attorneys may move that status be changed

(continued)

TABLE 10 (Continued)

Circuit	Is There a Statement on Publication?	Presumption for or Against Publication?	Nature of the Statement on Publication	How Is the Publication Decision Made?	May Publication Status Be Changed?[1]
4th[4]	IOP 36	Against (IOP 36.3)	The operating procedure lists explicit criteria to be met for publication of an opinion (IOP 36.3).	Opinions will be published only if the author or a majority of the joining judges believe the opinion meets the standards for publication (IOP 36.3).	"Counsel may move for publication of an unpublished opinion" (IOP 36.4).
5th	Rule 47.5	For (rule 47.5.2)	The rule lists explicit criteria; if these are met the opinion will be published (rule 47.5.1)	Opinions will be published unless each panel member decides against publication. Once decided against, any judge on the court, or a party, may request reconsideration; a unanimous panel decision is needed to change the first decision (rule 47.5.2).	Yes, parties may request reconsideration of a decision not to publish (rule 47.5.2).
6th	Rule 24	For: signed and per curiam opinions Against: orders (rule 24.1.2)	The rule lists explicit criteria the court must consider in deciding whether to publish decisions (rule 24.a.1).	Opinions will be published unless a majority of the panel decides against it; orders will not be published unless a panel member requests it (rule 24.a.2).	Not by rule, but in practice attorneys may move that status be changed
7th	Rule 35	For: opinions Against: orders (rule 35.b)	The rule lists explicit criteria; if these are met, an opinion will be written and published (rule 35.c.1). Rule 35.c.2 defines orders and rule 35.b limits their publication.	A majority of the panel must decide whether disposition will be by unpublished order; a single judge may request publication (rule 35.d).	Yes, by motion stating reasons (rule 35.d.3)

(continued)

TABLE 10 (Continued)

Circuit	Is There a Statement on Publication?	Presumption for or Against Publication?	Nature of the Statement on Publication	How Is the Publication Decision Made?	May Publication Status Be Changed?[1]
8th	Plan (app. to rules)	Neither for nor against	The plan lists explicit criteria; when the case or opinion meets these, the opinion will be published (plan, ¶ 4).[5]	The decision will ordinarily be made prior to preparation of the opinion; a majority of the panel determines publication, but a single judge may make his or her decision available (plan, ¶ 3).	Not by rule, but in practice attorneys may move that status be changed
9th	Rule 21 General Orders, ch. 4	For: opinions Against: orders and memoranda (rule 21.a) General presumptions against (General Orders, ch. 4.2.1)	The disposition will be by opinion and will be published if one or more explicit criteria are met; other dispositions may be published if so designated by a majority of the judges (rule 21.b, .e).	At the postargument conference, the judges reach tentative agreement about publication (IOP I.1).	Yes, by letter stating reasons to clerk within 60 days of the issuance of the disposition (rule 21.d)
10th	Rule 17	Publication required for some dispositions and should not occur for others (rule 17.d-f)	The rule lists explicit criteria under which publication of dispositions will and will not occur (rule 17.d-f).	The court or a panel will decide whether to publish an opinion (rule 17.c).	Not by rule, but in practice attorneys may move that status be changed
11th	Plan IOP 5.B	For: opinions Against: orders (plan, pt. III)	Signed and per curiam opinions will be published; affirmances without opinions are published only in table form (plan, pt. III).	No statement in the plan	Not by rule, but in practice attorneys may move that status be changed

(continued)

TABLE 10 (Continued)

Circuit	Is There a Statement on Publication?	Presumption for or Against Publication?	Nature of the Statement on Publication	How Is the Publication Decision Made?	May Publication Status Be Changed?[1]
D.C.[6]	Plan	Neither for nor against	The plan lists explicit criteria; when these are met, an opinion will be written and published; the plan also describes situations in which orders, judgments, and memoranda should be used (plan, p. 2).	At conference the panel decides the form of disposition; the writing judge may later ask for reconsideration of the decision; a single judge may have his or her opinion published (plan, pp. 1, 3).	Not by rule, but in practice attorneys may move that status be changed
Fed.	Rule 18.a	Neither for nor against	"Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published" (rule 18.a).	A decision not to publish must be unanimous among the panel judges; any judge may require publication of his or her opinion (Proc. Handbook, § 23).	Yes, by motion stating reasons (rule 18.a)

NOTE: Where no sources are cited in columns 3 and 5, the information was obtained in an interview. IOP = internal operating procedures; plan = plan for publication of opinions.

1. The full question here is, Do the rules, operating procedures, or publication plan provide a procedure by which attorneys may request that an unpublished disposition be changed to a published disposition?

2. A committee in the Second Circuit is reviewing the court's publication policies.

3. In practice, all dispositions other than signed opinions are subject to review under rule 0.23.

4. The Fourth Circuit does not publish the decision in a case disposed of without argument unless all the active judges agree that it should be published. Thus, the circuit's publication rules and criteria apply in effect only to the decisions rendered in cases that are orally argued to the court.

5. In practice, if an opinion is at all noteworthy it is published.

6. A committee in the D.C. Circuit is reviewing the court's publication policies.

TABLE 11

ARE THE FOLLOWING CRITERIA USED
IN DECIDING WHETHER TO PUBLISH A DECISION?

Circuit	Publish if Published Below?	Publish if Reversed?	Publish if Opinion Is Split?	Publish if Remanded from Supreme Court?	Publish if Creates or Resolves Conflict?	Publish if Established Law Applied to New Facts?	Publish Part of Decision?
1st	Yes (plan, b.6)	Yes. The disposition is published if the lower court decision was published (plan, b.6).	No	No	Yes*	D/K	Yes (plan, b.5)
2nd[1]	No. In practice the appellate decision is often left unpublished, even though the decision below was published.	Yes*	Yes. Only unanimous decisions may be disposed of by unpublished summary order (rule 0.23).	No	Yes*	Yes*	No
3rd	No. In practice the appellate decision is not necessarily published if the disposition below was published.	No	Yes*	No	Yes*	D/K	No
4th[2]	No	No	Yes*	No	Yes (IOP 36.3.v)	No	No
5th	No. In practice, if the case does not have precedential value it is not published, regardless of the action below.	Yes. The disposition may be published, but does not have to be (rule 47.5.1).	Yes. The opinion may be published if it is accompanied by a concurring or dissenting opinion (rule 47.5.1).	Yes (rule 47.5.1)	Yes (rule 47.5.1)	Yes (rule 47.5.1)	Yes*

(continued)

TABLE 11 (Continued)

Circuit	Publish if Published Below?	Publish if Reversed?	Publish if Opinion Is Split?	Publish if Remanded from Supreme Court?	Publish if Creates or Resolves Conflict?	Publish if Established Law Applied to New Facts?	Publish Part of Decision?
6th	Yes (rule 24.a.1.vi)	Yes. Under some circumstances the decision will be published (rule 24.a.1.v).[4]	Yes. The decision will be published if it is accompanied by a concurring or dissenting opinion (rule 24.a.1. iv).	Yes (rule 24.a.1.vii)	Yes (rule 24.a.1.ii)	Yes (rule 24.a.1.i)	No
7th[3]	Yes. The opinion is published if it reverses the lower court's published opinion (rule 35.c.1.v).	Yes (see column 1)	Yes*	Yes (rule 35.c.1.vi)	Yes (rule 35.c.1.iv)	No	No
8th[3]	Yes. An opinion is published if the previously published rationale is not accepted (plan, ¶ 4.c). In practice, it is usually published if published below.	Yes (see column 1)	Yes*	Yes*	Yes (plan, ¶ 4.b)	Yes (plan, ¶ 4.c)	No
9th	Yes. The opinion is published "unless the panel determines that publication is unnecessary for clarifying the panel's disposition" (rule 21.b.5).	No	Yes. The opinion will be published if there is a concurring or dissenting opinion and the author requests publication (rule 21.b.6).	No	Yes*	No	Yes*

(continued)

TABLE 11 (Continued)

Circuit	Publish if Published Below?	Publish if Reversed?	Publish if Opinion Is Split?	Publish if Remanded from Supreme Court?	Publish if Creates or Resolves Conflict?	Publish if Established Law Applied to New Facts?	Publish Part of Decision?
10th[3]	Whatever form the appellate decision takes, it will be published if the court or agency decision below was published (rule 17.f).	No	No	Yes*	Yes (rule 17.d.1)	Yes*	Yes. In cases in which the decision below was published, but the appellate decision would not ordinarily be published, a part of the decision may be published (rule 17.f).
11th	Not by rule, but in practice the court does publish its decisions if the lower court decision was published	No	Yes*	Yes*	Yes*	Yes*	No
D.C.[5]	Not by rule, but in practice the court publishes, in either text or list form, any disposition in which there was a published disposition below	No	Yes. The opinion is published if there is a concurring or dissenting opinion (plan, p. 3).	No	Yes (plan, p. 2)	Yes (plan, p. 2)	Yes (plan, p. 2)
Fed.[3]	No. In practice, the disposition is treated as any other: Does the public need to know the content?	No	No	Yes*	Yes*	No	No

NOTE: Where sources are not cited, the information was obtained in an interview. This table is a continuation of the publication rules and practices reported in table 10. An asterisk next to a "yes" response indicates that the criterion is used in practice even though the court's local rule does not specify the practice. A "no" response indicates that the court's rule does not specify the standard and that the judges necessarily follow it in practice. D/K = don't know, i.e., the respondent did not know the judges' practice. IOP = internal operating procedures; plan = plan for publication of opinions.

(continued)

TABLE 11 (Continued)

1. A committee in the Second Circuit is reviewing the court's publication policies.

2. The Fourth Circuit does not publish the decision in a case disposed of without argument unless all the active judges agree that it should be published. Thus, the circuit's publication rules and criteria apply in effect only to the decisions rendered in cases that are orally argued to the court.

3. Rule 35.d in the Seventh Circuit, the plan for publication in the Eighth and Tenth Circuits, and section 23 of the Federal Circuit's Procedural Handbook state that a single judge may make an opinion available for publication. The Seventh Circuit rule and Tenth Circuit plan, however, also indicate that this practice is not favored.

4. If the reversal is caused by an intervening change in law or fact, or if the reversal is a remand without comment of a case reversed or remanded by the Supreme Court, the decision need not be published.

5. A committee in the D.C. Circuit is reviewing the court's publication policies.