

Circuit Rule 28

Briefs

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~~(b) — Citation to Published Opinion and to Statute.~~ Citations to decisions of this court must be to the Federal Reporter. Dual or parallel citation of cases is not required. Citations of state court decisions included in the National Reporter System must be to that system in both the text and the table of authorities. Citations to all federal statutes, including those statutes applicable to the District of Columbia, must refer to the current official code or its supplement, or if there is no current official code, to a current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation.

~~(c) — Citation to Unpublished Dispositions.~~

~~———— (1) — Unpublished Dispositions of this Court.~~

~~———— (A) Unpublished dispositions entered before January 1, 2002.~~ Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

~~———— (B) Unpublished dispositions entered on or after January 1, 2002.~~ All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

~~———— (C) Applicability to pending cases.~~ The provisions of Rule 28(c)(1)(B) apply to any appeal or other proceeding pending in this court on or after January 1, 2002.

~~———— (2) — Unpublished Opinions of Other Courts.~~ Unpublished dispositions of other courts of appeals and district courts may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished opinions by other courts of appeals may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts may not be cited.

~~———— (3) — Procedures Governing Citation to Unpublished Dispositions.~~ Counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited in the brief. The addendum may be bound together with the brief, but separated from the

body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

(d)(b) References to Authorities and Other Material. When citing to the record, authorities, or an other material, citations must refer to specific pages of the source; *passim* or similar terms may not be used.

(e)(c) Length of Briefs. The length of briefs is governed by FRAP 28.1, 32(a)(7), and Circuit Rule 32(a).

(f)(d) Briefs for Intervenors. The rules stated below apply with respect to the brief for an intervenor in this court. For purposes of this rule, an intervenor is an interested person who has sought and obtained the court's leave to participate in an already instituted proceeding.

(1) Except by permission or direction of the court, the brief must conform to the brief lengths set out in Circuit Rule 32(a)(3).

(2) The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief, and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court.

(3) Except as otherwise directed by the court, the brief must be filed in accordance with the time limitations described in FRAP 29.

(4) Intervenors on the same side must join in a single brief to the extent practicable. This requirement does not apply to a governmental entity. (For this purpose, the term "governmental entity" includes the United States or an officer or agency thereof, the District of Columbia, or a State, Territory, or Commonwealth of the United States.) Any separate brief for an intervenor must contain a certificate of counsel plainly stating why the separate brief is necessary. Generally unacceptable grounds for the filing of separate briefs include representations that the issues presented require greater length than these rules allow (appropriately addressed by a motion to exceed length limits), that counsel cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings.

(5) A reply brief may be filed for an intervenor on the side of appellant or petitioner at the time the appellant's or petitioner's reply brief is due.

(g)(e) Request to Exceed the Limits on the Length of Briefs and for Extension of Time for Filing.

(1) The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons.

(2) A motion to exceed the limits on length of briefs or to extend the filing time for a brief must be filed at least 10 calendar days before the main briefs are due to be filed, and at least 5 calendar days before a reply brief is due to be filed.

(3) Before filing a motion to exceed the limits on length of briefs, or to extend the time for filing, counsel for the moving party must attempt to obtain the consent of other counsel. If consent is not obtained, counsel for the moving party must attempt to inquire whether an opposition or other form of response will be filed. In the opening paragraph of any such motion, counsel must recite the position taken by other counsel in response to these inquiries, or the efforts made to obtain responses.

If other counsel have stated an intention to file an opposition or other response, or have not been reached after reasonable effort, counsel for the moving party must serve the motion by hand, or if such service is not feasible, by giving other counsel telephone notice of the filing and serving the motion by the most expeditious form of service. If counsel is unable to effect service by hand or telephone notice at the time of filing, the opening paragraph of the motion must recite the efforts made to do so.

(4) Submission of a motion to exceed the limits on length of briefs or extend the filing time for a brief does not toll the time for compliance with filing requirements. Movants will be expected to meet all filing requirements in the absence of an order granting a waiver.

(h)(f) Citation of Supplemental Authorities. After briefing has been completed, a party may file an original and 4 copies of a letter pursuant to FRAP 28(j).

See also Circuit Rule 28.1 (Cross-Appeals), Circuit Rule 29 (Brief of an Amicus Curiae), **Circuit Rule 32.1 (Citing Judicial Dispositions)**, and Circuit Rule 47.1 (Matters under Seal).

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Circuit Rule 32.1

Citing Judicial Dispositions

(a) Citation to Published Opinion and to Statute. Citations to decisions of this court must be to the Federal Reporter. Dual or parallel citation of cases is not required. Citations of state court decisions included in the National Reporter System must be to that system in both the text and the table of authorities. Citations to all federal statutes, including those statutes applicable to the District of Columbia, must refer to the current official code or its supplement, or if there is no current official code, to a current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation.

(b) Citation to Unpublished Dispositions.

(1) Unpublished Dispositions of this Court.

(A) Unpublished dispositions entered before January 1, 2002. Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(B) Unpublished dispositions entered on or after January 1, 2002. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court.

(2) **Unpublished Opinions of Other Courts.** Unpublished dispositions of other courts of appeals and district courts entered before January 1, 2007, may be cited when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition is relevant. Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

(3) **Procedures Governing Citation to Unpublished Dispositions.** A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

Circuit Rule 29

Brief of an Amicus Curiae

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See Circuit Rule 28(ed) (Brief for Intervenors), and Circuit Rule 34(e) (Participation in Oral Argument by Amici Curiae).

Circuit Rule 36

Decisions of the Court; Opinions and Abbreviated Dispositions

(c) Unpublished Opinions.

(2) While unpublished ~~orders and judgments~~ **dispositions** may be cited to the court in accordance with **FRAP 32.1 and** Circuit Rule ~~28(c)(1)(B)~~ **32.1(b)(1)**, a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.

IX. BRIEFS AND APPENDIX

A. BRIEFS

(See Fed. R. App. P. 28-32; D.C. Cir. Rules 25, 28-32**32.1**)

8. Contents

(See Fed. R. App. P. 28; D.C. Cir. Rule 28; **Fed. R. App. P. 32.1; D.C. Cir. Rule 32.1.**)

Citation requirements for briefs are set out in **FRAP 32.1 and** Circuit Rule ~~28(b)~~ **32.1**. Counsel must cite D.C. Circuit decisions to the Federal Reporter and state court decisions to the National Reporter System. Parallel citations to the U.S. App. D.C. for D.C. Circuit decisions are not required. All federal statutes, including those applicable to the District of Columbia, must be cited by the current official code or its supplement, or, if there is no current official code, to the current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation. When citing to the record, authorities, or any other material, citations must refer to specific pages of the source; *passim* or similar terms may not be used.

~~In 2002, Circuit Rule 28(c) was significantly revised. The current Rule 28(c)(1)(A) retains the provisions of the earlier Rule 28(c) for unpublished dispositions entered by the Court before January 1, 2002. Thus, counsel may not cite as precedent the u~~Unpublished orders, judgments, sealed opinions **dispositions**, or explanatory memoranda entered by this Court before ~~that date~~ **January 1, 2002, may not be cited as precedent.** Counsel ~~may refer to a~~An unpublished disposition when arguing that it has **may, however, be cited for its** *res judicata*, law of the case, or preclusive effect, ~~but not for its effect as precedent.~~

~~For cases pending with the Court on or after January 1, 2002, counsel is allowed to cite as precedent all u~~Unpublished dispositions of the D.C. Circuit, ~~provided those dispositions were entered by the Court on or after January 1, 2002,~~ **may be cited as precedent.** Unpublished dispositions include any order, judgment, explanatory memorandum, or other disposition, including interlocutory rulings and summary orders (but not sealed dispositions). (As before, ~~counsel may also cite an unpublished disposition of this Court~~ **may always be cited for its** when arguing that it has *res judicata*, law of the case, or preclusive effect.)

~~Counsel may also cite u~~Unpublished dispositions of other **federal** courts of appeals and district courts **entered before January 1, 2007, may be cited** where they are relevant for purposes of *res judicata*, law of the case, or their preclusive effect. Otherwise, unpublished ~~opinions~~ **dispositions** of other courts of appeals **entered before January 1, 2007,** may be cited only in the circumstances and for the purposes allowed by the court issuing the disposition, and unpublished dispositions of district courts

entered before that date may not be cited. Unpublished dispositions of other federal courts entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1.

If ~~counsel cite to unpublished dispositions under Rule 28(c)~~, ~~counsel cited in a brief are not available in a publicly accessible electronic database, a copy of each must be included in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein.~~ The addendum may be bound together with the brief, but it should be separated from the body of the brief and any other addendum by a distinctly colored separation page. If the addendum is bound separately, ~~counsel it must be filed and served~~ it concurrently with, and in the same number of copies as, the brief itself.

It is important to understand ~~both the significance of the revised Rule 28(c)~~, as well as an important caveat in connection with reliance upon unpublished dispositions **of this court**. For example, counsel are ~~now~~ permitted to argue that an unpublished disposition is binding precedent on a particular issue; they may also argue that an unpublished disposition establishes an intra-circuit conflict in decisions warranting a rehearing *en banc*. On the other hand, counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition. *See* D.C. Cir. Rule 36(c)(2). Indeed, unpublished dispositions contain language to that very effect. Thus, counsel should recognize that the Court believes its published precedents already establish and adequately explain the legal principles applied in the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions. (*See generally* Circuit Rule 36, which sets out the criteria for published and unpublished opinions.)

Counsel should avoid use of designations such as "appellant" and "appellee." In the interest of clarity, it is preferable to use the designations in the court or agency below, the actual names of the parties, or terms descriptive of them, such as "the employee."

The excessive use of footnotes also should be avoided. The Court prefers that substantive arguments not be made in footnotes. Footnotes should be used primarily for citations.

Finally, counsel may not refer this Court to sections of pleadings filed in the district court to support those contentions upon which it relies on appeal in lieu of addressing such arguments in the brief.

9. Citation of Supplemental Authorities
(*See* Fed. R. App. P. 28(j); D.C. Cir. Rule 28~~(g)~~**(f)**.)

When pertinent and significant authorities come to a party's attention after briefing or oral argument but before decision, a party may promptly advise the Clerk by letter, limited to 350 words, with copies to all other parties as provided in Federal Rule of Appellate Procedure 28(j). Other parties may file a response to the letter, but any response must be similarly limited.

XII. MAKING THE DECISION

A. FORMS OF DECISION

(See Fed. R. App. P. 32.1, 36; D.C. Cir. Rule 32.1, 36.)

Four possible forms for disposing of cases that have been considered by a merits panel are currently used: a published signed opinion, a published *per curiam* opinion, an unpublished judgment or order with memorandum, and a judgment or order without memorandum. The first two forms are familiar to all attorneys. An unpublished judgment or order with memorandum is addressed primarily to those immediately concerned with the case. The memorandum usually is fairly brief, stating only the facts and law necessary for an understanding of the Court's decision. A judgment or order without memorandum indicates affirmance or reversal, or grant or denial of a petition for review, with a brief explanation, such as citation of a governing precedent. With the exception of orders filed under seal and some scheduling orders generated by the Court's docketing system, all orders and judgments, including Clerk's orders, issued on or after June 1, 2001, are available over the Internet via PACER, the Judiciary's electronic public access service. A small "image" icon appears next to the docket entry for any order or judgment that can be viewed online. The date of issuance is also a link to the image file (in PDF format). A PACER account is required (available from the PACER Service Center), and a per page fee applies. The PACER Service Center can be accessed through a link at the Court's web site, www.cadc.uscourts.gov.

Circuit Rule 36(a)(2) sets out the criteria the Court employs in determining whether to publish an opinion. The Court's policy is to publish an opinion or memorandum if it meets one or more of the following criteria: (1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies, or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that give it general public interest.

An unpublished **opinion disposition** will be used where the Court's **disposition decision** does not satisfy the criteria for publication under Circuit Rule 36(a). Citation of unpublished **opinions dispositions** is governed by **FRAP 32.1** and Circuit Rule ~~28(e)~~ **32.1(b)**. Although **Circuit Rule ~~28(e)~~ 32.1(b)(1)** ~~will permits~~ citation, as precedent, of unpublished **opinions dispositions of this Court** issued on or after January 1, 2002, Circuit Rule 36(c)(2) makes clear that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition, *i.e.*, the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents.