

Citations to Unpublished Opinions in the Federal Courts of Appeals

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I. Introduction

The Appellate Rules Advisory Committee has proposed a new Federal Rule of Appellate Procedure 32.1, which would permit attorneys and courts in federal appeals in all circuits to cite unpublished opinions. Currently, by local rules, courts in four circuits (the Second, Seventh, Ninth, and Federal Circuits) forbid citation to their unpublished opinions in unrelated cases; we call these “restrictive” circuits. Courts in six circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) discourage citation to their unpublished opinions, but permit it when there is no published opinion on point; we call these “discouraging” circuits. Courts in the remaining three circuits (the Third, Fifth, and District of Columbia Circuits) more freely permit citation to unpublished opinions; we call these “permissive” circuits.

At its June 2004 meeting, the Standing Committee on Rules of Practice and Procedure asked the Appellate Rules Advisory Committee to ask the Federal Judicial Center to conduct empirical research that would yield results helpful to the Standing Committee’s consideration of the Appellate Rules Advisory Committee’s proposed rule.¹ We undertook a research effort with three components: (1) a survey of judges, (2) a survey of attorneys, and (3) a survey of case files.²

We surveyed all 257 sitting circuit judges and asked them how citation rules are likely to affect the time it takes to prepare unpublished opinions, the length of unpublished opinions, and the frequency of unpublished opinions. We also asked judges in circuits whose courts permit citation to unpublished opinions in unrelated cases—the discouraging circuits and the permissive circuits—whether these citations require additional work, are helpful, and are inconsistent with published authority. We asked judges in restrictive circuits whether special characteristics of their circuits would create problems if attor-

1. Below is the text proposed to the Standing Committee in June 2004:

Rule 32.1 Citing Judicial Dispositions

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

(b) **Copies Required.** If a party cites a 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.

2. We are grateful to our colleagues Joe Cecil, Jim Eaglin, Vashty Gobinpersad, Tyeika Hartsfield, Estelita Huidobro, Carolyn Hunter, Dean Miletich, Donna Pitts-Taylor, and Jeannette Summers for their assistance with this research. We are grateful to Geoffrey Erwin, Sylvan Sobel, and Russell Wheeler for their review of this report and Dexter Green and Frank Washington for printing it.

neys were permitted to cite unpublished opinions in unrelated cases. The courts of appeals in both the First and the District of Columbia Circuits changed their local rules recently to relax their restrictions on citations to unpublished opinions, and we asked judges in those circuits about the effects of the rule changes.

To get a representative sample of appellate attorneys who practice in each circuit, we selected the authors of briefs filed in a random sample of appeals in each circuit where a counseled brief was filed on both sides—cases we call fully briefed appeals. We asked attorneys about their desires to cite unpublished opinions in the cases selected, and we asked them about the probable impact of a rule permitting citation to unpublished opinions.

We examined a random sample of cases filed in each circuit to determine how often attorneys and courts cite unpublished opinions in unrelated cases. We have also collected data on whether the cases are resolved by published or unpublished opinions, or without opinions, and how long the published and unpublished opinions are.

II. Survey of Judges

Judges in circuits that permit citation to unpublished opinions in unrelated cases do not think the number of unpublished opinions that they author, the length of their unpublished opinions, or the time it takes them to draft unpublished opinions would change if the rules on citing unpublished opinions were to change. Judges in circuits that recently relaxed their rules on citation to unpublished opinions reported some increase in such citations, but no impact on their work.

Judges in circuits that permit citation to unpublished opinions in unrelated cases reported that these citations create only a small amount of additional work and are seldom inconsistent with published authority, but they are no more than occasionally helpful.

Judges in circuits that forbid citation to unpublished opinions in unrelated cases, on the other hand, predicted that relaxing the rules on citation to unpublished opinions will result in shorter opinions or opinions that take more time to prepare.

We surveyed all 257 sitting circuit judges, including 165 active judges and 92 senior judges; 222 responded (86%). The response rate for individual circuits ranged from 64% in the District of Columbia Circuit (7 out of 11 judges) to 95% in the Sixth Circuit (21 out of 22 judges). (See Exhibit A, *infra* page 29.)

Ten judges (4%) responded to the survey, but did not answer its questions (one judge in a restrictive circuit—a senior judge in the Second Circuit who observed that senior judges in that circuit do not prepare unpublished opinions; five judges in discouraging circuits—three judges in the Fourth Circuit who opined that their local rule works well as it is, one judge in the Eighth Circuit who referred us to the views expressed by Judge Arnold in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), and one judge in the Tenth Circuit; and four judges in permissive circuits—one judge in the Fifth Circuit and three judges in the District of Columbia Circuit who opined that their local rule works well as it is).

A. Preparing Unpublished Opinions

Most judges in circuits that permit citation to the court's unpublished opinions said that a change in the rules making such opinions either more or less citable would have no impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them. Among judges in the circuits that prohibit citation to their unpublished opinions in unrelated cases, nearly half said that their unpublished opinions would get shorter if they were to become citable, and over half of the judges said that

their unpublished opinions would take more time to write. Most judges in the Second, Ninth, and Federal Circuits said that citations to unpublished opinions would create special problems for their circuits, but most judges in the Seventh Circuit said that such citations would not create special problems.

1. If Citation Were Prohibited (Discouraging and Permissive Circuits)

We asked judges in circuits that permit citation to their unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were prohibited. We posed these questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits)³ and the permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).⁴

a. Length of Unpublished Opinions

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if they were not citable. We received answers to these questions from 79% of the judges asked. A large majority (101 out of 123, or 82%) said that the length of their unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit B, *infra* page 30.) Among the judges who said that their unpublished opinions would change in length, approximately twice as many said that they would decrease in length as said that they would increase in length (15, or 12%, compared with 7, or 6%). Only six judges (5%) said that the change would be more than moderate; four said that there would be a great decrease or a very great decrease and two said that there would be a great increase.

b. Drafting Time

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there

3. Three judges in the Fourth Circuit and one judge in the Eighth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

4. One judge in the Third Circuit and one judge in the Fifth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions were not citable. We received answers to these questions from 79% of the judges asked. A large majority (103 out of 123, or 84%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit C, *infra* page 31.) Among the judges who said that the amount of time preparing unpublished opinions would change, all but one said that the amount of time would decrease. Only three judges (2%) said that the change would be more than moderate; all three said there would be a great decrease or a very great decrease.

2. If Citation Were Allowed Only Sometimes (Permissive Circuits)

We asked judges in circuits that freely permit citation to the court's unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were permitted only when there is no published opinion on point. We posed these questions only to the 50 judges in the permissive circuits (the Third, Fifth, and District of Columbia Circuits).

a. Length of Unpublished Opinions

We asked: If attorneys were allowed to cite an unpublished opinion of your court only when there was no published opinion on point, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if those opinions could be cited only when there is no published opinion on point. We received answers to these questions from 72% of the judges asked. A large majority (27 out of 36, or 75%) said that the length of the unpublished opinions that they authored would not change if attorneys were permitted to cite them only when there was no published opinion on point. (See Exhibit D, *infra* page 32.) Among the judges who said that their unpublished opinions would change in length, all but one said that the length would increase. Only two judges (6%) said that the change would be more than moderate; both said that there would be a great increase or a very great increase.

b. Drafting Time

We asked: If attorneys in your circuit were allowed to cite an unpublished opinion of your court only when there was no published opinion on point, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions could be cited only when there is no published opinion on point. We received answers to these questions from 74% of the judges asked. A large majority (28 out of 37, or 76%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were permitted to cite them only when there is no published opinion on point. (See Exhibit E, *infra* page 33.) All of the judges who said that the amount of time preparing unpublished opinions would change said that it would increase (9, or 24%). Only one said that the change would be more than moderate; this judge said that there would be a great increase.

3. If Citation Were Always Allowed

We asked judges in circuits that either do not permit citation to their unpublished opinions or permit citation to their unpublished opinions only when there is no published opinion on point to tell us what would happen if citation to the court's unpublished opinions were freely permitted.

a. Number of Unpublished Opinions (Discouraging Circuits)

We posed these questions to the 105 judges in the discouraging circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits).

We asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, do you think that the number of unpublished opinions that you author would increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions only when there is no published opinion on point, judges would not expect the number of unpublished opinions that they author to change if citation to the opinions were permitted more freely. We received answers to these questions from 79% of the judges asked. A large majority of judges (66 out of 83, or 80%) said that the number of unpublished opinions that they author would stay the same if attorneys could cite the court's unpublished opinions more freely. (See Exhibit F, *infra* page 34.) Among the judges who said that the number of unpublished opinions that they author would change, more than three times as

many said that the number would decrease as said that the number would increase (13, or 16%, compared with 4, or 5%). Only six judges (7%) said that the change would be more than moderate; four said that there would be a great decrease or a very great decrease, and two said that there would be a great increase.

b. Length of Unpublished Opinions (Restrictive and Discouraging Circuits)

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

Restrictive Circuits—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

Discouraging Circuits—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 83% of the judges asked. A large majority of judges (69 out of 88, or 78%) in the *restrictive circuits* said that the length of the unpublished opinions that they author *would change* if attorneys were permitted to cite them, but a substantial majority of judges (58 out of 84, or 69%) in the *discouraging circuits* said that the length of the unpublished opinions that they author *would not change* if attorneys were permitted to cite them freely. (See Exhibit G, *infra* page 35.)

A plurality of judges in restrictive circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite them. Among the large majority of judges in restrictive circuits who said that their unpublished opinions would change in length, most (41 out of 69, or 59%) said that the opinions would decrease in length. Most of these judges (33 out of 41, or 80%) said that the decrease would be more than moderate; 16 judges said there would be a very great decrease, and 17 judges said there would be a great decrease. Of the judges who said that their unpublished opinions would increase in length, half said that the increase would be moderate or less, and half said that the increase would be more than moderate. Six judges said that there would be a very great increase in the length of their un-

published opinions, and eight judges said that there would be a great increase in the length of their unpublished opinions.

Very few judges in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite those opinions more freely. Among the minority of judges (26 out of 84, or 31%) in discouraging circuits who said that their unpublished opinions would change in length, a large majority (22 out of 26, or 85%) said that the opinions would increase in length. Most of these judges (12 out of 22, or 55%) said that the increase would be moderate or less; two judges said that there would be a very great increase, and eight judges said that there would be a great increase. Only four judges (5%) in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys could cite unpublished opinions more freely; half said that there would be a great decrease and half said that the decrease would be moderate or less.

c. Drafting Time (Restrictive and Discouraging Circuits)

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

Restrictive Circuits—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

Discouraging Circuits—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 84% of the judges asked. A very large majority of judges (160 out of 173, or 92%) who answered these questions said that the amount of time they spend preparing unpublished opinions would stay the same or increase if attorneys could cite the unpublished opinions more freely. (See Exhibit H, *infra* page 36.) A majority of judges (50 out of 89, or 56%) in the *restrictive circuits* said that the time they would take to prepare unpublished opinions would *increase* if attorneys were permitted to cite the opinions, but a majority of judges (47 out of 84, or 56%) in the *discouraging circuits* said they would take the *same* amount of time to

prepare unpublished opinions if attorneys were permitted to cite the opinions freely.

Among the majority of judges in restrictive circuits who said that the amount of time they spend preparing unpublished opinions would increase if attorneys could cite them, a substantial majority (33 out of 50, or 66%) said that the increase would be more than moderate. This includes more than a third of all judges (37%) in restrictive circuits who responded to the questions. Twelve judges said the increase would be very great; 21 judges said the increase would be great. Among the small minority of judges (12 out of 89, or 13%) who said that the amount of time would decrease, four said the decrease would be very great, and four said the decrease would be great.

Among the minority of judges in discouraging circuits who said that the amount of time they spend preparing unpublished opinions would change if attorneys could cite the opinions freely, all but one said that the amount of time would increase. Eleven judges said that the increase would be more than moderate—four said the increase would be very great, and seven said that the increase would be great. One judge said that there would be a great decrease.

d. Problems (Restrictive Circuits)

We posed these questions to the 102 judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits).

We asked: Would a rule allowing the citation of unpublished opinions in your circuit cause problems because of any special characteristics of your court or its practices? If your answer is “yes,” please describe the relevant characteristics.

We received an answer to the first question from 84% of the judges asked. A substantial majority of the judges (58 out of 86, or 67%) said that a rule permitting citation to the court’s unpublished opinions would be especially problematic for their circuit. (See Exhibit I, *infra* page 37.) But although a substantial majority of judges (53 out of 74, or 72%) in the Second, Ninth, and Federal Circuits said that there would be special problems, a majority of judges (7 out of 12, or 58%) in the Seventh Circuit said that there would not be special problems.

Fifty-seven judges offered thoughts on the effect of permitting citation to unpublished opinions in their courts. (See *infra* Appendix A.) Twenty judges predicted that citations to unpublished opinions would increase judges’ workload. Thirteen judges predicted that unpublished opinions would become shorter if they could be cited. Seven judges expressed concern about the quality of the court’s unpublished opinions. Six judges observed that citations to unpublished opinions are unlikely to be helpful. Five judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. Three judges predicted that allowing citation to unpublished opinions could ultimately result in the opinions being prece-

dential. One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage. A few judges offered thoughts on more than one of these topics, and eight judges expressed other thoughts.

B. Work of Chambers Reviewing Briefs (Discouraging and Permissive Circuits)

Most judges told us that citations to unpublished opinions create a small or very small amount of additional work for them, are occasionally or seldom helpful, and are seldom inconsistent with published authority.

We posed these questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) and permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).

1. Work

We asked: When a brief cites an unpublished opinion of your court, how much additional work does this citation create for you and your chambers staff? Choices were a very great amount, a great amount, some, a small amount, and a very small amount.

Citations to unpublished opinions do not appear to create much additional work for the court. We received answers to this question from 75% of the judges asked.⁵ Almost all judges (114 out of 116, or 98%) said that an unpublished opinion creates less than a great amount of additional work. (See Exhibit J, *infra* page 38.) Approximately half of the judges who responded said that citations to unpublished opinions create a very small amount of additional work (57 out of 116, or 49%; 40 out of 82, or 49%, in discouraging circuits, and 17 out of 34, or 50%, in permissive circuits).

2. Helpfulness

We asked: Which of the following best describes how often the citation of an unpublished opinion of your court has been helpful? Choices were very often, often, occasionally, seldom, and never.

Citations to unpublished opinions do not appear to be helpful very often. We received answers to this question from 79% of the judges asked. A very large majority (116 out of 123, or 94%) said that citations to unpublished opinions have been helpful less than “often.” (See Exhibit K, *infra* page 39.) A large minority (48 out of 123, or 39%) said that citations to unpublished opinions are occasionally helpful, and another large minority (54 out of 123, or 44%) said

5. Five judges wrote “none,” which was not one of the choices offered.

that citations to unpublished opinions are seldom helpful. A smaller minority (14 out of 123, or 11%) said that citations to unpublished opinions are never helpful. Six judges (5%) said that citations to unpublished opinions are often helpful, and one judge (1%) said that such citations are very often helpful.

3. Inconsistency

We asked: Which of the following best describes how often an attorney has cited an unpublished opinion of your court that is inconsistent or difficult to reconcile with a published opinion of your court? Choices were very often, often, occasionally, seldom, and never.

We received answers to this question from 79% of the judges asked. Almost all judges (119 out of 122, or 98%) said that cited unpublished opinions have been inconsistent or difficult to reconcile with published authority less than “often.” (See Exhibit L, *infra* page 40.) Many judges (33 out of 122, or 27%) said that cited unpublished opinions are occasionally inconsistent, most (67 out of 122, or 55%) said that cited unpublished opinions are seldom inconsistent, and a few (19 out of 122, or 16%) said that cited unpublished opinions are never inconsistent. Only two judges (2%) said that such opinions are often inconsistent, and only one judge (1%) said that such opinions are very often inconsistent. Although the majority response in most circuits was seldom or never, a substantial majority of Sixth Circuit judges (14 out of 20, or 70%) said that cited unpublished opinions are occasionally inconsistent with published authority.

C. Effect of New Local Rules (A Discouraging Circuit—the First Circuit; and a Permissive Circuit—the District of Columbia Circuit)

Two circuits have recently changed their local rules on citations to unpublished opinions. The courts of appeals for the First Circuit and the District of Columbia Circuit used to prohibit citations to their unpublished opinions in unrelated cases.

The court of appeals for the First Circuit still discourages such citations but permits them if they have persuasive value and if there is no published opinion on point. The First Circuit used to be a restrictive circuit and is now a discouraging circuit.

The court of appeals for the District of Columbia Circuit now permits citation to unpublished opinions as precedent. The District of Columbia Circuit used to be a restrictive circuit and is now a permissive circuit. Only unpublished opinions issued after the effective date of the rule change, January 1, 2002, maybe be cited in unrelated cases, however.

We asked these questions of the 10 judges in the First Circuit and the 11 judges in the District of Columbia Circuit. These judges told us that attorneys are now citing unpublished opinions more often, but this has not had an impact on their work.

1. Frequency of Citation

We asked: Since this new local rule took effect, have attorneys cited unpublished opinions much more often, somewhat more often, as often as before, somewhat less often, or much less often?

We received answers to this question from 70% of the judges in the First Circuit. Most judges (5 out of 7, or 71%) said that attorneys cite unpublished opinions more often than before; of these judges, one judge said that it happens much more often, and four judges said that it happens somewhat more often. (See Exhibit M, *infra* page 41.) Two judges said that it happens as often as before.

We received answers to this question from 36% of the judges in the District of Columbia Circuit. Most judges (3 out of 4, or 75%) said that attorneys cite unpublished opinions somewhat more often than before; one judge said that it happens as often as before. (See Exhibit M, *infra* page 41.)

2. Drafting Time

We asked: Since this new local rule took effect, has the amount of time that you have spent drafting unpublished opinions increased, decreased, or remained unchanged? If the amount of time that you have spent drafting unpublished opinions has changed, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said the amount of time they spend drafting unpublished opinions has not changed since the opinions became citable; one judge said that there has been a small increase in time spent drafting unpublished opinions. (See Exhibit N, *infra* page 42.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that the amount of time they spend drafting unpublished opinions has not changed since the opinions became citable. (See Exhibit N, *infra* page 42.)

3. Work

We asked: Has the new local rule made your work harder or easier? If the new local rule has made your work harder or easier, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said that there has

been no appreciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions; one judge said that the work has become harder, but it has been a very small change. (See Exhibit O, *infra* page 43.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that there has been no appreciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions. (See Exhibit O, *infra* page 43.)

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III. Survey of Attorneys

A random sample of federal appellate attorneys expressed a substantial interest in citing unpublished opinions. Most attorneys said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule.

To get a representative sample of attorneys practicing in each of the 13 circuits, we surveyed the authors of the briefs filed in the cases selected for the survey of case files—a random sample of cases in each circuit. So that our sample would be balanced between appellant and appellee attorneys, we surveyed authors of briefs in cases that were fully briefed, by which we mean a counseled brief was filed on both sides. We identified 384 attorneys to survey, ranging from 12 in the Fourth Circuit to 41 in the Eighth Circuit. We received 331 responses (86%).⁶ (See Exhibit P, *infra* page 44.)

A. Citing Unpublished Opinions in Briefs

A substantial number of attorneys told us that they would have been likely to cite an unpublished opinion if their court’s rules on such citations had been more lenient.

1. Wanted to Cite an Unpublished Opinion

a. Opinions by this Circuit

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of the court of appeals for *this circuit* that you would have liked to cite, but did not because of the court’s rules on citations to unpublished opinions?

Two-fifths (40%) of the attorneys said “yes.”⁷ (See Exhibit Q, *infra* page 45.) More attorneys in restrictive circuits said “yes” (51%, ranging from 33% in

6. Some attorneys who responded to the survey did not answer every question. Approximately 10% of the attorneys who authored briefs in cases before the courts of appeals for the First and Federal Circuits were surveyed much later than the other attorneys in this study and their responses may still come in.

We sent each attorney a questionnaire with a cover letter from the chair of the Advisory Committee on Appellate Rules. If we did not get a response after several weeks, we sent the questionnaire again. If we still did not get a response, we faxed a third copy of the questionnaire. If we still did not get a response, we examined the brief for an alternate attorney to survey. If there was such an attorney, we eliminated the first attorney from the sample and surveyed the alternate.

7. For the attorney survey, averages across circuits are computed so that each circuit is weighted equally.

the Second Circuit to 80% in the Federal Circuit) than in the discouraging circuits (38%, ranging from 27% in the Eleventh Circuit to 46% in the Eighth Circuit) or the permissive circuits (31%, ranging from 21% in the District of Columbia Circuit to 40% in the Fifth Circuit).⁸

b. Opinions by Other Courts

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of one or more *other courts* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?

Approximately one quarter of the attorneys (27%) said "yes." (See Exhibit R, *infra* page 46.) More attorneys in restrictive circuits said "yes" (32%, ranging from 19% in the Second Circuit to 44% in the Ninth Circuit) than in the discouraging circuits (24%, ranging from 10% in the First Circuit to 50% in the Eighth Circuit) or the permissive circuits (26%, ranging from 15% in the Fifth Circuit to 41% in the Third Circuit).

2. Would Have Cited an Unpublished Opinion

a. Opinions by this Circuit

We asked: Had this circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of the court of appeals for *this circuit* in your brief or briefs in this appeal?

Nearly half of the attorneys (48%) said "yes." (See Exhibit S, *infra* page 47.) More attorneys in the restrictive circuits said "yes" (59%, ranging from 43% in the Second Circuit to 80% in the Federal Circuit) than in the discouraging circuits (45%, ranging from 32% in the First Circuit to 56% in the Sixth Circuit) or the permissive circuits (39%, ranging from 27% in the District of Columbia Circuit to 46% in the Third Circuit).

b. Opinions by Other Courts

We asked: Had the circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of one or more *other courts* in your brief or briefs in this appeal?

8. It is perhaps surprising that so many attorneys in circuits that ostensibly permit citation to unpublished opinions said they wished they could have cited such opinions in the selected cases. But the court of appeals for the District of Columbia Circuit only permits citation to its unpublished opinions issued in 2002 or later, and the lack of a local rule by the court of appeals for the Third Circuit explicitly addressing the issue creates an environment in which some attorneys are unsure whether they should cite unpublished opinions or not.

Approximately one third of the attorneys said “yes” (32%). (See Exhibit T, *infra* page 48.) More attorneys in the restrictive circuits said “yes” (33%, ranging from 20% in the Federal Circuit to 50% in the Ninth Circuit) and in the discouraging circuits (33%, ranging from 5% in the First Circuit to 54% in the Eighth Circuit) than in the permissive circuits (29%, ranging from 20% in the Fifth Circuit to 44% in the Third Circuit).

B. The Impact of the Proposed Rule

1. Burden

Attorneys reported that a rule permitting citation to unpublished opinions in unrelated cases would have little impact on the attorneys’ workloads.

We asked: What effect on your appellate work would a new rule of appellate procedure freely permitting citations to unpublished opinions in all circuits (but not changing whether such opinions are binding precedent or not) have on your federal appellate work? Choices were substantially more burdensome, a little bit more burdensome, no appreciable impact, a little less burdensome, and substantially less burdensome.

A plurality of attorneys (38%) said that a rule permitting citation to unpublished opinions in unrelated cases would have “no appreciable impact” on their workloads. (See Exhibit U, *infra* page 49.) Regarding the choices ranging from substantially less burdensome to substantially more burdensome as a scale from 1 to 5, the average burden rating among the attorneys answering this question was 3.1, which corresponds to very slightly more burdensome. The average change in burden predicted by attorneys was slightly higher in the restrictive and discouraging circuits (3.1) than in the permissive circuits (2.9). The averages for individual circuits ranged from 2.6 in the Federal Circuit (slightly less burdensome) to 3.6 in the Ninth Circuit (slightly more burdensome).

Approximately 10% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *more* burdensome. The rates for this answer by circuit were highest in the Ninth Circuit (22%) and the First Circuit (17%). The rates for all other circuits were 13% or less.

Approximately 7% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *less* burdensome. The rates for individual circuits ranged from 0% in three circuits (the First, Second, and Seventh Circuits) to 19% in the Federal Circuit.

2. Open-Ended Question

We asked: The Appellate Rules Advisory Committee has proposed a new national rule, which would permit citation to the courts of appeals' unpublished opinions; what impact would you expect such a rule to have?

Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 298 attorneys who answered this question, most were supportive of the proposed rule (162, or 54%), many opposed the proposed rule (61, or 20%), and many were neutral (75, or 25%). (See Exhibit V, *infra* page 50. See Appendix B for a compilation of the responses.)

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Ninety-one attorneys saw this as having access to additional valuable resources, but four attorneys worried about bias in the additional authority. Thirty-one attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but six attorneys said that they already review the unpublished opinions anyway.

Many attorneys commented on how unpublished opinions are used. Four attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-six attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 16 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Fifteen attorneys opined that unpublished opinions tend not to be of as high quality as published opinions in their drafting, but one attorney said that their quality is good.

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many of them are available electronically from attorneys' desktops, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 14 attorneys said that they are still often less accessible than published opinions.

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Twenty-five attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Seventeen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that they would just get shorter. Two attorneys predicted that they would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Eight attorneys opined that the ability to

cite unpublished opinions would make courts more accountable. Four attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 12 attorneys suggested that perhaps the distinction should be eliminated.

Sixty-five attorneys provided other comments: 31 were supportive of the proposed rule, 31 were neutral, and three were opposed to it.

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IV. Survey of Case Files

On average, the courts of appeals published approximately one-third of their opinions in our sample of cases, but most of the courts resolved half to most of their cases without opinions. And many of the unpublished opinions in our sample—most for some courts—are under 500 words in length, which means they are so short as to be of limited value as authorities.

It is relatively common for a fully briefed federal appeal—a case with counseled briefs filed on both sides—to include in a brief or opinion a citation to an unpublished opinion in an unrelated case; that is, cited as legal authority rather than concerning the history of the case. This occurs much more often in the briefs than in the opinions. Citations to unpublished opinions, especially in the briefs, often are included in string citations, which suggests that the citations are not crucial.

Many of the unpublished opinions cited were written by courts other than the ones hearing the appeals.

Of the 650 cases we reviewed for this study, we found six opinions—three by the court of appeals for the Sixth Circuit and three by the court of appeals for the Tenth Circuit—that cite the court’s own unpublished opinions.

A. Opinions

From all of the appeals filed in federal courts of appeals in 2002, we selected at random 50 in each circuit.⁹ We selected cases filed in 2002 so that they would be filed recently enough for many documents to be available electronically, but long enough ago so that almost all of them are resolved. In fact, all but 12 (98%) have been resolved.¹⁰

9. The number of cases filed in 2002 per circuit ranged from 1,105 for the District of Columbia Circuit to 12,365 for the Ninth Circuit. (See Exhibit W, *infra* page 51.)

10. All cases selected in the First, Fourth, Fifth, Seventh, Eighth, Eleventh, and Federal Circuits have been resolved. Still unresolved are four cases in the Second Circuit: *Ni v. United States Department of Justice* (2d Cir. 02–4764, filed 11/18/2002) (asylum appeal argued 05/19/2005), *Zhang v. United States Department of Justice* (2d Cir. 02–4813, filed 11/25/2002) (immigration appeal scheduled to be ready for argument the week of 08/25/2005), *Bogonis v. Attorney General* (2d Cir. 02–4861, filed 12/03/2002) (immigration appeal scheduled to be ready for argument the week of 05/16/2005), and *Ni v. Ashcroft* (2d Cir. 02–4903, filed 12/09/2002) (immigration appeal scheduled to be ready for argument the week of 09/12/2005); two cases in the Third Circuit: *Aruanno v. Cape May City Jail* (3d Cir. 02–1395, filed 02/07/2002) (prisoner appellant’s appointed attorney suggested 05/04/2004 that the court summarily vacate the district court’s orders and remand for development of a more complete record) and *Spada v. Flemming Co.* (3d Cir. 02–4155, filed 11/18/2002) (civil appeal stayed by bankruptcy); one case in the Sixth Circuit, *United States v. Burford* (6th Cir. 02–6231, filed 10/17/2002) (joint motion to remand pending in a criminal appeal of a drug sentence); one case in the Ninth Circuit, *United States v. Murillo* (9th Cir. 02–50200, filed 04/24/2002) (decision pending in a sentencing guidelines appeal consolidated with nine others); two cases in the Tenth Circuit, *Beierle v. Colorado Department of Corrections* (10th Cir. 02–1502, filed 11/13/2002) (decision pending in the appeal of

Ninety of the appeals were resolved by opinions published in West's *Federal Reporter* (14%). The percentage of cases resolved by published opinions ranged from 2% for the courts of appeals for the Fourth Circuit and the Eleventh Circuit to 34% for the court of appeals for the Eighth Circuit. (See Exhibit X, *infra* page 52, for the individual circuits' data.)

Nearly a third of the appeals were resolved by unpublished opinions (198, or 30%). An opinion is considered unpublished if it is not published in the *Federal Reporter*, but West and Lexis publish most of them online and West now publishes most of them in a print series called the *Federal Appendix*. We found all unpublished opinions published in the *Federal Appendix* for the courts of appeals for eight of the circuits: the First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Federal Circuits. We found most unpublished opinions published in the *Federal Appendix* for the courts of appeals for two of the circuits (the Second and Fifth Circuits) and some published in the *Federal Appendix* for the courts of appeals for two of the circuits (the Third and District of Columbia Circuits).

The court of appeals for the Eleventh Circuit only permitted electronic access to their unpublished opinions in April 2005, and has permitted this access only prospectively. All of the unpublished opinions of this court that we examined were "tabled" in the *Federal Appendix*, showing only whether the lower court was affirmed or reversed. The court of appeals for the Third Circuit publishes most of its signed unpublished opinions in the *Federal Appendix*, but only tables most of its per curiam unpublished opinions there. The court of appeals for the Fifth Circuit used to publish some and table some unpublished opinions in the *Federal Appendix*, but now publishes all of them there.

Most or all unpublished opinions are on Westlaw for all courts but the court of appeals for the Eleventh Circuit, which only started making unpublished opinions available electronically recently. Approximately half of the courts post most or all of their unpublished opinions on their websites—courts of appeals for the First, Second, Third, Fourth, Fifth, and Eighth Circuits.¹¹ All published and unpublished opinions are available through PACER¹² for cases in four circuits—the First, Fourth, Eighth, and District of Columbia Circuits—and some opinions are available through PACER for cases in the Tenth Circuit.

a dismissal of a Colorado state prisoner's complaint argued 06/22/2004) and *Initiative and Referendum Institute v. Walker* (10th Cir. 02–4123, filed 07/24/2002) (decision pending in an action challenging a requirement by Utah's constitution of a two-thirds supermajority for voters to enact legislation concerning the taking of wildlife argued 09/15/2003); and two cases in the District of Columbia Circuit, *Town of Cortlandt v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1331, filed 11/01/2002) (Federal Energy Regulatory Commission appeal held in abeyance pending resolution of an action in the district court by an intervenor in this appeal) and *Constellation Power Source, Inc. v. Federal Energy Regulatory Commission* (D.C. Cir. 02–1367, filed 11/27/2002) (Federal Energy Regulatory Commission appeal that arose out of the 2000 California energy crisis held in abeyance pending the resolution of other cases arising from that crisis).

11. This does not include the courts that post unpublished opinions on their websites for a limited number of days.

12. Public Access to Court Electronic Records provides fee-based online access to federal courts' docket and related information. For the Federal Judicial Center, fees are waived.

Some courts follow a pattern in which published opinions are signed and unpublished opinions are per curiam. This is true for the cases we examined in the courts of appeals for the Fourth, Fifth, and Eighth Circuits. The courts of appeals for the Seventh and Tenth Circuits designate their unpublished opinions “orders.” The court of appeals for the Sixth Circuit designates some of them “orders,” and the court of appeals for the District of Columbia Circuit designates some of them “judgments” and some of them “orders.” The court of appeals for the Second Circuit designates them “summary orders,” and the court of appeals for the Ninth Circuit designates them “memorandum” opinions or dispositions.

Among the cases in our sample decided by opinions, an average of 34% were decided by published opinions, with the rates for individual circuits ranging from 3% for the court of appeals for the Fourth Circuit to 86% for the court of appeals for the First Circuit. (See Exhibit Y, *infra* page 53, for the individual circuits’ data.)

Almost all of the published opinions in our sample are over 1,000 words in length, which corresponds to about four pages of office text (or two pages in the *Federal Reporter*). The only exception is the only published opinion in our sample by the court of appeals for the Eleventh Circuit, which is 679 words in length.¹³

An average of 71% of each court’s unpublished opinions are fewer than 1,000 words in length, which we regard as short. The rates for individual courts ranged from 43% for the court of appeals for the Seventh Circuit to 100% for the courts of appeals for the Eighth and District of Columbia Circuits.

Some who have expressed concern about the Advisory Committee on Appellate Rules’ proposal to uniformly permit citations to unpublished opinions have observed that unpublished opinions are often so very short as to not be useful as authority, and some have expressed concern that permission to cite unpublished opinions could result in their becoming so very short as to not be useful as authority. A crude, but useful, index of an opinion so very short as to be minimally useful as authority is an opinion under 500 words in length. We found no published opinion that short in our sample. An average of 51% of the courts’ unpublished opinions are that short, ranging from 0% for the court of appeals for the Sixth Circuit to 100% for the court of appeals for the Eighth Circuit. (See Exhibit Z, *infra* page 54, for how many unpublished opinions by each court are very short, short, or longer than that in our sample. See Exhibit AA, *infra* page 55, for the individual courts’ rates of very short unpublished opinions.)

Although the rate of very short opinions among unpublished opinions spanned the full range of possible values, on average the rates were higher the more permissive the court with respect to citations to unpublished opinions. The average rate for restrictive courts was 40%, the average rate for discouraging courts was 53%, and the average rate for restrictive courts was 61%. But because the variation among the courts is so great, this trend is not statistically significant.

A slight majority of the appeals were not resolved by an opinion (350, or 54%). We refer to these cases as resolved by “docket judgments.” Typically, the cases have docket entries stating how the cases were resolved (e.g., appeal volun-

13. *United States v. Anderson*, 328 F.3d 1326 (11th Cir. 2003).

tarily dismissed, certificate of appealability denied) and an order to that effect may be in the case file, but not a document in the form of an opinion.¹⁴

In most courts, docket judgments are very short—just a few words—but in the court of appeals for the First Circuit they can be as long as a few hundred words and they often cite opinions as authority. But they do not appear as opinions on Westlaw or in the *Federal Appendix*. The court of appeals for the Federal Circuit, on the other hand, does publish the equivalent of docket judgments—a few dozen words resolving the appeal—on Westlaw and in the *Federal Appendix*.

The court of appeals for the District of Columbia Circuit makes available electronically through the docket sheets its one- or two-page orders resolving cases without published opinions. Sometimes these orders are designated per curiam and list the names of the judges on the panel to which the case was assigned. Most of these orders are published in the *Federal Appendix* and we consider them unpublished opinions. Sometimes the orders do not identify the judges to whom the case was assigned and bear only the name of the clerk. Most of these are not published in the *Federal Appendix*. We refer to these orders as “clerk’s orders” and consider them the equivalent of docket judgments.

B. Citations

We examined all of the citations in the briefs and opinions filed in the 650 selected cases. We did not examine pro se briefs, and we did not examine memoranda supporting or opposing motions. One or more counseled briefs were filed in 41% of the cases. The rates for individual circuits ranged from 22% for the court of appeals for the Fourth Circuit to 54% for the court of appeals for the Eighth Circuit. (See Exhibit BB, *infra* page 56, for the individual circuits’ data.) We consider cases with one or more counseled briefs filed “briefed cases,” and we consider cases with one or more counseled briefs filed on both sides “fully briefed cases.”

We used WestCheck and Westlaw to examine every citation to an opinion in every brief and opinion in the selected cases. Appendix C describes all citations to unpublished opinions.

There are citations to unrelated unpublished opinions—in a brief or an opinion—in 12% of the cases, including an average of 29% of the briefed cases and an average of 35% of the fully briefed cases. This rate is approximately the same for restrictive, discouraging, and permissive courts. (See Exhibit CC, *infra* page 57.)

When unpublished opinions are cited, especially in briefs, they often are included in string citations, and it does not appear to someone not intimately involved in the cases that inclusion or exclusion of these citations would make much of a difference.

Approximately half of the cases with citations to unpublished opinions have citations only to unpublished opinions of other courts—other courts of appeals, district courts, and state courts. There are citations to unrelated unpublished opinions by the court of appeals deciding the case in 6% of the cases, including an average of 14% of the briefed cases and an average of 17% of the fully briefed

14. The court of appeals for the Fourth Circuit uses form opinions to deny certificates of appealability; other courts would resolve these cases by docket judgments.

cases. This rate is approximately three times as high for discouraging courts as it is for restrictive and permissive courts. (See Exhibit DD, *infra* page 58.)

We expected unpublished opinions of courts in restrictive circuits to be cited to and by those courts less often than unpublished opinions by other courts are cited to and by the other courts. We did not expect the rate of such citations to be dramatically lower for permissive courts than for discouraging courts. But the court of appeals for the District of Columbia Circuit has been a permissive court for only a short time, and the average for discouraging courts is driven relatively high by relatively very high rates for the courts of appeals for the Sixth and Tenth Circuits.

We found opinions by courts of appeals for six circuits—the First,¹⁵ Third,¹⁶ Sixth,¹⁷ Seventh,¹⁸ Tenth,¹⁹ and District of Columbia²⁰ Circuits—that cite unrelated unpublished opinions. (See Exhibit EE, *infra* page 59.)

15. One unpublished opinion by the court of appeals for the First Circuit cites an unpublished opinion by another federal court of appeals. In *United States v. Quiñones Rodríguez*, 70 Fed. Appx. 591, 591, 2003 WL 21699845 (1st Cir. 2003), the court distinguished two unpublished opinions by the court of appeals for the Eleventh Circuit, *United States v. Clements*, 2002 WL 1049106 (11th Cir. 2002), and *United States v. Joseph*, 2002 WL 1396783 (11th Cir. 2002).

16. Two published opinions by the court of appeals for the Third Circuit cite unpublished district court opinions. In *W.V. Realty Inc. v. Northern Insurance Company of New York*, 334 F.3d 306, 313–14 & n.6 (3d Cir. 2003), the court cited three unpublished opinions by the district court for the Eastern District of Pennsylvania: *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999), *Cooper v. Nationwide Mutual Insurance Co.*, 2002 WL 31478874 (E.D. Pa. 2002), and *General Refractories Co. v. Fireman's Fun Insurance Co.*, 2002 WL 376923 (E.D. Pa. 2002). In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143, 169 (3d Cir. 2005) (Ambro, J., concurring), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania, *In re Magic Marker Securities Litigation*, 1979 WL 1248 (E.D. Pa. 1979).

17. Four opinions by the court of appeals for the Sixth Circuit cite unpublished federal opinions. Three of these opinions cite the court's own unpublished opinions.

In *Smith v. Henderson*, 376 F.3d 529, 536 (6th Cir. 2004), the court cited one of its unpublished opinions, *Brown v. Chase*, 14 Fed. Appx. 482, 2001 WL 814931 (6th Cir. 2001). In *Klimik v. Kent County Sheriff's Department*, 91 Fed. Appx. 396, 400, 2004 WL 193168 (6th Cir. 2004), the court quoted one of its other unpublished opinions, *Bower v. Fillage of Mount Sterling*, 44 Fed. Appx. 670, 2002 WL 1752270 (6th Cir. 2002). In *Moore v. Potter*, 47 Fed. Appx. 318, 320, 2002 WL 31096673 (6th Cir. 2002), the court cited one of its unpublished orders, *Savage v. Unknown FBI Agents*, 1998 WL 69318 (6th Cir. 1998).

In *Hauck v. Commissioner of Internal Revenue*, 64 Fed. Appx. 492, 493, 2003 WL 21005238 (6th Cir. 2003), the court cited an unpublished opinion by the district court for the Western District of Texas, *Perez v. United States*, 2001 WL 1836185 (W.D. Tex. 2001).

18. One published opinion by the court of appeals for the Seventh Circuit cites a depublished district court opinion. In *United States v. George*, 363 F.3d 666, 672 (7th Cir. 2004), the court cited an opinion by the district court for the Eastern District of Pennsylvania that was initially published, *United States v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002), but subsequently withdrawn by the court and replaced by a new published opinion, *United States v. Llera Plaza*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

19. In four cases the court of appeals for the Tenth Circuit cited unpublished opinions by federal courts of appeals. In three of these cases the court cited its own unpublished opinions.

We found three opinions by the court of appeals for the Sixth Circuit²¹ and three opinions by the court of appeals for the Tenth Circuit²² that cite the courts' own unpublished opinions. (See Exhibit FF, *infra* page 60.) Interestingly, one of these opinions also cites an unpublished opinion by the court of appeals for the Ninth Circuit, a restrictive court.²³

In *United States v. Cruz-Alcala*, 338 F.3d 1194, 1197, 1199 (10th Cir. 2003), the court cited one of its own unpublished opinions, *United States v. Molina-Barajas*, 47 Fed. Appx. 552 (10th Cir. 2002), and an unpublished opinion by the court of appeals for the Ninth Circuit, *United States v. Viveros-Castro*, 1998 WL 225053 (9th Cir. 1998). In *Wiransane v. Ashcroft*, 366 F.3d 889, 898 (10th Cir. 2004), the court cited one of its own unpublished opinions, *Limerta v. Ashcroft*, 88 Fed. Appx. 363, 2004 WL 309333 (10th Cir. 2004), and an unpublished opinion by the court of appeals for the Third Circuit, *Lauw v. Ashcroft*, 2003 WL 22881647 (3d Cir. 2003). In *Jackson v. Barnhart*, 60 Fed. Appx. 255, 257, 2003 WL 1473554 (10th Cir. 2003), the court cited one of its own unpublished opinions, *Bellamy v. Massanari*, 29 Fed. Appx. 567, 2002 WL 120532 (10th Cir. 2002).

The court published three opinions in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02-2323, filed 12/03/2002, judgment 11/12/2004). First the court published an opinion by a two-judge panel staying the district court's preliminary injunction pending appeal. *O Centro Espirita Beneficiente Uniao do Vegetal*, 314 F.3d 463 (10th Cir. 2002). This opinion, *id.* at 467, cites an unpublished opinion by the court of appeals for the Eighth Circuit, *United States v. Brown*, 1995 WL 732803 (8th Cir. 1995). The appeal was initially decided by a three-judge panel in a published opinion, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), but reheard en banc and decided by a published per curiam opinion, *O Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004). An opinion concurring with the en banc opinion, *id.* at 1020 (McConnell, J.), and an opinion concurring in part and dissenting in part, *id.* at 984 (Murphy, J.), also cite the unpublished Eighth Circuit opinion.

20. One published opinion by the court of appeals for the District of Columbia Circuit cites an unpublished consent decree filed in the district court for the District of Columbia. In *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency*, 358 F.3d 936, 941 n.5 (D.C. Cir. 2004), the court cited a consent decree in another case requiring the Environmental Protection Agency to promulgate certain standards.

21. See *supra* note 17.

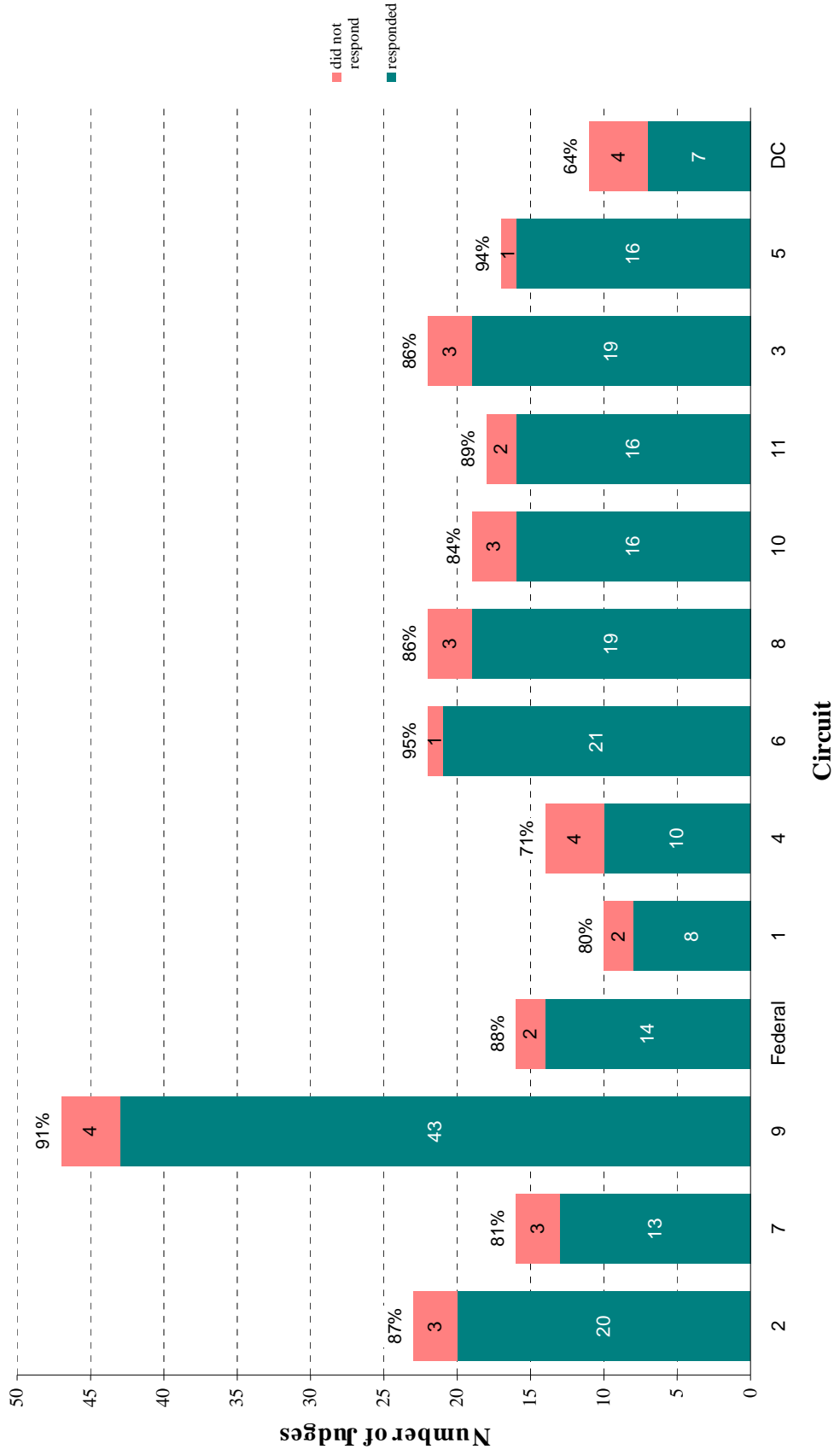
22. See *supra* note 19.

23. *Id.*

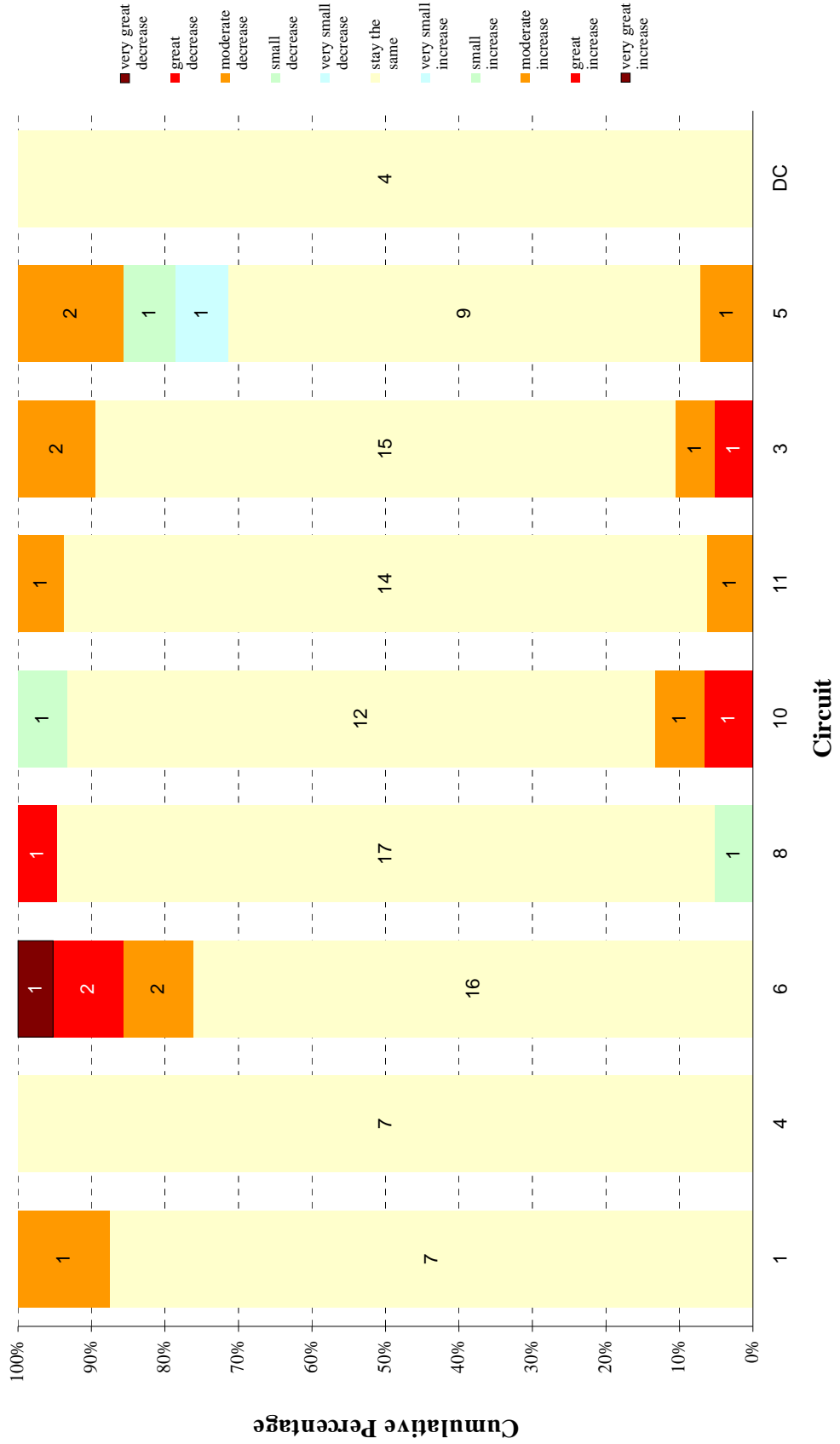
V. Exhibits

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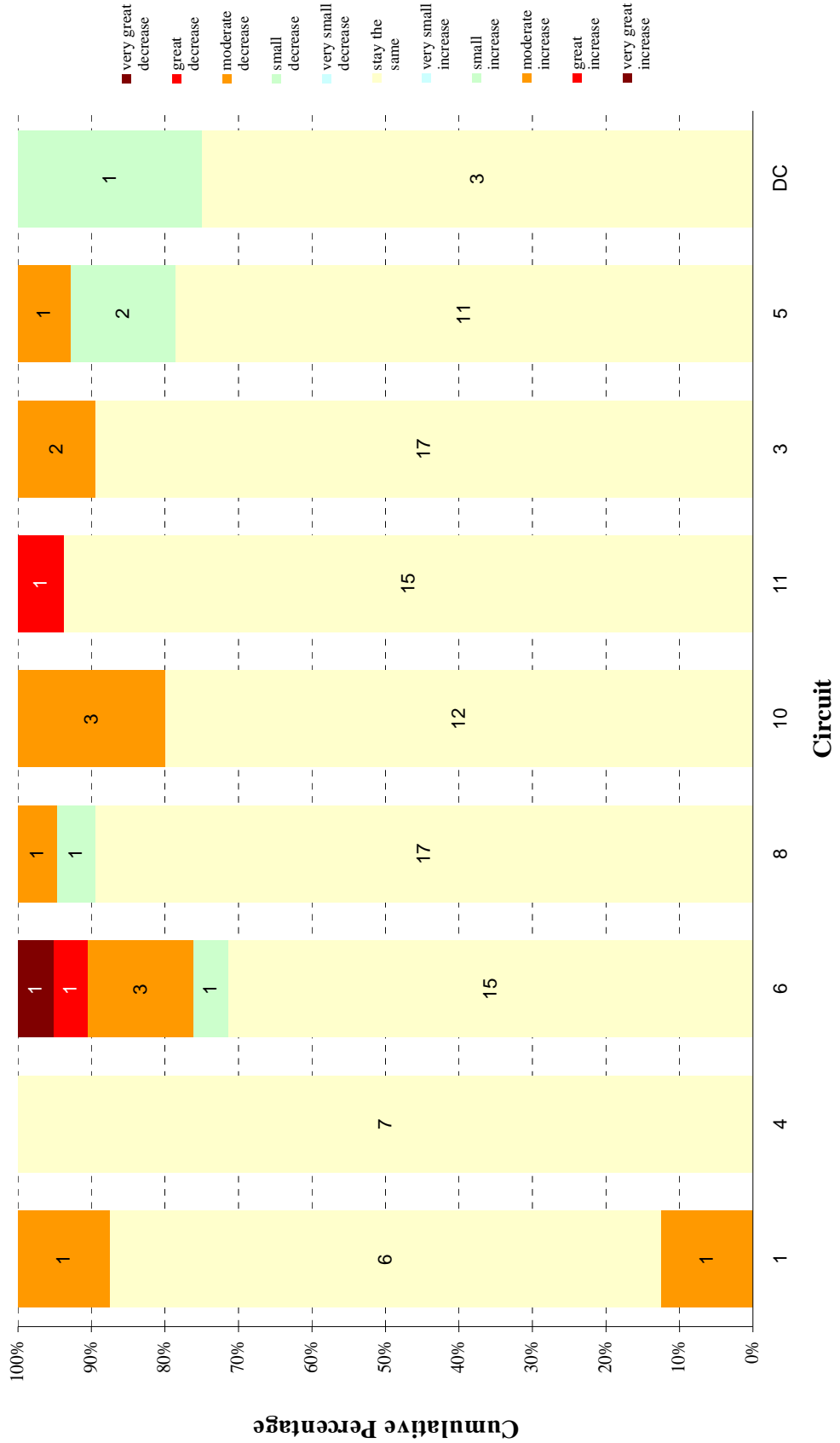
A. Judge Survey Response Rates



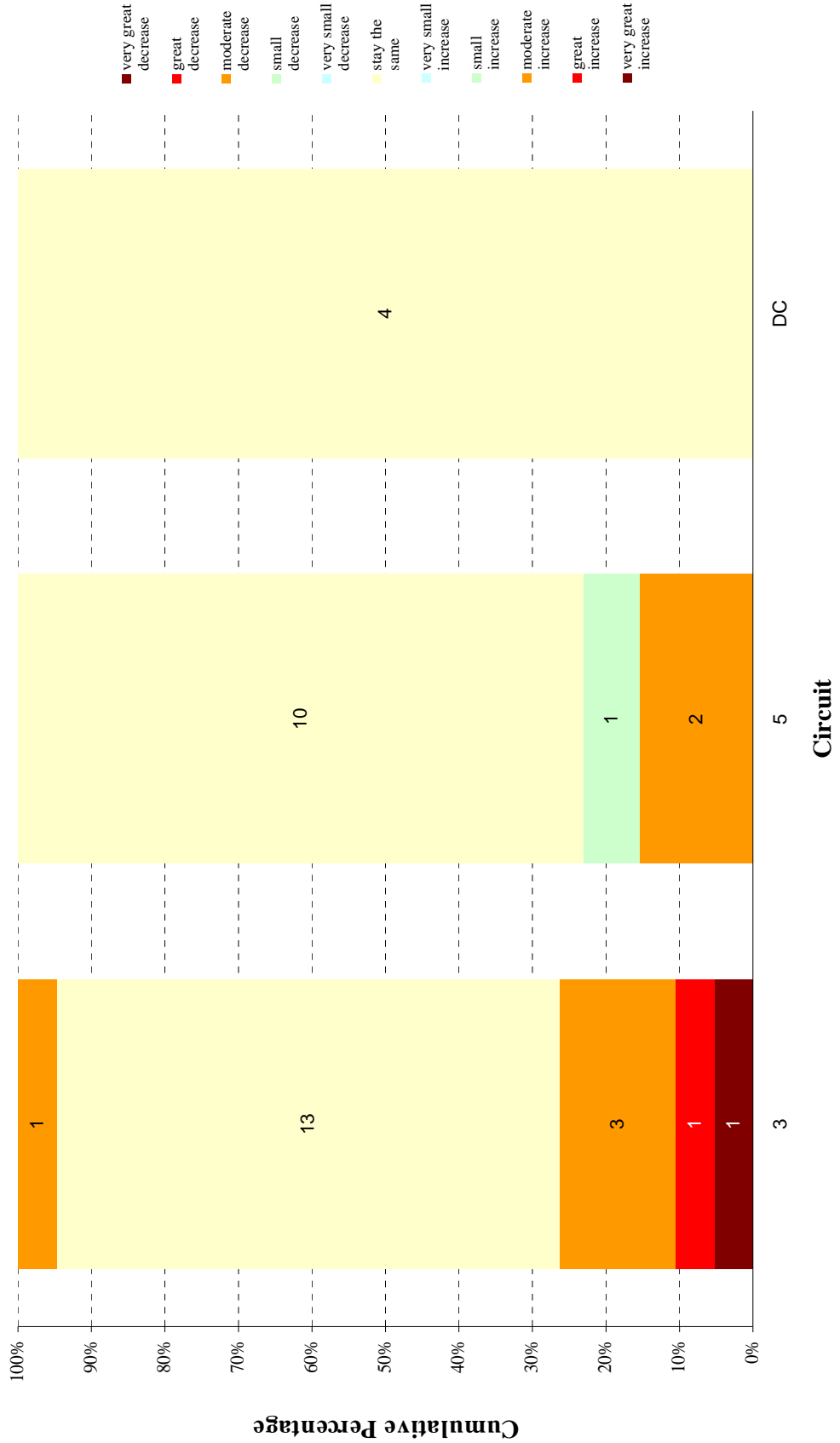
B. Length of Unpublished Opinions If Citation Was Prohibited



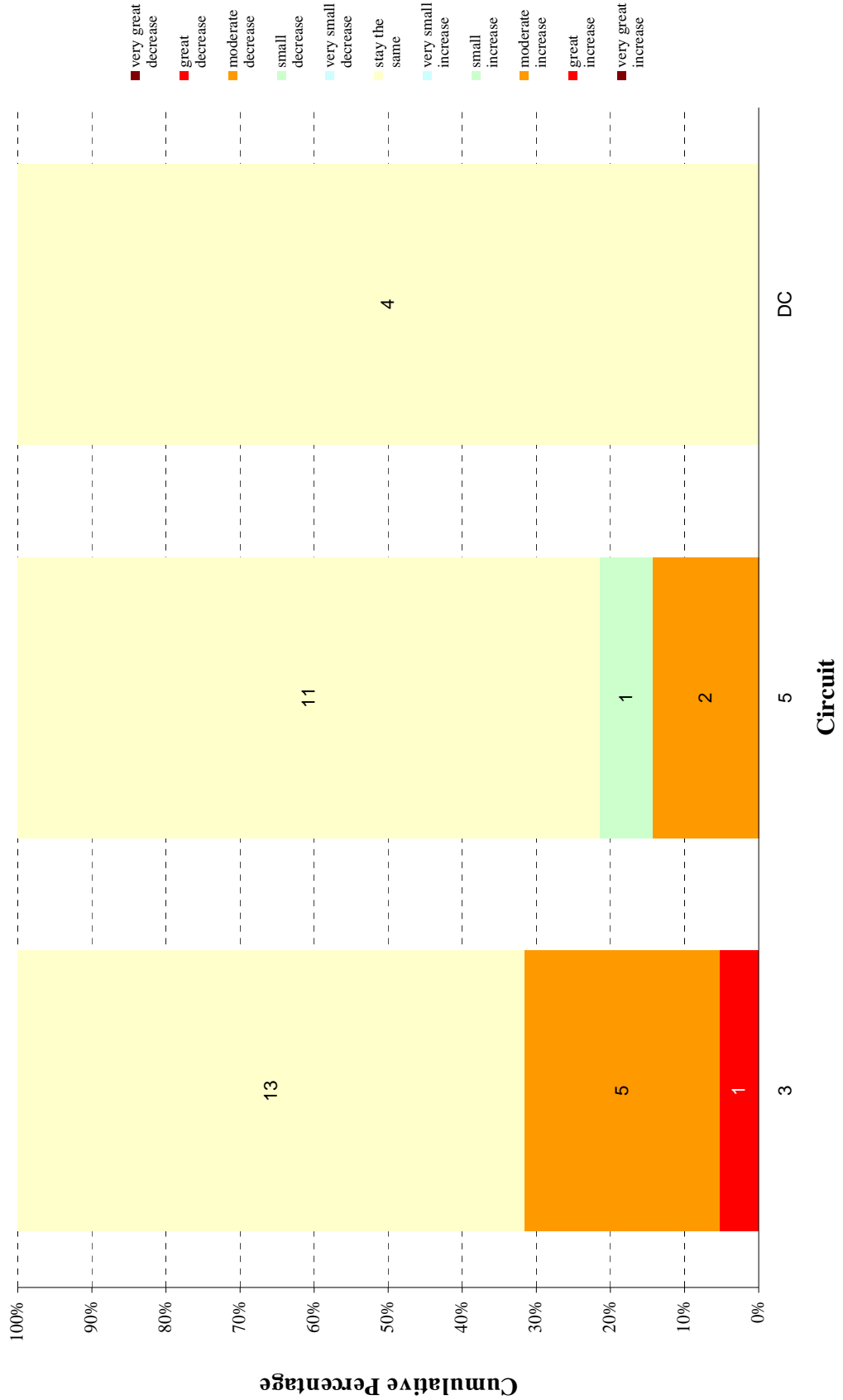
C. Time Preparing Unpublished Opinions If Citation Was Prohibited



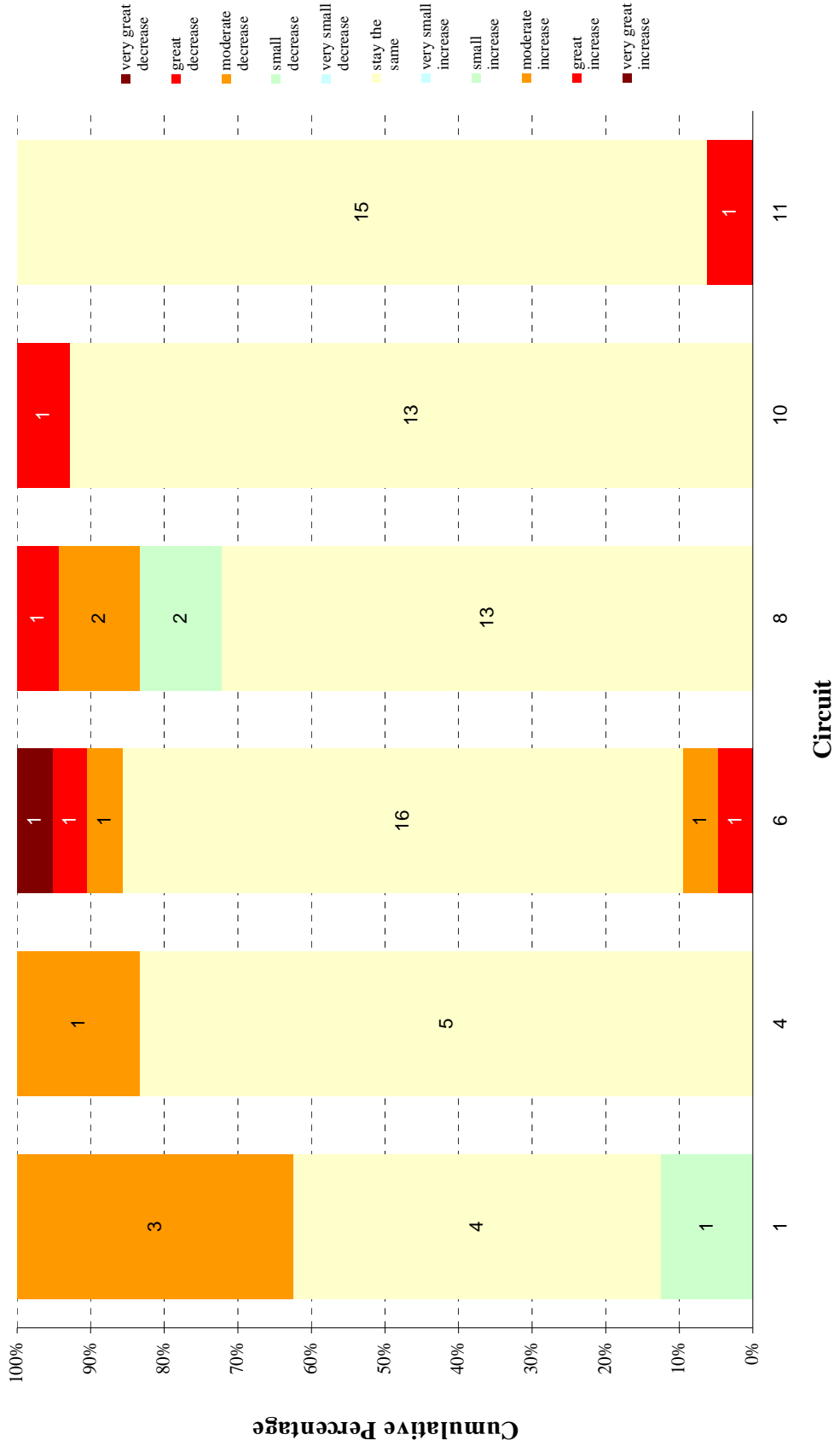
D. Length of Unpublished Opinions If Citation Was Allowed Only Sometimes



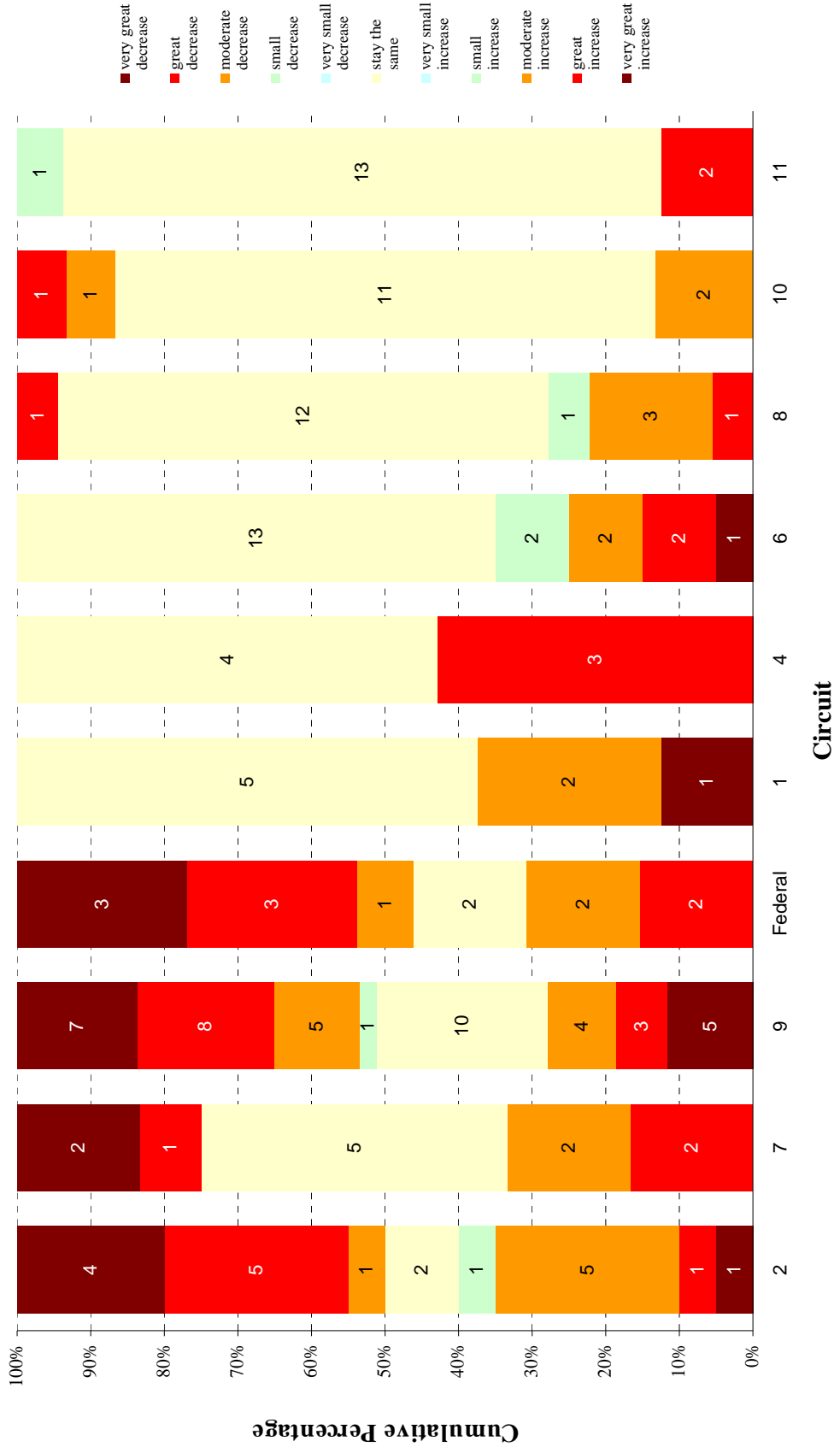
E. Time Preparing Unpublished Opinions If Citation Was Allowed Only Sometimes



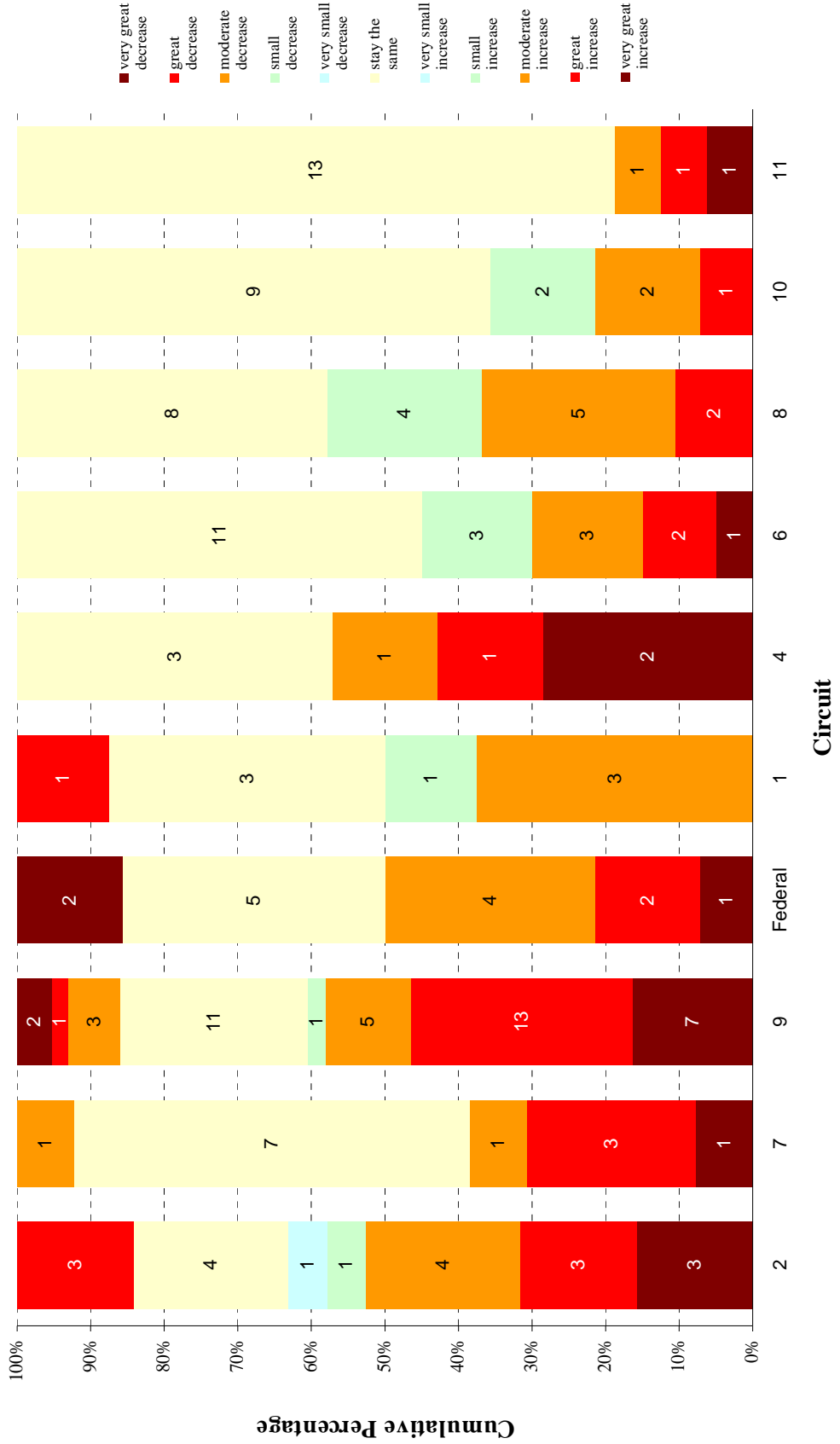
F. Number of Unpublished Opinions If Citation Was Freely Permitted

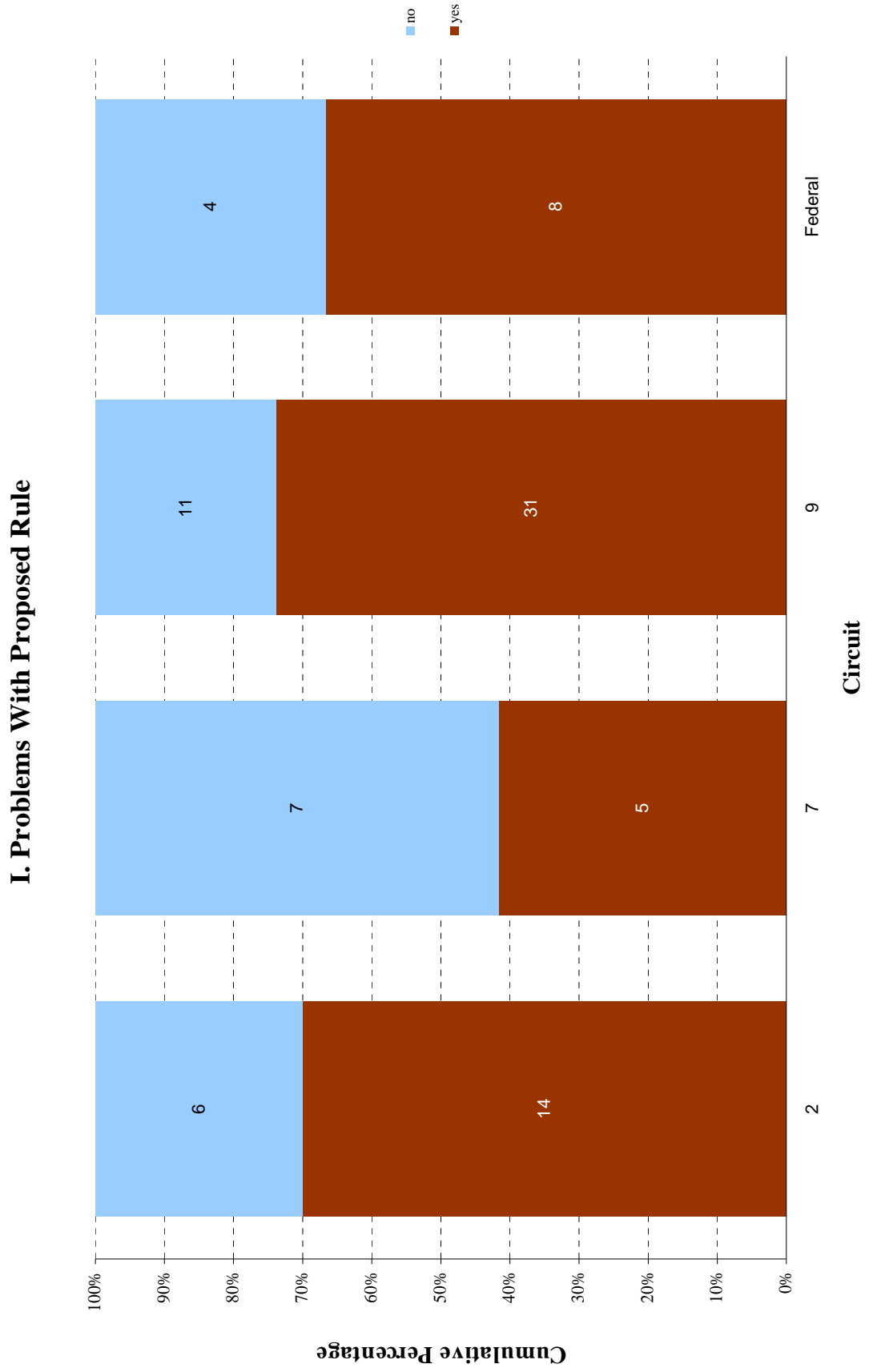


G. Length of Unpublished Opinions If Citation Was Freely Permitted

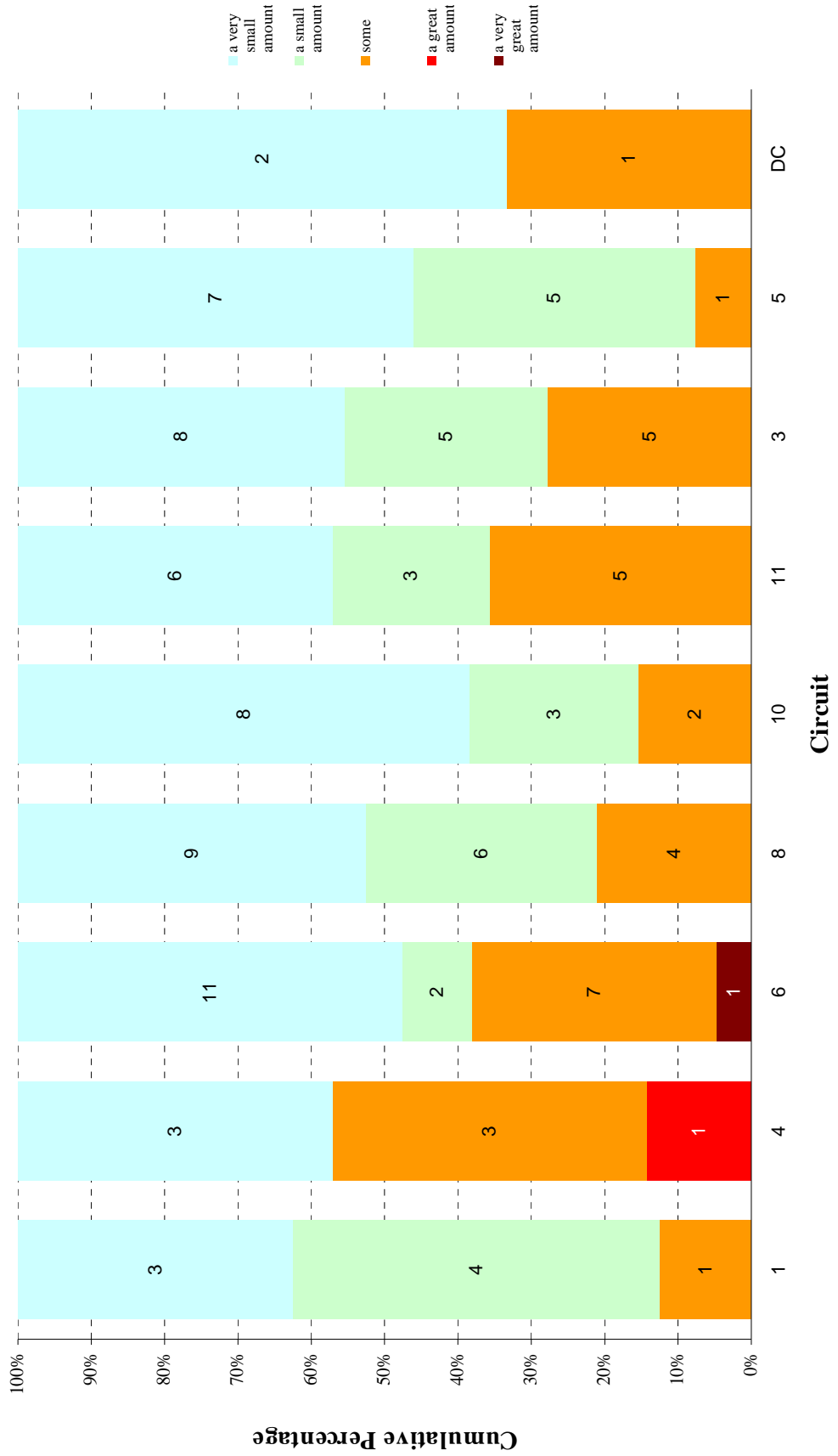


H. Time Preparing Unpublished Opinions If Citation Was Freely Permitted

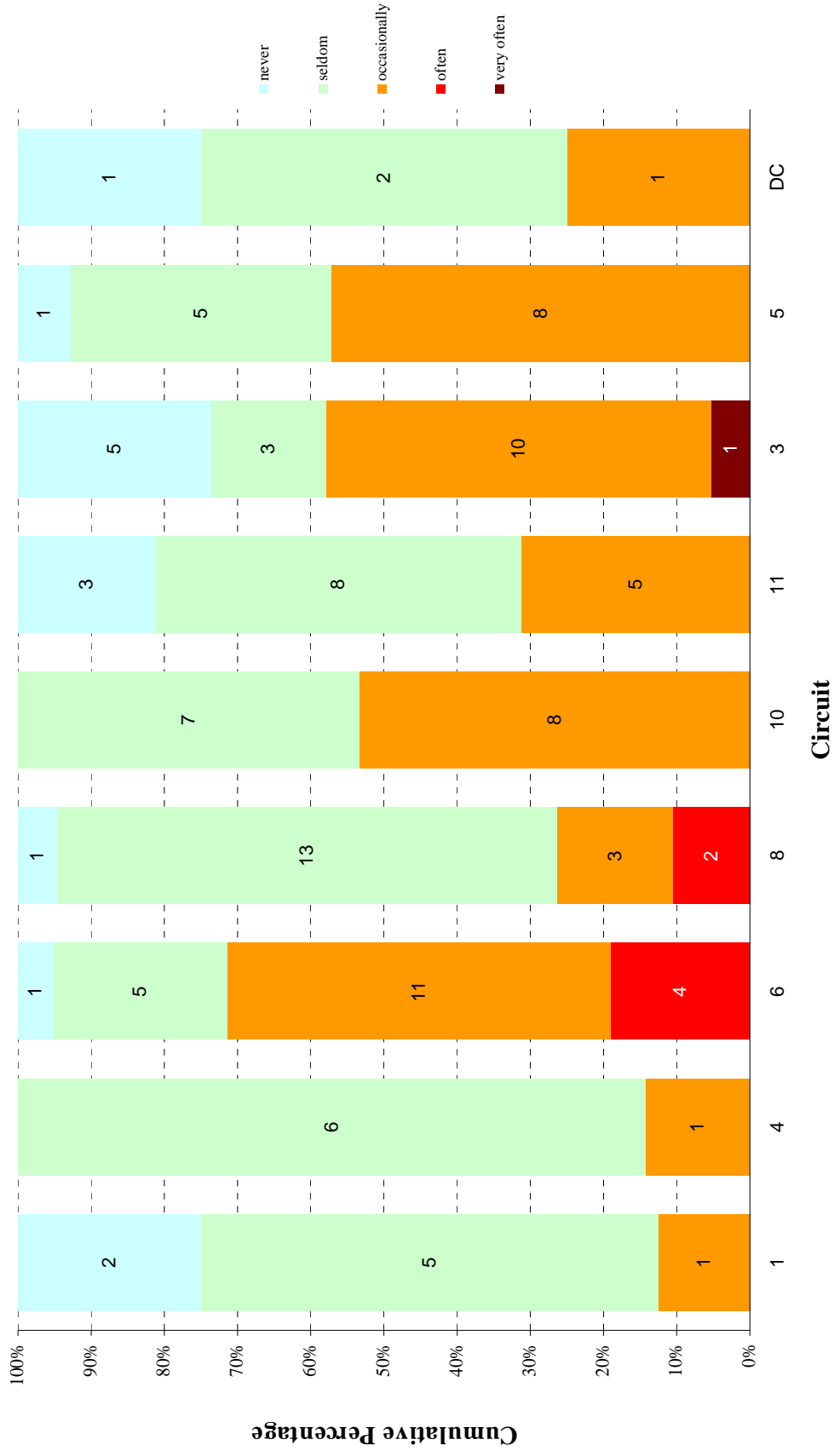




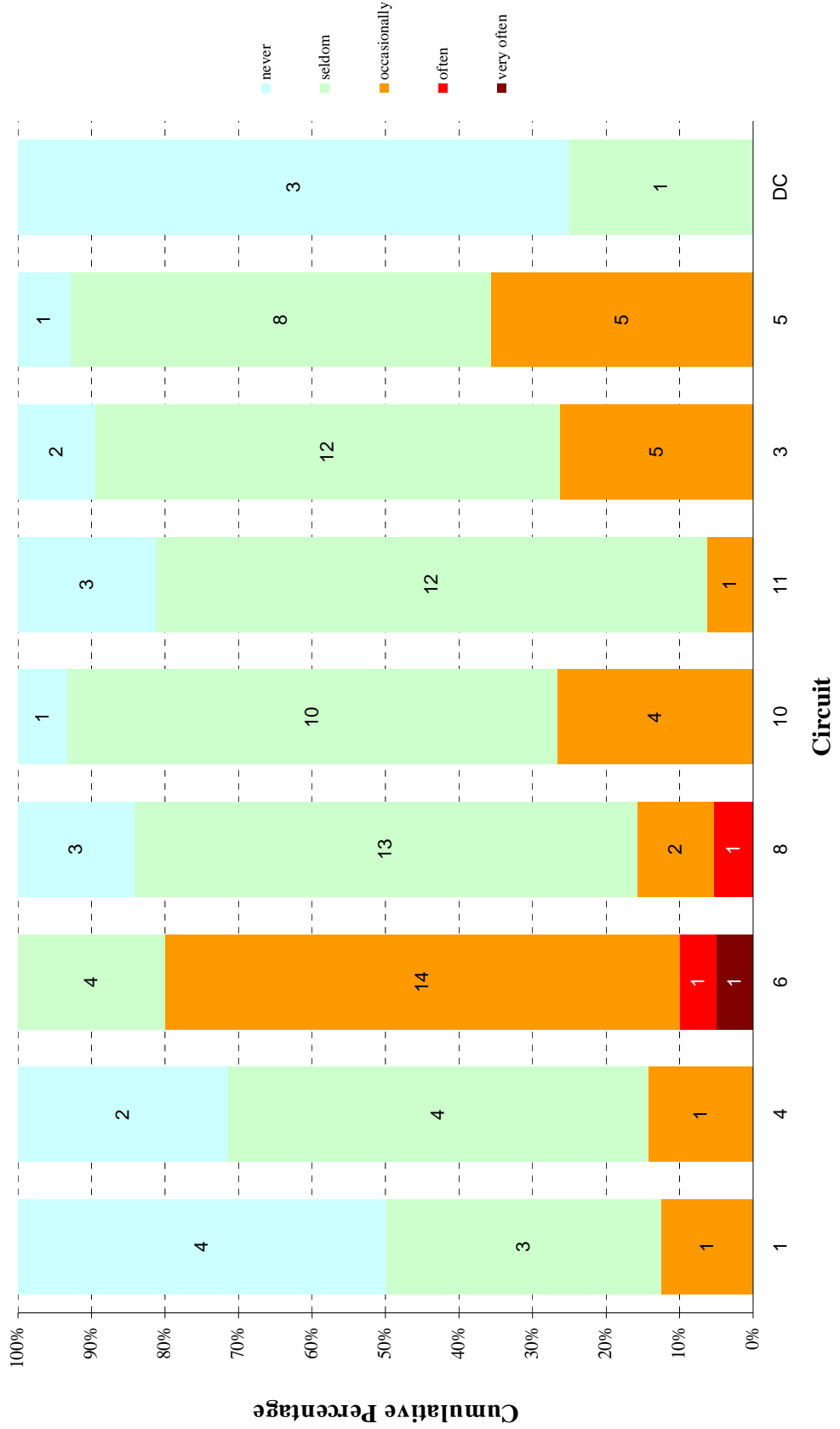
J. Unpublished Citation's Additional Work



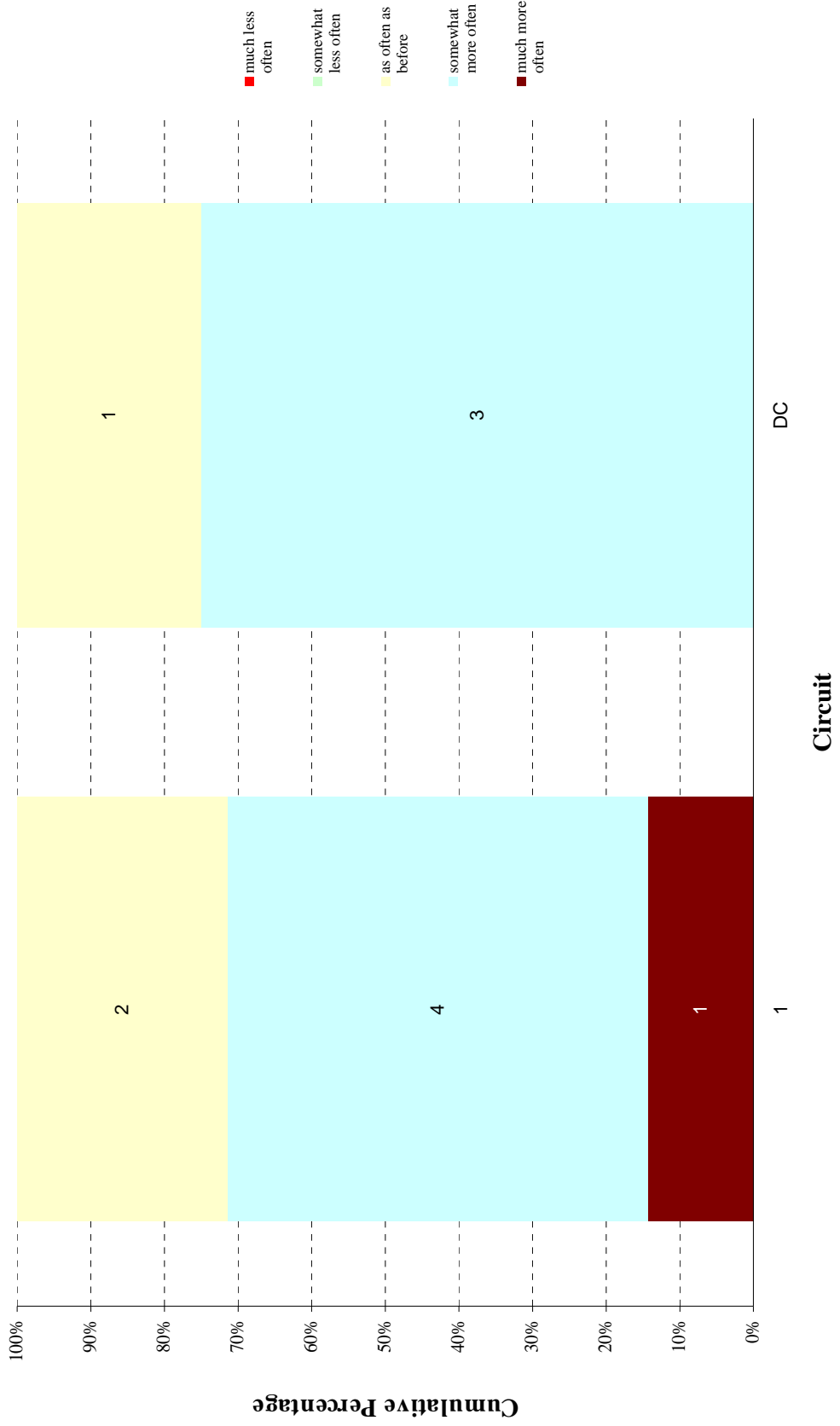
K. Unpublished Citation's Helpfulness



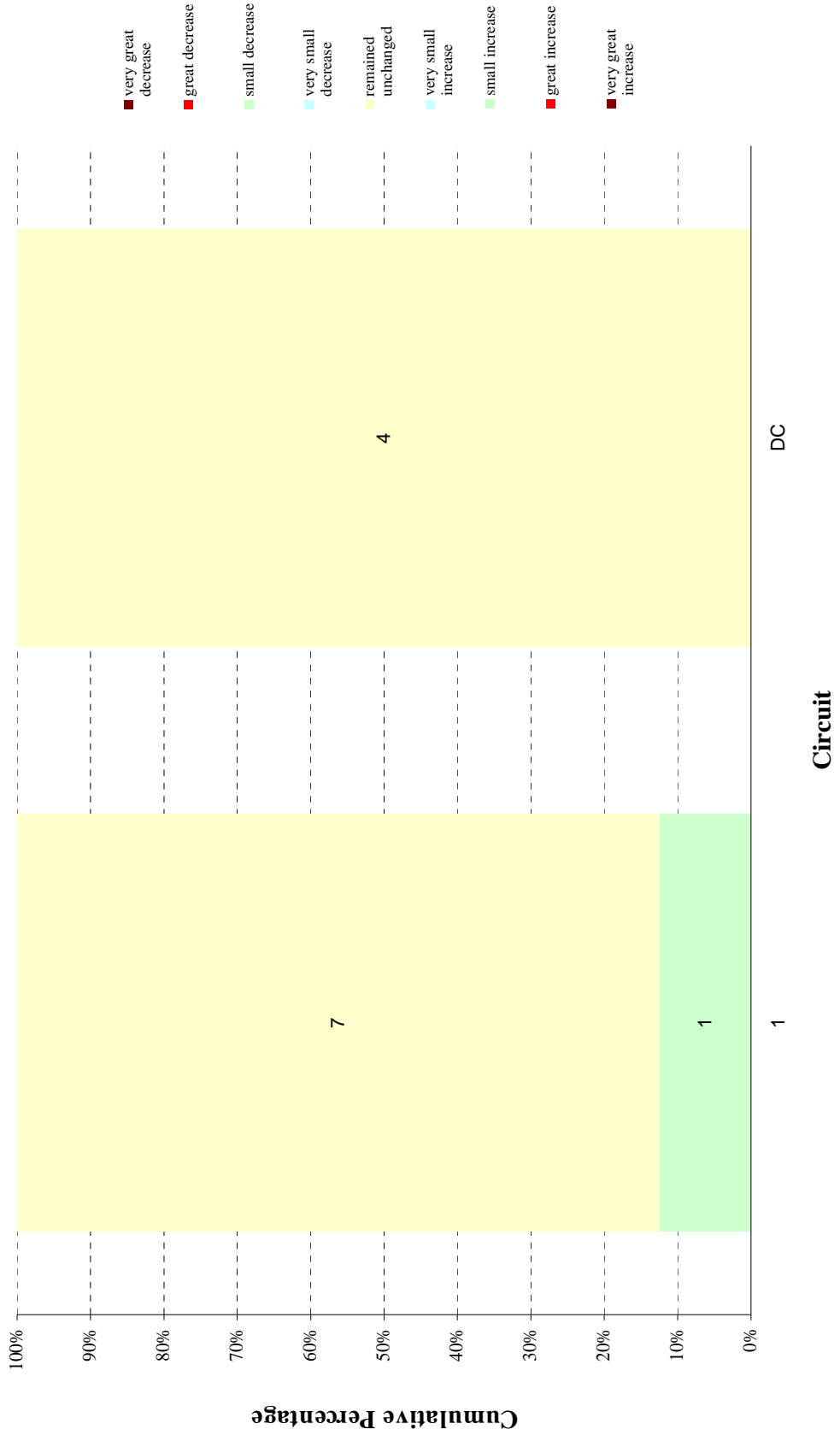
L. Unpublished Citation's Inconsistency



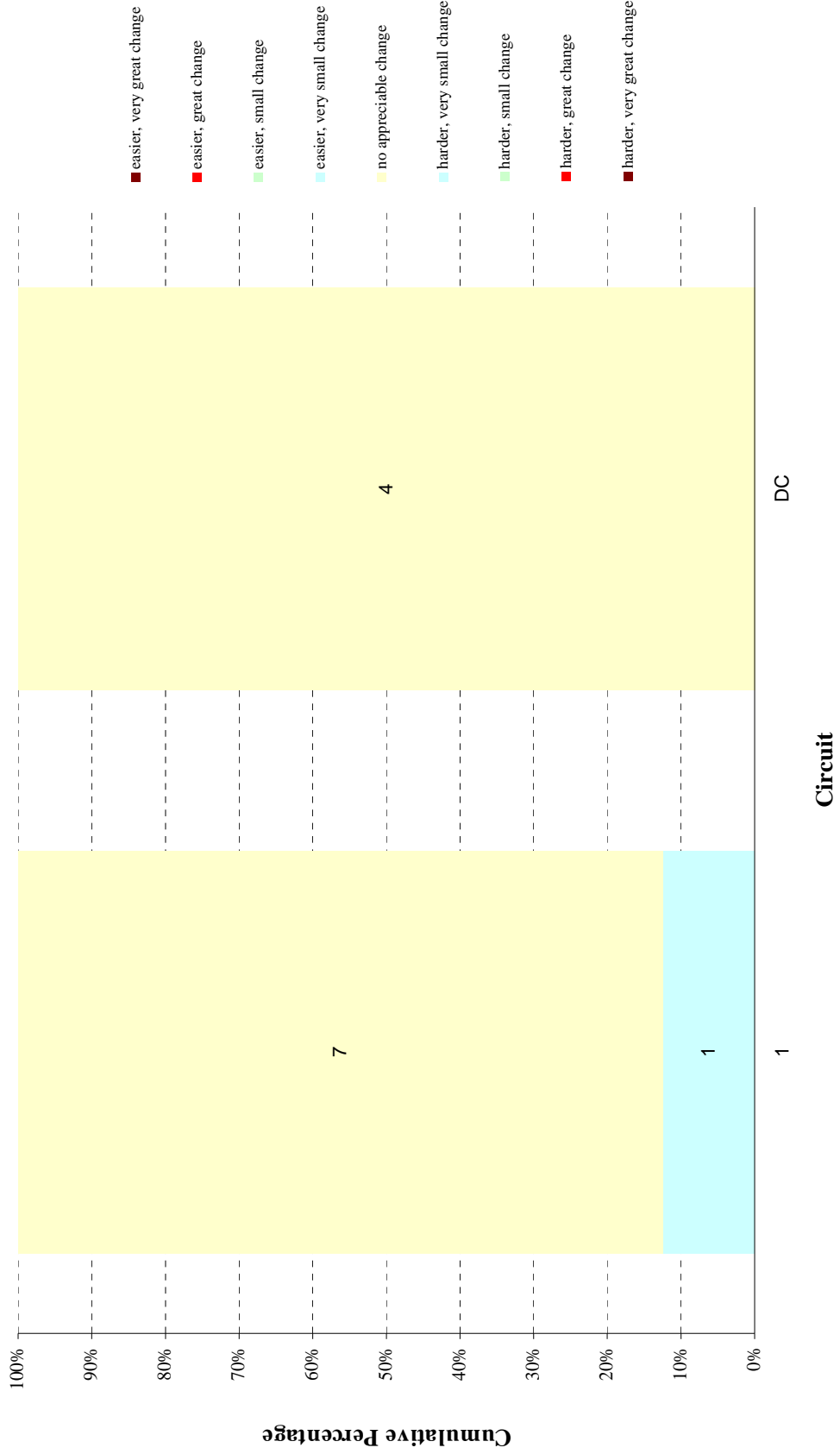
M. Frequency of Citation to Unpublished Opinions After Local Rule Change



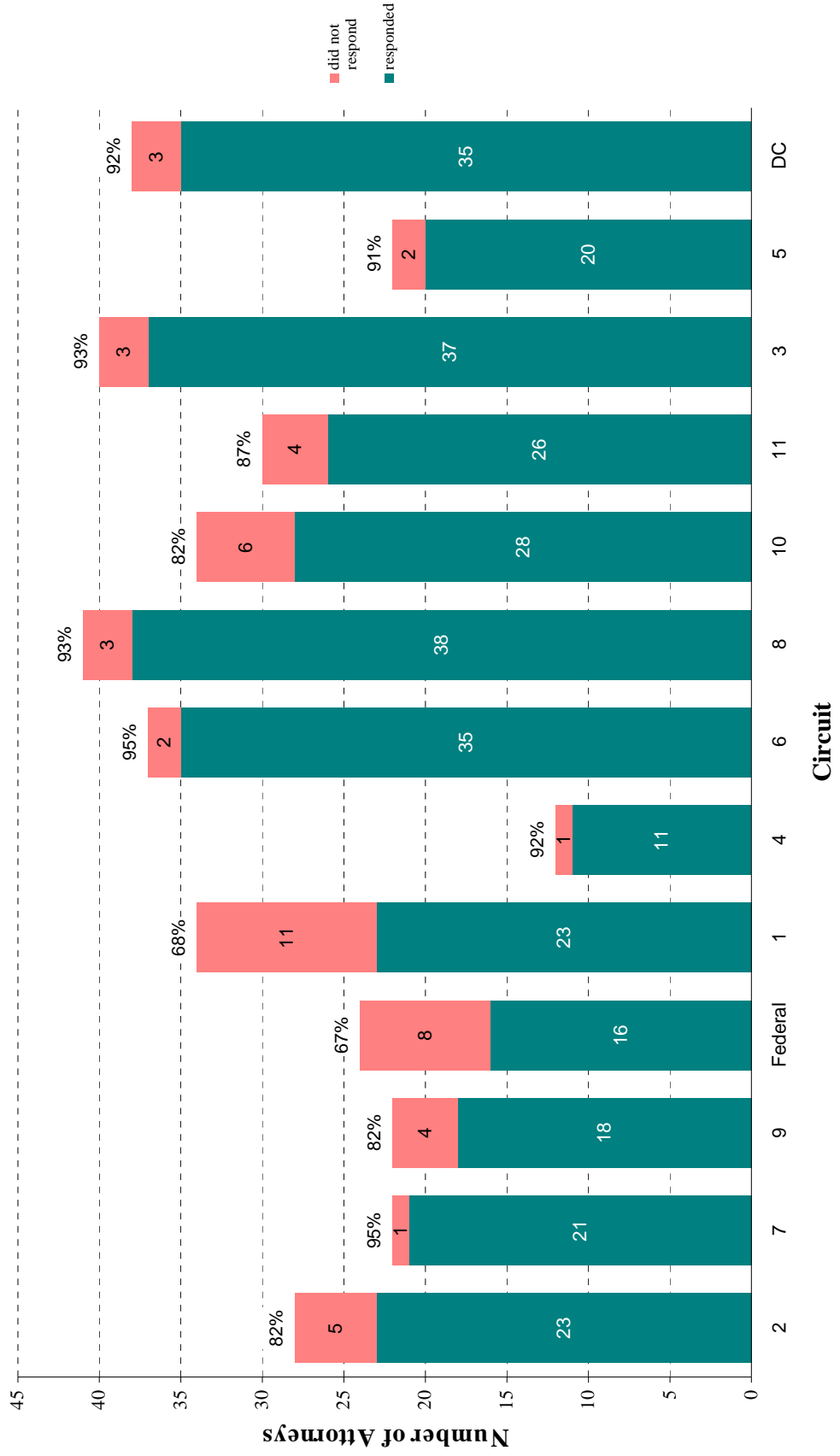
N. Time Preparing Unpublished Opinions After Local Rule Change



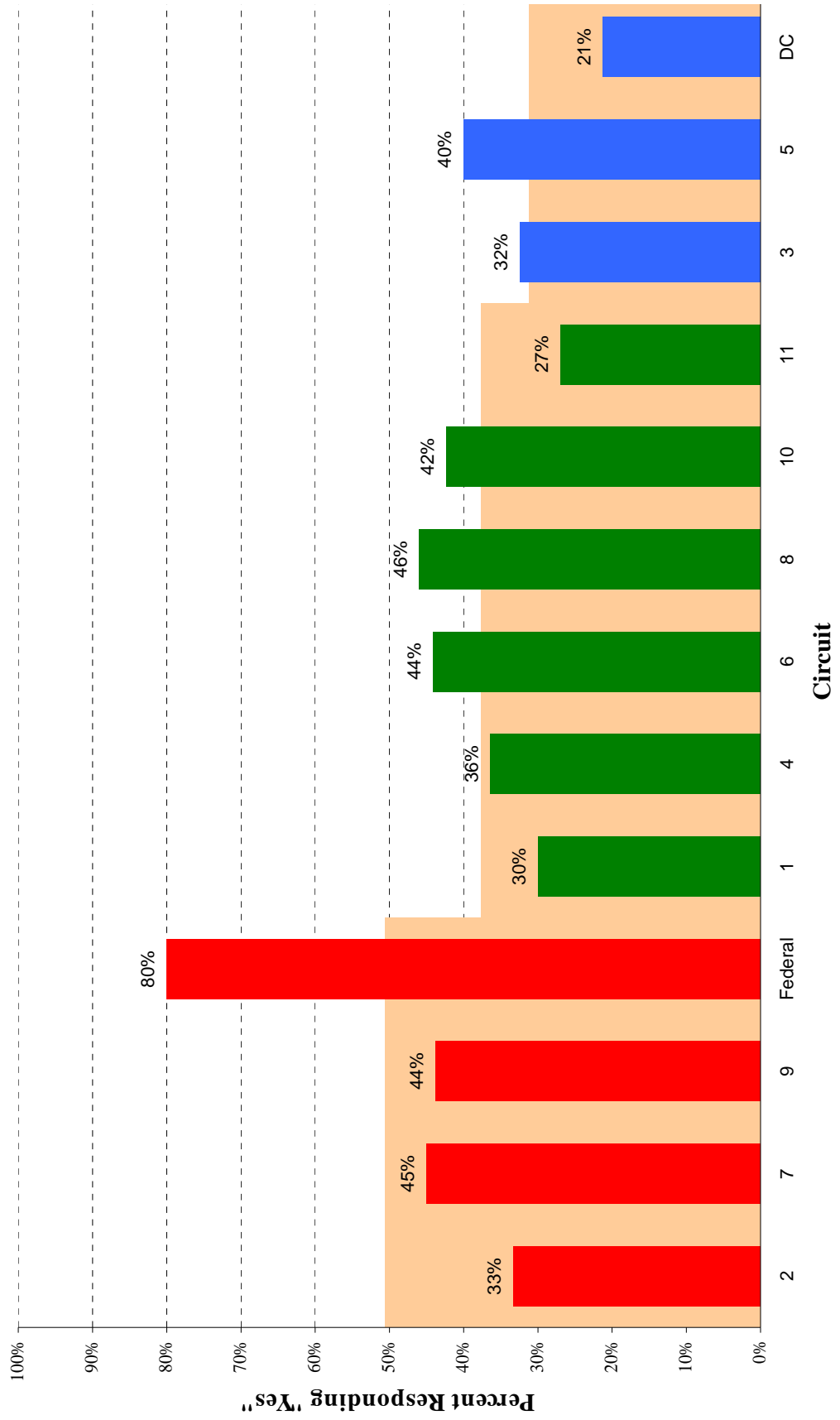
O. Work After Local Rule Change



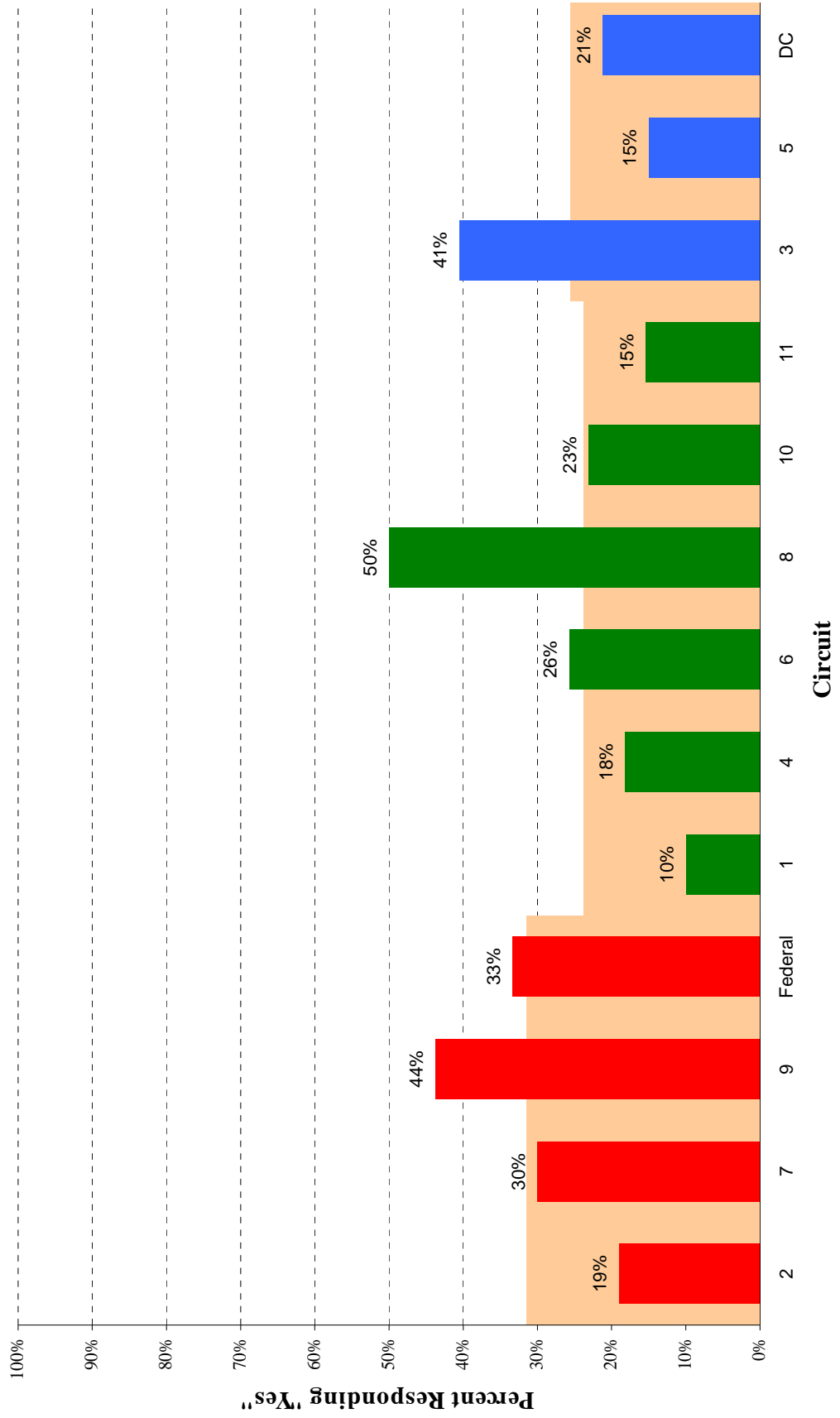
P. Attorney Survey Response Rates



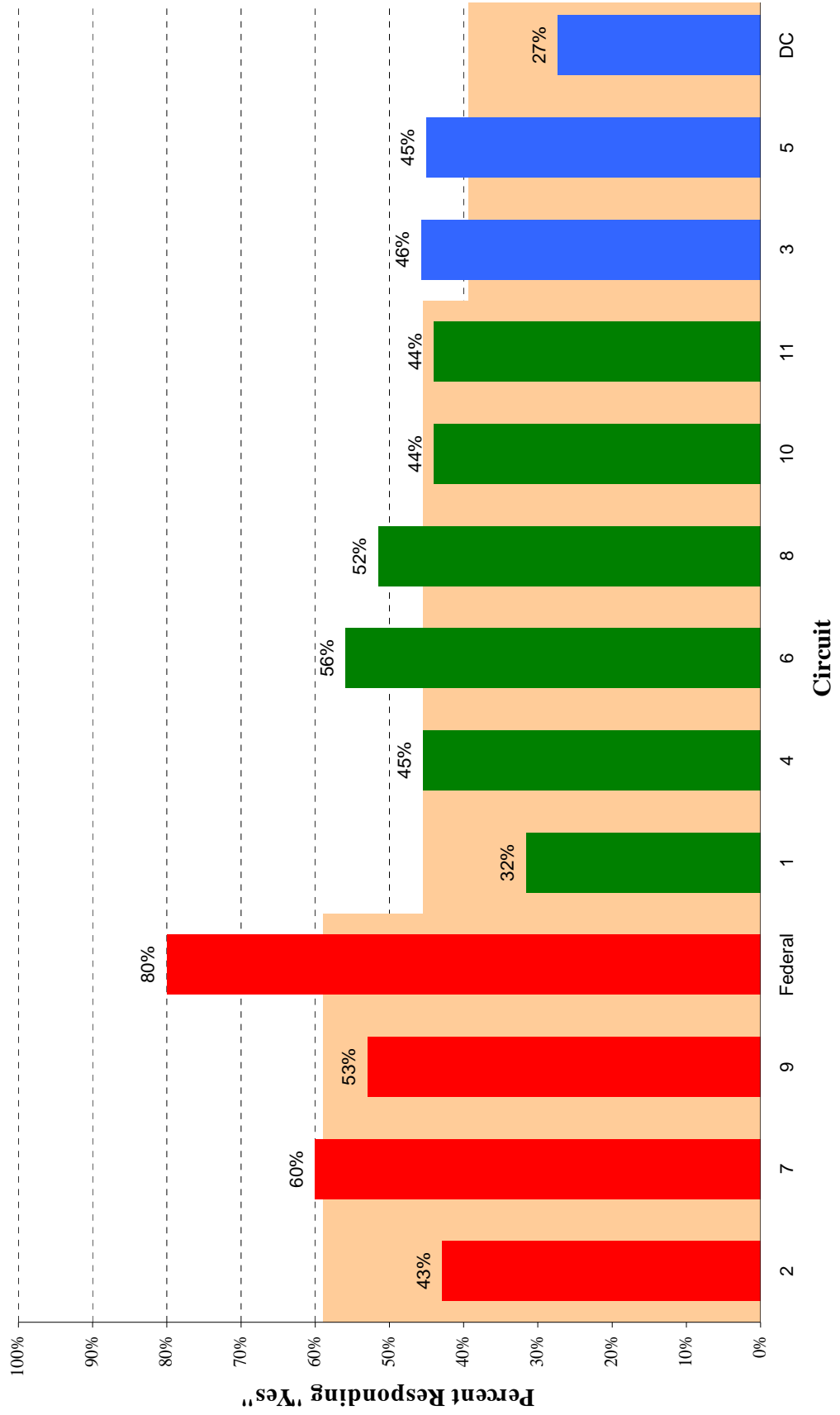
Q. Wanted to Cite this Court's Unpublished Opinion



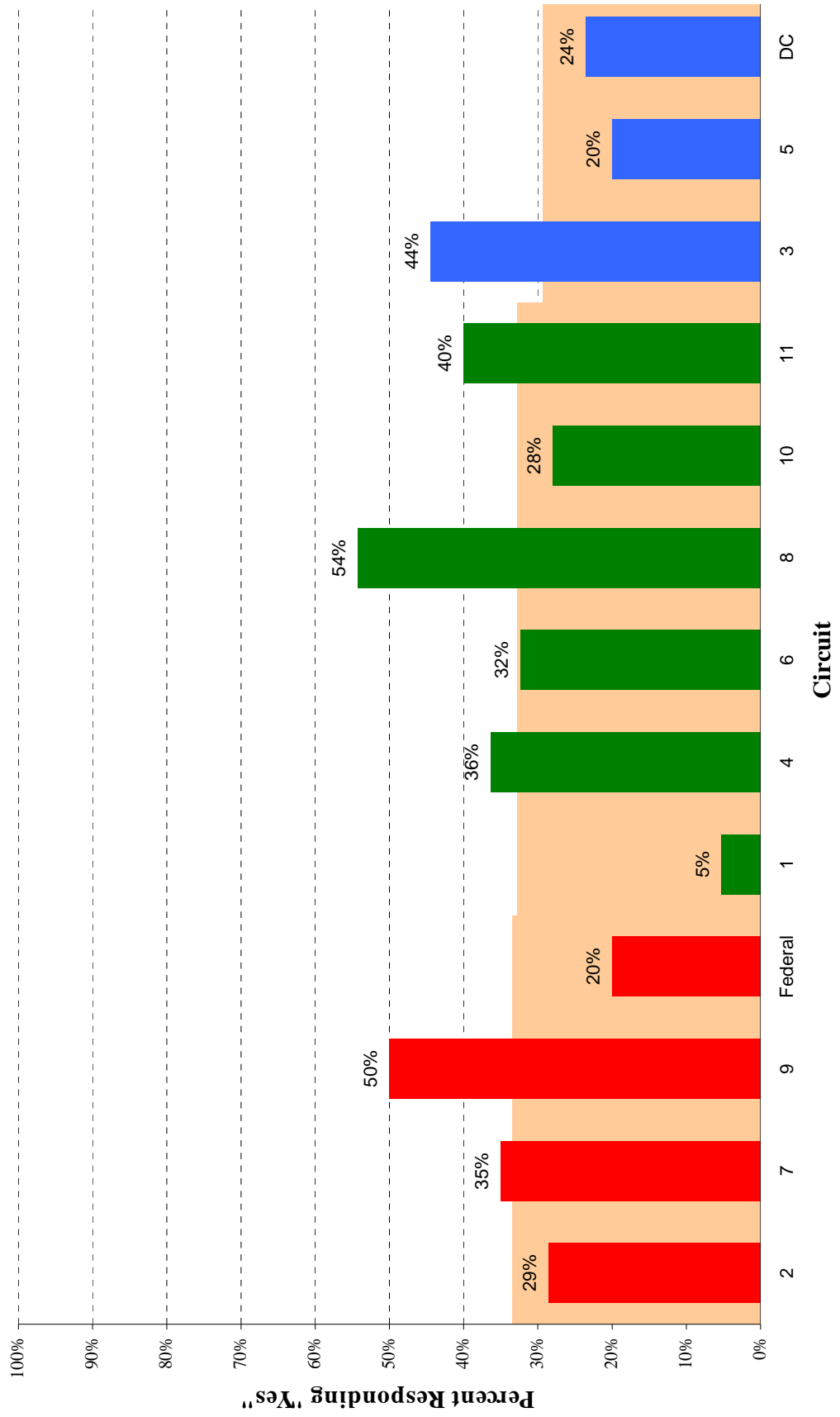
R. Wanted to Cite Another Court's Unpublished Opinion

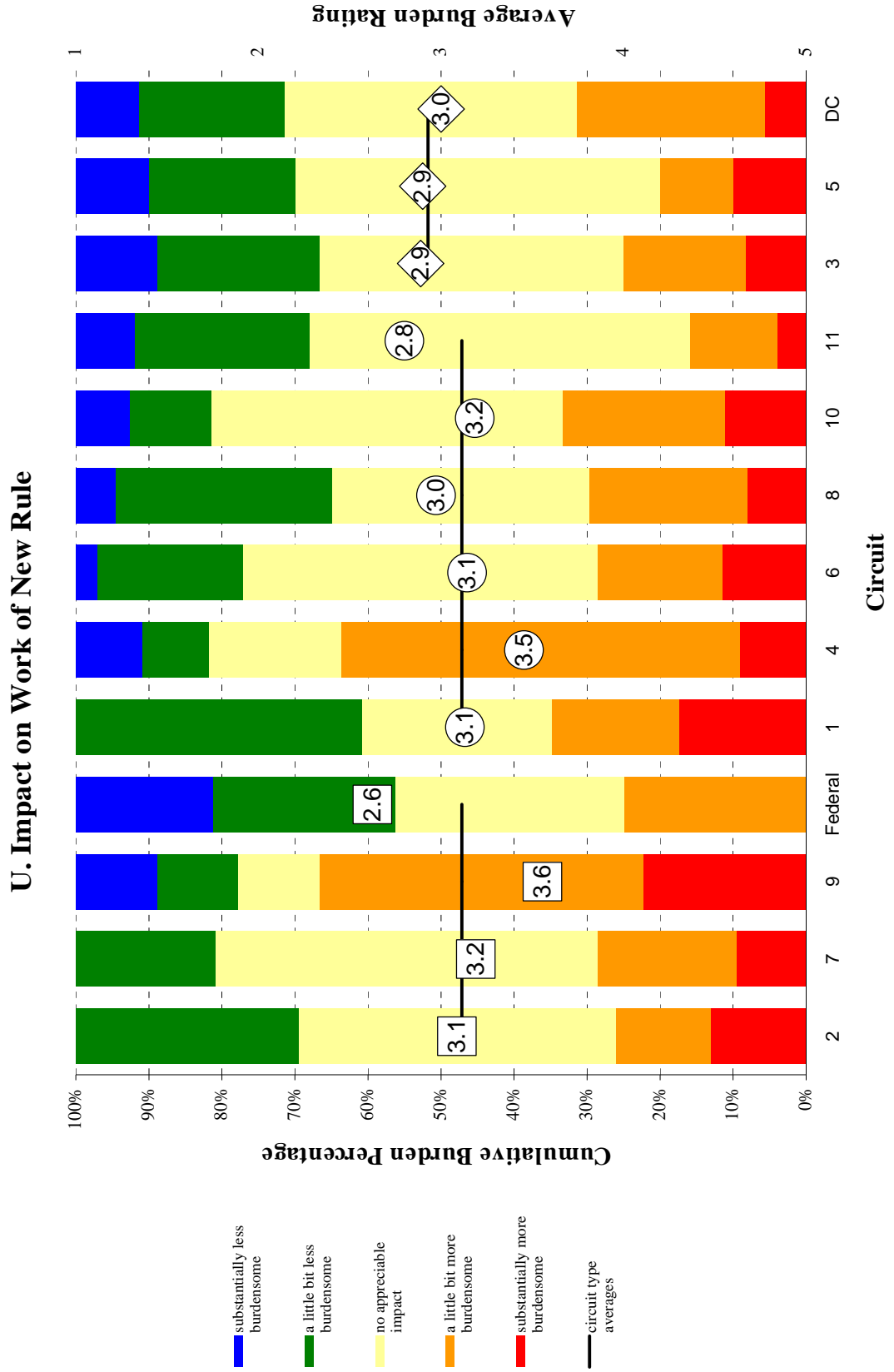


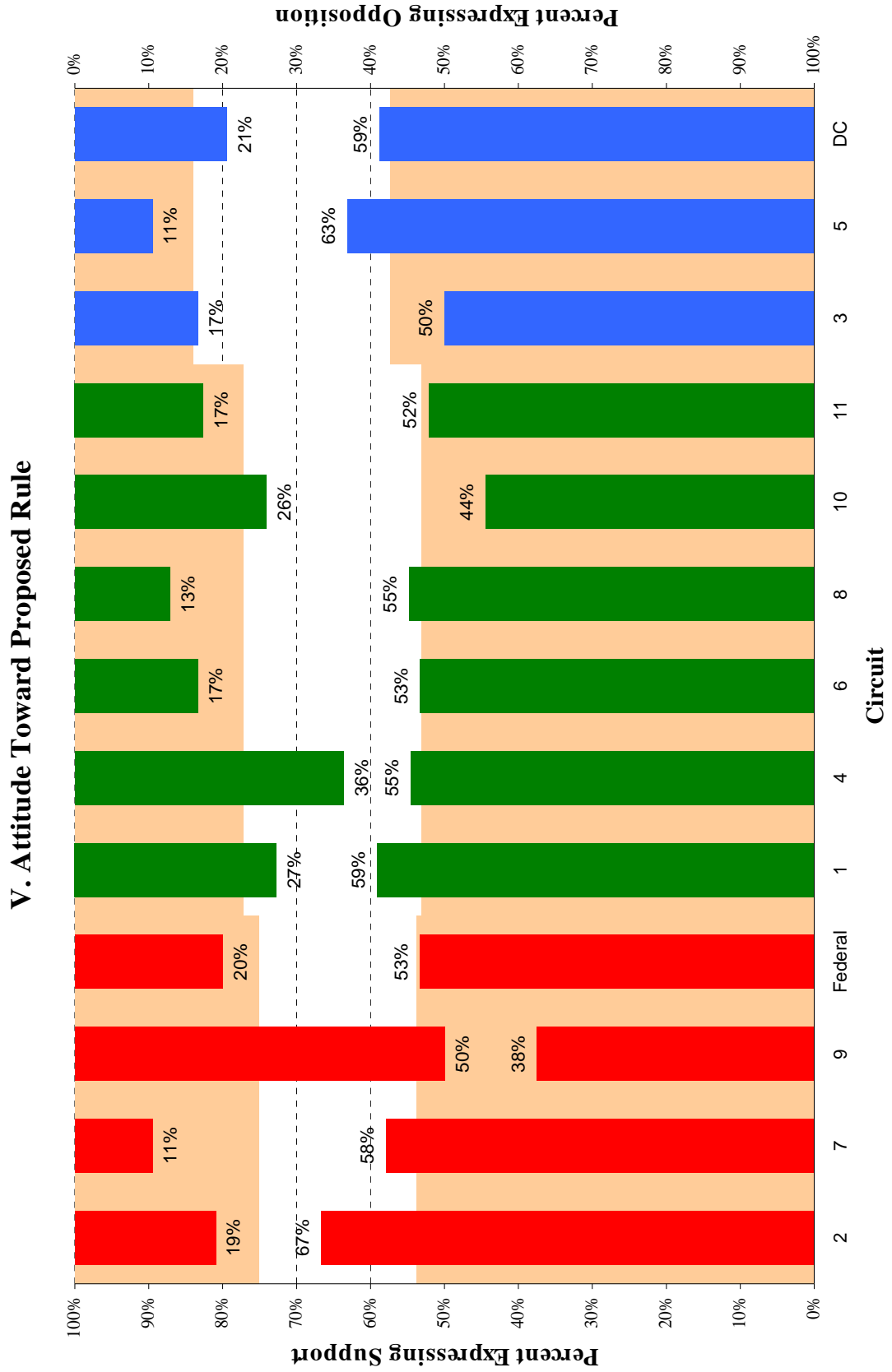
S. Would Have Cited this Court's Unpublished Opinion



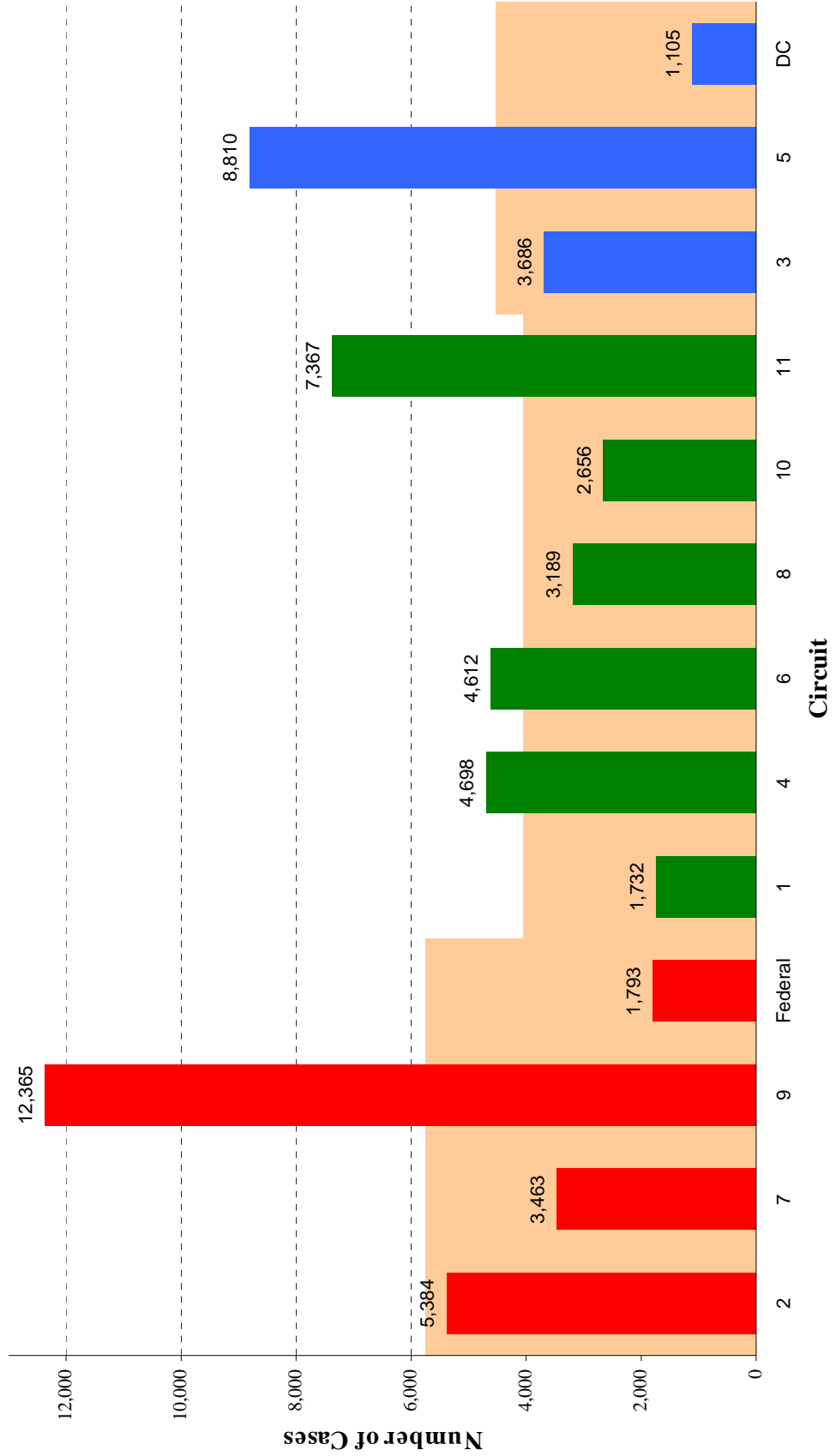
T. Would Have Cited Another Court's Unpublished Opinion



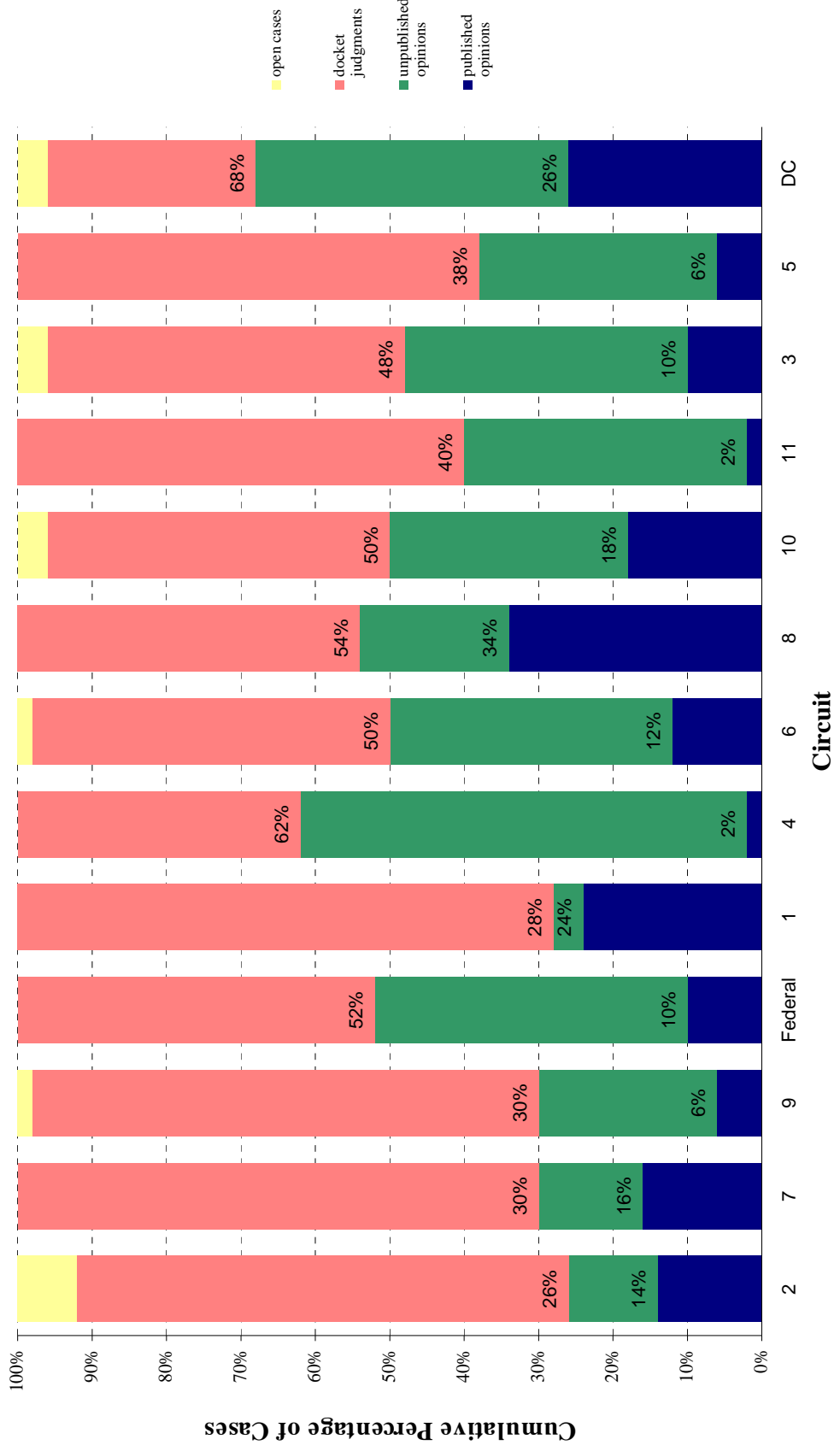




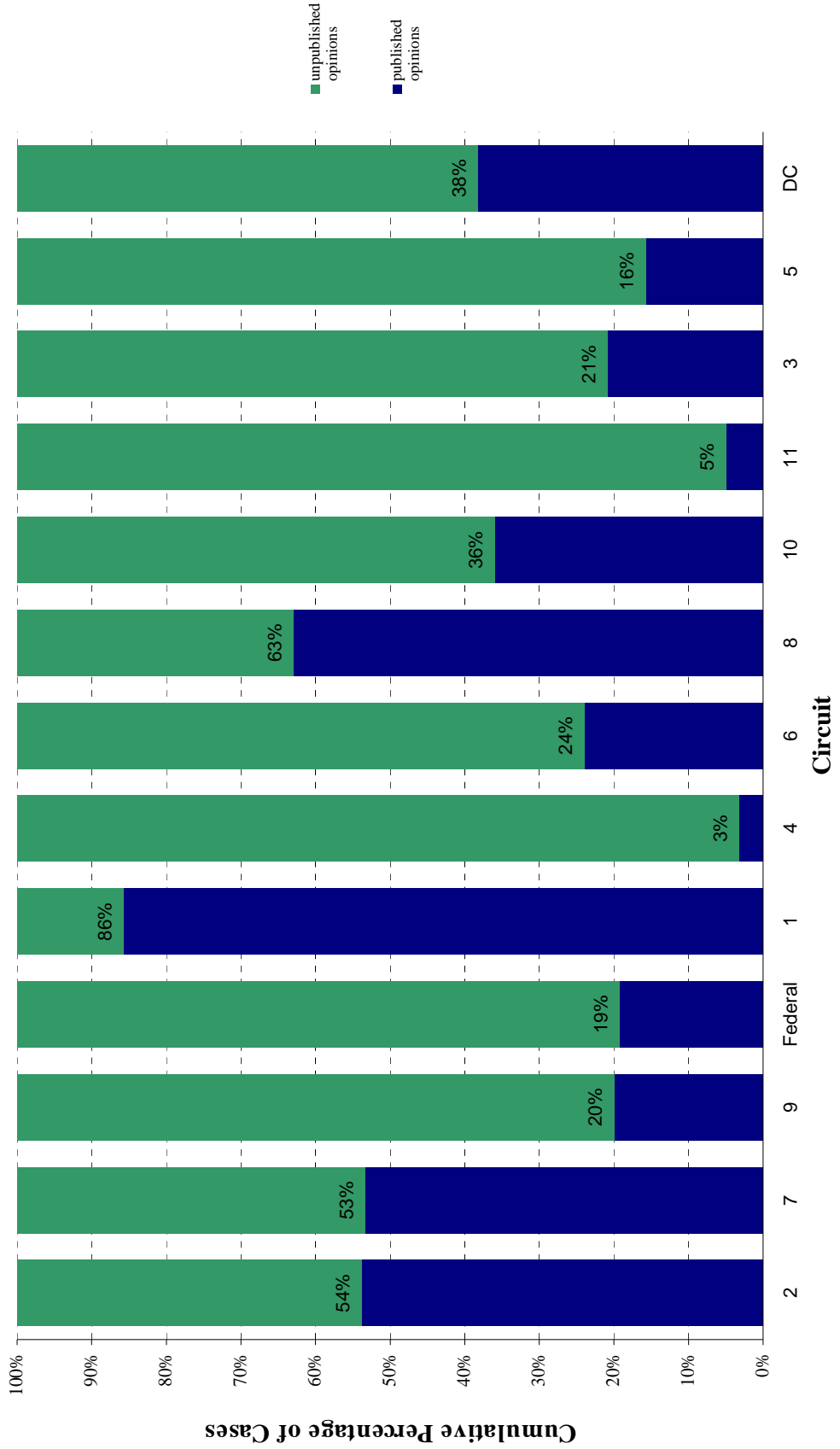
W. Cases Filed in 2002



X. Dispositions (With Opinion Rates and Publication Rates)

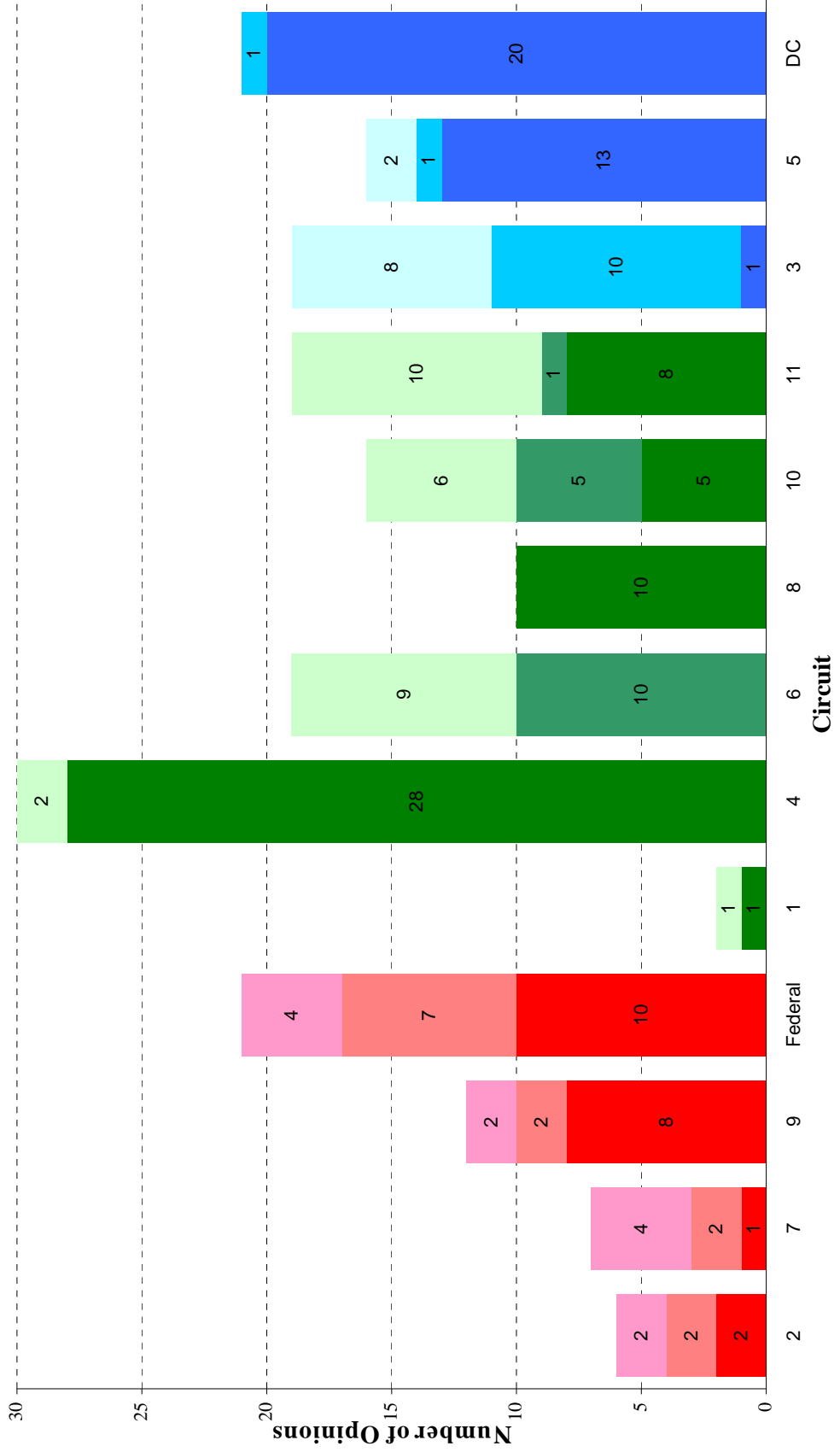


Y. Publication of Opinions in Closed Cases With Opinions

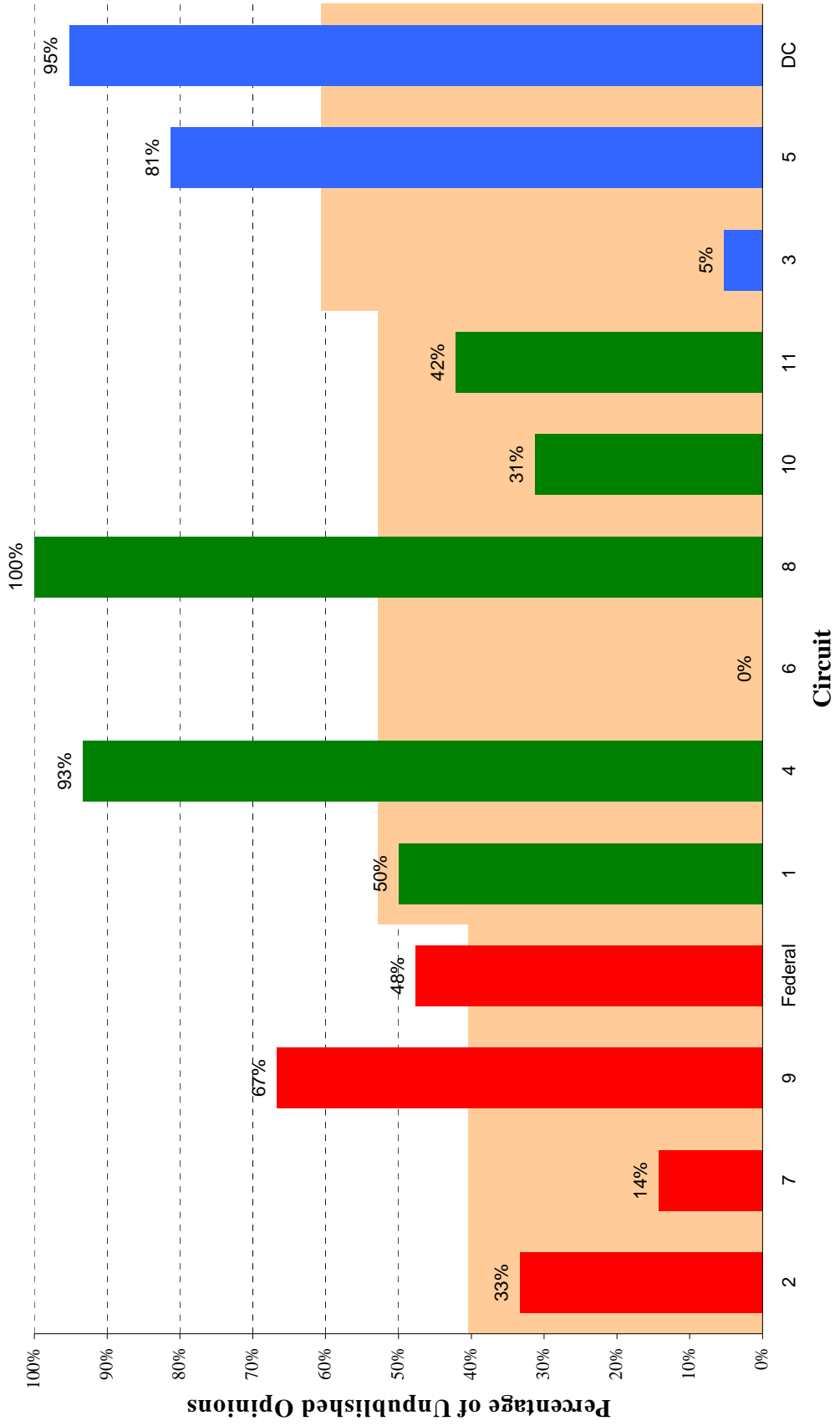


Z. Very Short, Short, and Other Unpublished Opinions

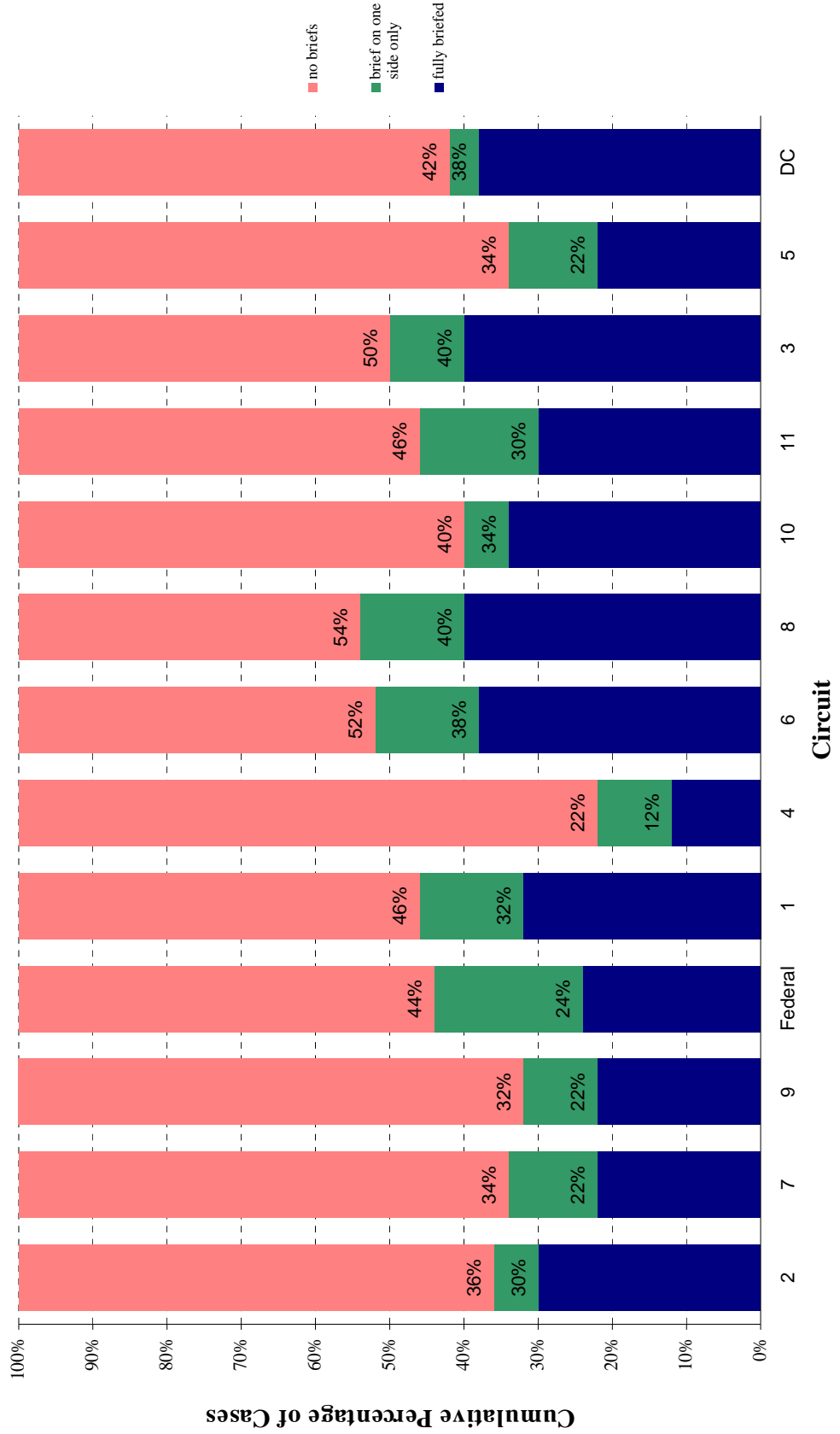
(dark = very short; medium = short; light = other)



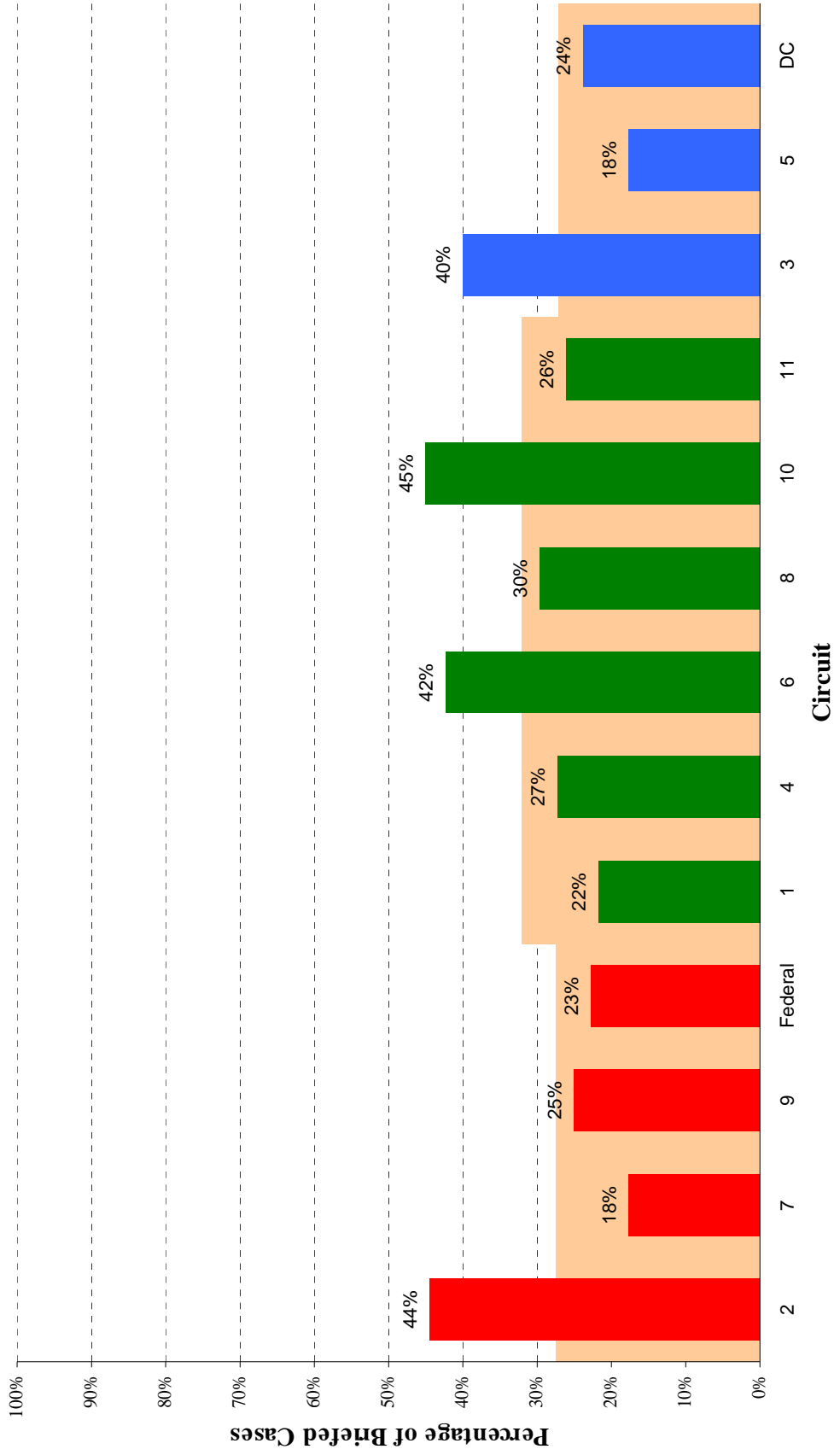
AA. Percentage of Unpublished Opinions That Are Very Short



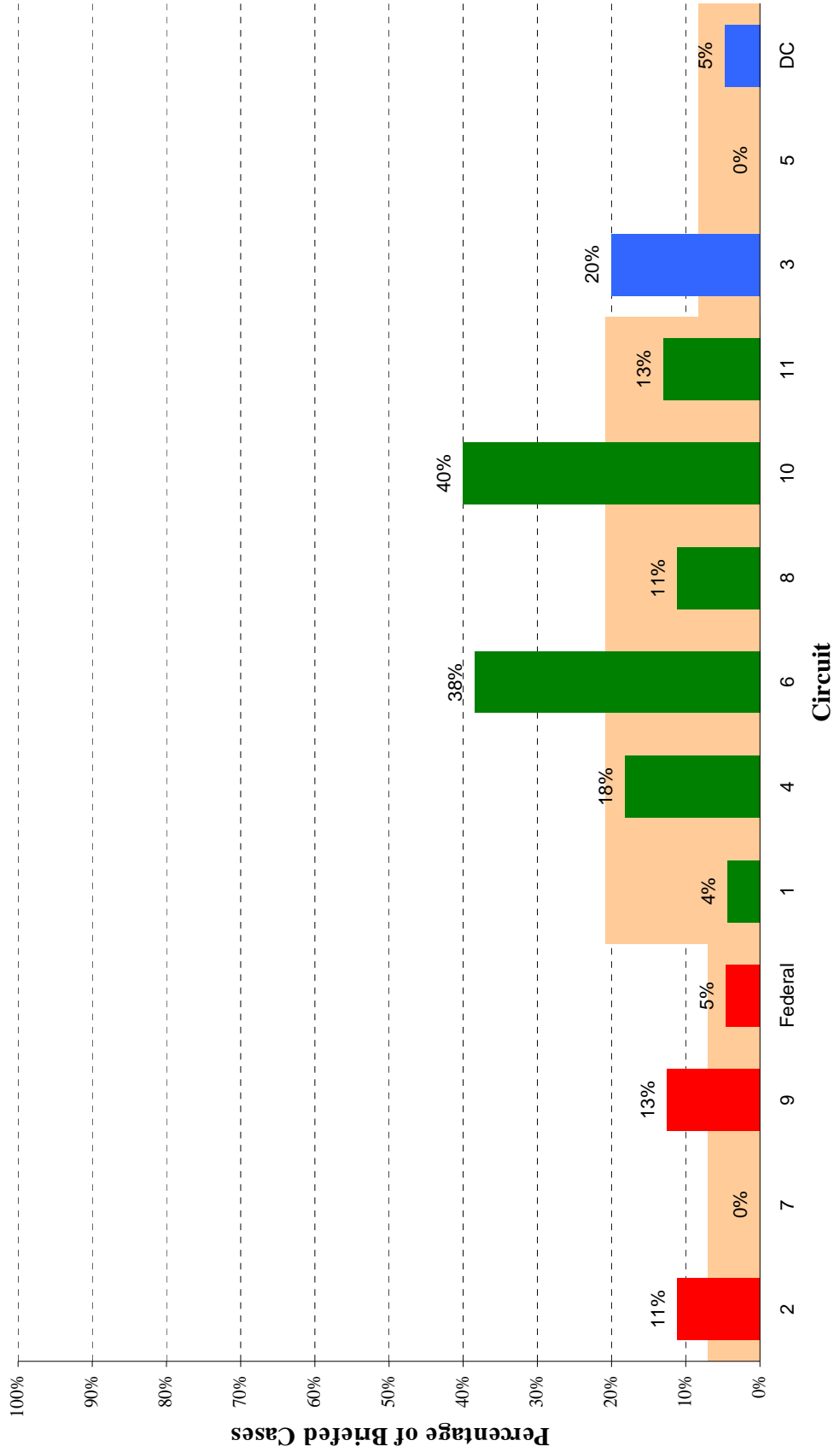
BB. Appeals With Counselored Briefs



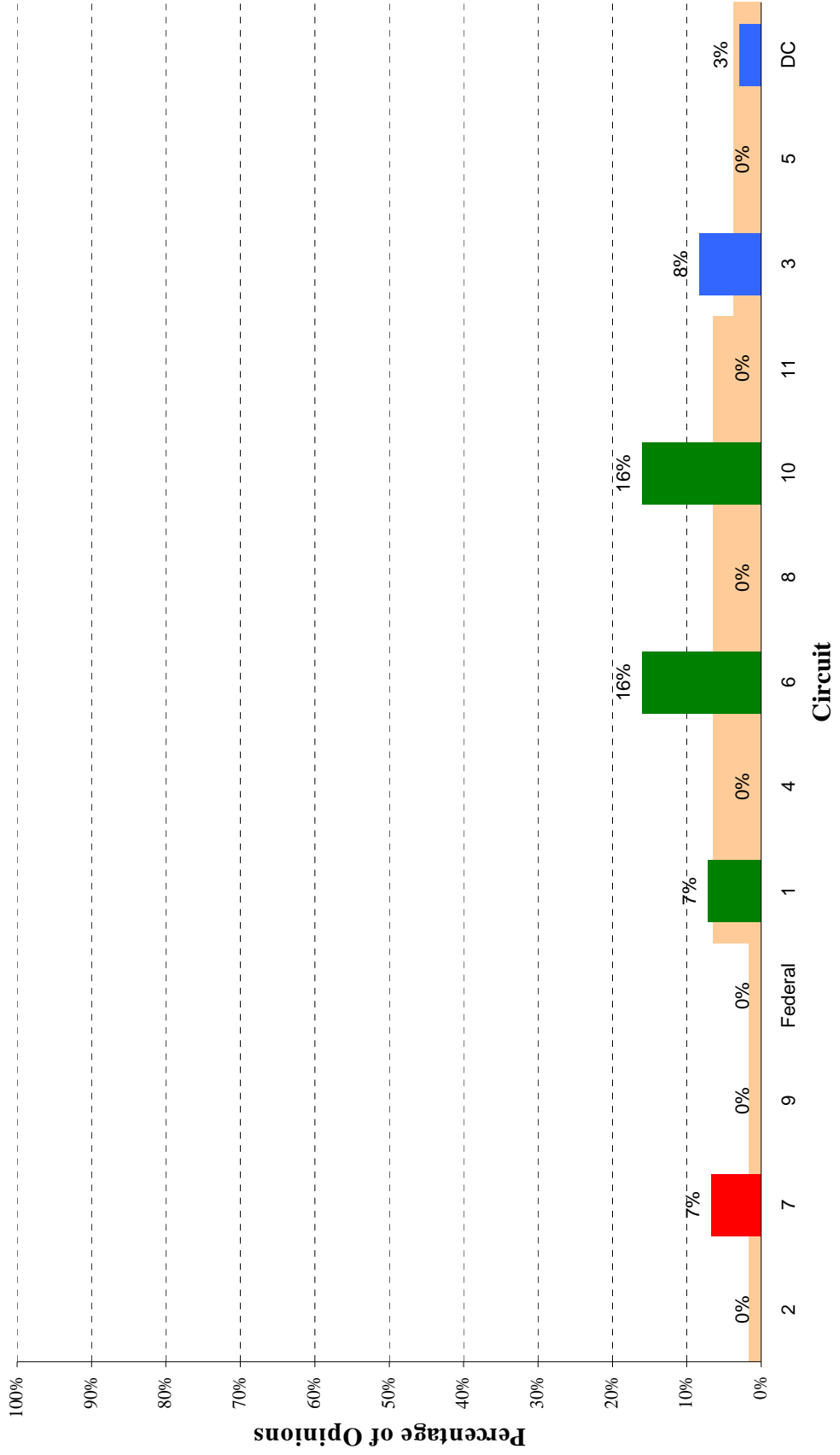
CC. Briefed Cases With Citations to Unrelated Unpublished Opinions



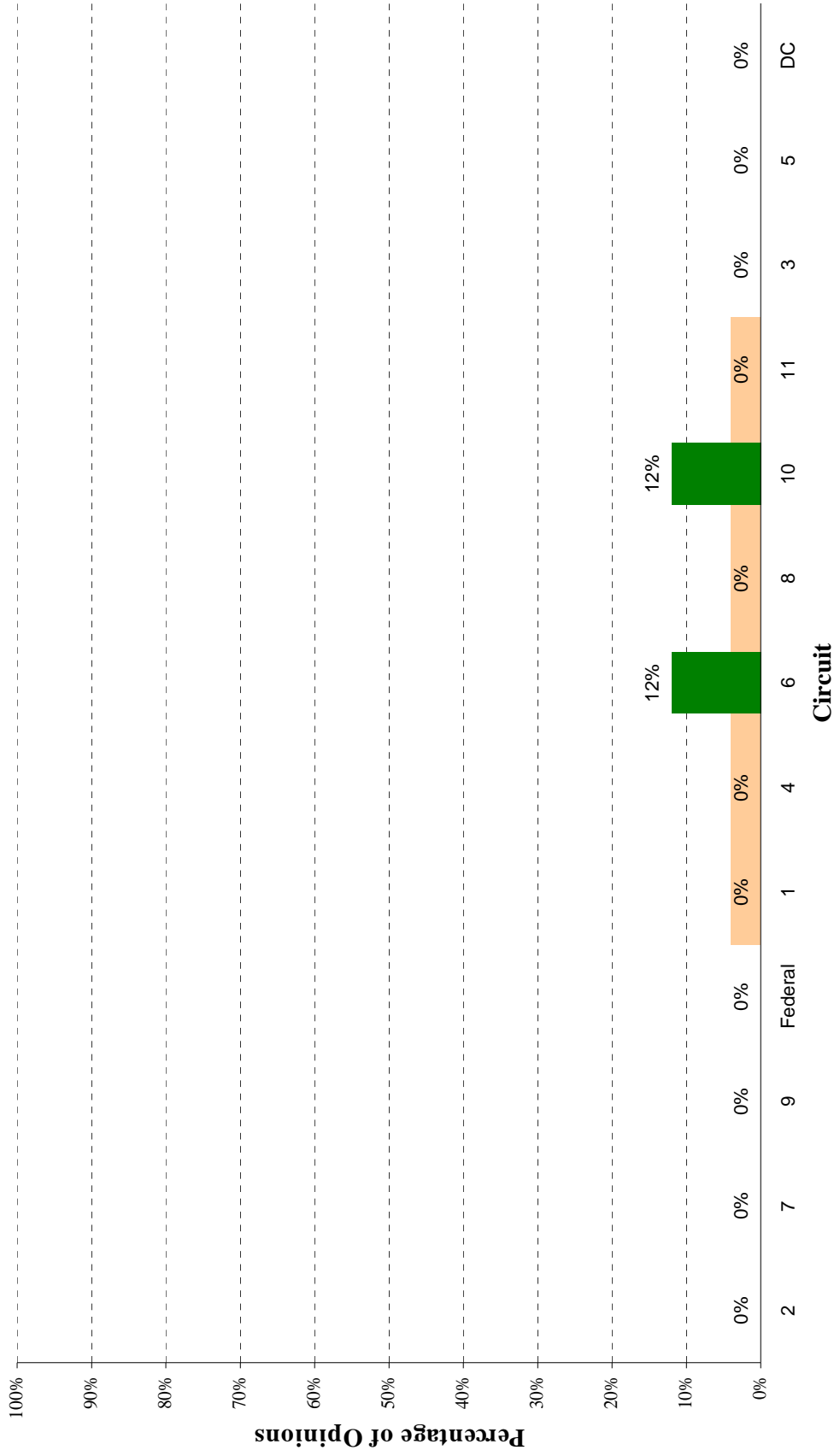
DD. Briefed Cases With Citations to Unrelated Unpublished Opinions by the Deciding Court



EE. Opinions That Cite Unrelated Unpublished Opinions



FF. Opinions That Cite the Court's Own Unrelated Unpublished Opinions



VI. Appendices

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Appendix A: Judges' Predictions of Problems Posed by Citations to Unpublished Opinions

We asked judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits) whether a rule allowing the citation of unpublished opinions would cause problems because of any special characteristics of their court or its practices. Those who responded “yes” were invited to describe the relevant characteristics. This appendix compiles their responses.

Responses are organized by major theme: an increase in workload (20 responses), unpublished opinions becoming shorter (13 responses), a concern about the quality of the court’s unpublished opinions (seven responses), the small likelihood that citations to unpublished opinions would be helpful (six responses), a concern about increased time to resolve cases (five responses), a concern that unpublished opinions might come to be regarded as precedential (three responses), an observation that the rule change would be advantageous to the government (one response), and other thoughts (eight responses). A few responses covered more than one theme and are cross-referenced accordingly.

We present the judges’ responses anonymously and essentially verbatim, with some copyediting. Each response is identified by circuit and ordinal position in this report. So response 7-4 is the fourth response here from a Seventh Circuit judge.

1. Second Circuit

Fourteen Second Circuit judges said that citations to their court’s unpublished opinions would create special problems; six judges said that they would not. Three judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

a. Unpublished Opinions Would Become Shorter

Three judges predicted that unpublished opinions would become shorter if they could be cited.

J2-1. Presently, we prepare unpublished opinions that carefully respond to the issues raised on appeal, but are not as extensive or work-intensive as published opinions. If unpublished opinions are citable, there will likely be two effects. In most cases the unpublished opinions will be reduced to a bare minimum. This will have the effect of depriving litigants of the general reasoning of the dispositive decision and perhaps make it

more difficult for the litigant to seek further review whether by rehearing or by petitioning the Supreme Court. In some cases, the result could be the opposite—a greater expenditure of time and effort than would otherwise be the case to create a more fulsome unpublished opinion that approaches the kind of effort required by a published opinion. If the rule were applied retroactively, there would be an impairment of the circuit's *corpus juris* as unpublished opinions never intended for citation could be included in briefs. The Second Circuit would vastly prefer to decide on its own whether unpublished opinions are citable as opposed to having the issue decided for the court by outsiders.

J2-2. If unpublished opinions are citable, two different effects are foreseeable. In most cases, the unpublished opinion will be reduced to a bare minimum. This will deprive litigants of the general reasoning provided in our unpublished opinions up to now, and perhaps make it more difficult for a litigant to seek further review. In other cases, the result may be just the opposite; more care and effort than necessary may be expended in making these opinions more like published opinions, at the expense of scarce judicial time and resources. One should ask: what has been the purpose of unpublished opinions up to now? The purpose, as our circuit has regarded it, is to make clear to litigants and counsel what the basis of the court's decision is, and to show in summary fashion that the panel has considered each and every point argued by each side. Unpublished opinions are appropriate when existing precedent governs the issues raised. If made citable, both virtues of the unpublished opinion—its clarity and its economy—may be undermined.

J2-3. The proposed rule would endanger the practice of giving a reasoned decision in *all* cases, because it would lead to useless one-line orders.

b. Unpublished Opinions Are Not Helpful in Other Cases

Three judges observed that citations to unpublished opinions are unlikely to be helpful.

J2-4. Our guideline for the use of unpublished summary orders restricts them to cases adequately covered by pre-existing precedent. Our rule of practice does not permit citation to summary orders as authority for a proposition of law (although they may of course be cited with reference to the disposition of the particular case). We consider this practice highly beneficial to the quality of justice in our circuit for the following reason. Our judges, like others elsewhere, are over-worked and are putting in long hours. Realistically, they cannot really work longer hours; changes would simply affect allocation of judges' time. Under our present practice, we devote little time to the explanations in summary orders because their non-citability limits their potential to cause harm. Consequently, our judges can devote more time to the published opinions, that is to say, to the cases that

play a significant role in shaping and explaining the law. If unpublished orders become citable, we would need to worry lest a carelessly written passage of a summary order cause problems. Our judges would be compelled to take substantial time away from the opinions that are important to the development of the law, devoting that time instead to the cases that have little or nothing to say about the law. Since summary orders are properly used only in cases adequately covered by existing precedent, counsel have little need to cite them. The desire to cite them arises primarily in circumstances where the order—prepared in haste—said something ill advised, which would not have been said had the order been citable. Allowing them to be cited would serve little useful purpose but would cause a wasteful misallocation of judicial time—taking valuable time away from the difficult task of getting it right in the opinions that play a role in shaping and explaining the law.

J2-5. (a) Since summary orders are never pre-circulated to the full court and do not appear as slips, judges who were not on the panel have no opportunity ever to know what they say. So I'd be disinclined to give a summary order cite any weight. I worry that litigants will be lulled into relying on material that the judges will not credit or consider. (b) Summary orders do not purport to state all the facts and circumstances that bear upon the result. Ordinarily, they say that "the parties are assumed to be familiar with the facts, procedural history, and the appellate issues presented." (c) Sometimes a summary order is indicated because the briefing is so poor that the salient issues are not raised, the best precedents are omitted, or the issue is scrambled. While I do research, I'm not willing to do the lawyering for any party; so a summary order is often unhelpful even if the issue is ostensibly interesting.

J2-6. Because of the volume of cases heard by this court, fact-bound, non-precedential decisions are best handled in summary fashion. Citation of the orders out of their factual context would be misleading.

c. Increased Workload

Three judges predicted that citations to unpublished opinions would increase judges' workload. (In addition to comments J2-7 and J2-8, see comment J2-4.)

J2-7. More work with no benefit to the cause of justice. Anything worth saying to those other than the parties and trial lawyers should end up in a per curiam or other published opinion.

J2-8. Such a rule would greatly delay the resolutions of cases and add considerably to our workload.

d. Disposition Time

Three judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. (In addition to comments J2-9 and J2-10, see comment J2-8.)

J2-9. Speedy disposition of cases, a characteristic of this court, would be affected.

J2-10. A characteristic of our court is to issue summary orders promptly.

e. Quality of Unpublished Opinions

One judge expressed concern about the quality of the court's unpublished orders. (See comment J2-4.)

f. Other Thoughts

Three judges had other thoughts.

J2-11. Our summary orders are generally quite detailed. I am sure much of that is because 20% of our cases are pro se and we are the only circuit to allow pro se litigants to argue.

J2-12. It would harm the collegiality of the court, because of strong differences in opinion as to how summary orders should be prepared.

J2-13. Our court uses staff decision making far less than other circuits.

2. *Seventh Circuit*

Only five Seventh Circuit judges said that citations to their court's unpublished opinions would create special problems; seven judges said that they would not. Four judges did not return an answer to this question. (Comment 7-5 below comes from a judge who said citations to unpublished opinions would not create special problems.)

a. Unpublished Opinions Would Become Shorter

Three judges predicted that unpublished opinions would become shorter if they could be cited.

J7-1. If attorneys were allowed to cite unpublished orders in our circuit, it would immeasurably increase the amount of time spent by judges in reviewing the draft orders of the staff law clerks, who do not usually operate under the direct supervision of a judge. One reason it would take a great deal more time is because each and every case citation would have to be verified more thoroughly than is now done in the Rule 34 cases (cases decided on briefs without oral argument) and short argument cases (ten minutes). These cases are routinely handled and include the proposed

judgment and sentencing recommendation sent to us for review, modification, approval, or declination. Because of the large volume of the same, the publication time of these orders, as well as the time allotted to the orally argued cases, would be impacted and thus interfere with the present caseload flow. If every case, in effect, were to be treated as a polished, thoughtfully considered published opinion, I am confident that this circuit might well have to seriously consider limiting the number of cases heard on oral argument as well as the time allotted for each case. This is because precious time and resources will be taken from an already overburdened caseload and allocated to the Rule 34 and short argument matters. Thus, the court may be forced to adopt the procedure of issuing cursory, one-line orders in many cases as some other circuits have done, rather than our present procedure of issuing well reasoned, cited, and thoughtful extensive and thorough opinions. The result would be detrimental to the court system, judges, litigants and the bar, and I seriously urge that the judicial authorities considering this question give serious consideration before adopting the procedure of allowing the citing of unpublished orders in this circuit.

J7-2. I oppose citing unpublished opinions/orders. We have too many published ones as it is. Our orders now are quite detailed. I will do shorter ones—*e.g.*, “the evidence is sufficient,” etc.—if they are going to be cited back to us.

J7-3. We provide a full statement of reasons in *all* cases—no one-word affirmances. We could not continue the practice if all our opinions could be thrown back in our faces.

b. Unpublished Opinions Are Not Helpful in Other Cases

Two judges observed that citations to unpublished opinions are unlikely to be helpful.

J7-4. In general, the “unpublished” dispositions in the Seventh Circuit are detailed, factually intensive treatments of a subject. Generally also, they represent applications of such well established standards as the *McDonnell Douglas* test, substantial evidence review of Social Security or immigration rulings, or *Anders* review of a criminal appeal. Finding the hidden advance in the law will be a search for a needle in a haystack. It is also quite unnecessary, given the percentage of opinions that are published in this circuit, which is in turn a direct consequence of our policy to grant oral argument in all fully counseled cases. Later publication of “unpublished” orders has been an adequate corrective for the occasional slip.

J7-5. Citing unpublished opinions (orders) will not facilitate the resolution of cases nor improve the quality or uniformity of circuit law.

c. Quality of Unpublished Opinions and the Slippery Slope to Precedent

One judge expressed concern about the quality of the court's unpublished orders and predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

J7-6. If we are going to cite "unpublished" opinions, we might as well publish everything. Non-argued cases with little or no merit deserve no more than short orders, and snippets from them should not have precedential value. In our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. These definitely should not be available for citation.

d. Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload. (See comment J7-1.)

3. Ninth Circuit

Thirty-one Ninth Circuit judges said that citations to their court's unpublished opinions would create special problems, 11 judges said that they would not, and one judge said that he did not know. Four judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

a. Increased Workload

Fifteen judges predicted that citations to unpublished opinions would increase judges' workload.

J9-1. Our local rule contemplates a memorandum disposition of a paragraph or two—the result and the reason. Changing this practice to a published disposition would put pressure on the court to expand the dispositions into more substantive recitations. Simply because we issue an unpublished disposition does not mean that we do not spend considerable time reviewing the record and reviewing the case. However, many cases do not merit an extensive explanation. Switching to citable dispositions will definitely increase the workload of already very busy judges. Finally, there is no need for citation. We ran an experimental citation approach, and attorneys did not find occasion for citation. Our limited citation rule addresses key issues concerning *res judicata*, circuit splits, etc.

J9-2. Because of the great caseload of the Ninth Circuit, the Ninth Circuit would be particularly impacted. Also, because 37.5% of our case volume is immigration cases, "publishable" case memos would have to be more carefully checked against earlier rulings to avoid intra-circuit splits in

what tend to be repetitive situations. I may be repeating what I said earlier, but the more experience I have on this court, the more grateful I am that unpublished dispositions are not citable. Oh, I almost forgot. Often we do not call a case for a vote for a rehearing en banc because, although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues. And it will only affect the parties. If all memorandum dispositions are to be cited, the number of en banc calls will surely rise.

J9-3. Currently my court issues very brief unpublished opinions. The parties are aware of the facts. If there is no disagreement among the parties concerning the appropriate standard of review, or the applicable law, we generally omit reference to the citations supporting these principles. If those opinions are now to be published, we will be required to set forth the relevant facts and discuss principles of law that are not in dispute so that counsel will be able to determine whether the unpublished opinion is pertinent or distinguishable.

J9-4. We assume unpublished memoranda are addressed only to the parties, who know the history and the facts of the case. We only state what we decide and why. If they were citable, then we would have to assume they are written to the public at large and describe the history and facts, and this would increase dramatically the time involved in preparing them. Also, the issues decided and why might have to be explained in more depth.

J9-5. The practice in our court with respect to unpublished opinions is to make them very brief with no recitation of the facts, the standard of review, etc., unless they are directly at issue. We assume that the unpublished opinions are for the parties and that this information need not be part of the disposition. If publication is involved and citation is permitted, we write for the general public, a much more time-consuming process.

J9-6. This is a very large circuit. It should have been divided many years ago. To permit citations to unpublished opinions will increase the burden on the court very significantly. The solution is to create two or more circuits out of the geographic monster of the Ninth. It is a remnant of a sparsely populated west. That west is now heavily populated. *The time for restructuring is now.*

J9-7. Right now, neither the lawyers nor the judges need to pay any attention to unpublished dispositions. If they can be cited, that would change. Much time could be required to address unpublished dispositions, all of which time would be wasted, in my opinion. I have yet to see any meaningful explanation of either the necessity or benefit of citing unpublished opinions.

J9-8. I am not sure how special this characteristic is in relation to the problem, but here it is: We have a much higher case volume than other circuits. (Not per judge, but overall.) That will mean a *huge* number of previ-

ously uncitable memorandum dispositions will be citable. More work for us, and a *lot* more work for the lawyers.

J9-9. We are already laboring under a back-breaking caseload. The immigration caseload continues to expand. Having to spend more time reading and researching cases when the caseload is already extremely heavy would create an additional burden on chambers.

J9-10. Some judges and panels may increase the time they put in on unpublished opinions. At present, unpublished opinions get less work by some judges. I think allowing citation of unpublished opinions will dramatically increase the work of the circuit.

J9-11. About one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result. That practice could not be maintained.

J9-12. Probably it would cause more burden with our already excessive caseload, because many judges would write longer dispositions.

J9-13. The number of unpublished opinions is great, and it would require substantially more time to complete opinions.

J9-14. It would probably greatly interfere with our screening program and cripple our productivity.

J9-15. Much more attention to the facts of the case would be required to provide a context.

b. Unpublished Opinions Would Become Shorter

Five judges predicted that unpublished opinions would become shorter if they could be cited.

J9-16. In my circuit there is a clear distinction between precedential and non-precedential. We believe it is important to inform the parties of the reason for the decision without worrying about some phrase unintentionally being a cloud on the precedent of the circuit. That is why I believe the rule change would result in shorter, less explanatory dispositions. I hope it will not lead to simple judgment orders as in some other circuits.

J9-17. Because prior memorandum dispositions were written with the clear understanding that they had no precedential value, changing the rule now means that underlying assumption was wrong. I would have written such dispositions quite differently, and far more tersely, had I known the rule would be undermined by the proposed change now under consideration.

J9-18. Given our large volume of cases, the only way to avoid an increased burden of writing “publishable-quality” dispositions will be to revert to extremely summary format; otherwise our “published” opinion backlog will increase. I would therefore opt for very summary dispositions.

J9-19. Most of our judges share bench memos, which tend to be fairly long. Often the bench memos are converted into unpublished dispositions without much change. Obviously, they would have to be pared down substantially if they were to become citable.

J9-20. I would try to say as little as possible in all unpublished opinions. This would result in a considerable disservice to lawyers and litigants. The volume of our work leaves little alternative, however.

c. Quality of Unpublished Opinions

Two judges expressed concerns about the quality of the court's memorandum dispositions.

J9-21. We have two kinds of unpublished decisions—those issued in calendared cases before regular panels (not all of which are argued), and those issued in “screening” cases, in which drafts are prepared by central staff and approved by three-judge panels after oral presentations and brief reviews of documents. I would be comfortable having the first group cited, as long as they are not precedential, because a substantial amount of chambers work, by both law clerks and judges, go into them. As to the second group—screened cases—the dispositions are exceedingly short, and I have much less confidence in whatever reasoning does appear. Allowing them to be cited would be pointless, as they would (I hope) never be “persuasive” on any issue. Thus, while I hope someday to persuade my court to allow citations to the first kind of disposition, we need to have autonomy to accommodate our own practices.

J9-22. Our dispositions that come out of our screening panels in large volume are essentially right as to result, but somewhat short on reasoning.

d. Disposition Time

Two judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued.

J9-23. The sheer volume of cases precludes this rule as being a viable solution to whatever perceived problem the rule purportedly addresses. It would also preclude us from handling the hundreds of cases a month through screening sessions. I truly believe that our length of time from filing to disposition would grow exponentially and that we would never catch up.

J9-24. Some judges would AWOP (affirm without opinion) more cases. Some would devote hours to fine-tuning, revising, and researching. Delay in filing would ensue.

e. Unpublished Opinions Are Not Helpful in Other Cases

One judge observed that citations to unpublished opinions are unlikely to be helpful. (See comment J9-1.)

f. Slippery Slope to Precedent

One judge predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

J9-25. To increase the number of citable decisions, even non-precedential ones, given the number of precedential decisions we have, would exacerbate the problem of size. Neither lawyers nor law clerks can be expected to appreciate the difference between citable-precedential and citable-persuasive, so citable-persuasive dispositions will slither into being precedential. We lack the resources to give 10,000 dispositions the same attention and scrutiny as precedential opinions must have; all that is necessary is for three judges to agree on the disposition, not each word, but if dispositions can be cited for some kind of value that should change. If they do not have any value, what is the point of citing them? Bottom line: it is a back door way to make everything precedential.

g. Other Thoughts

Five judges had other thoughts.

J9-26. Although I personally support allowing the citation of unpublished decisions as persuasive (not binding) authority, the opposition on our court is such that it would cause many judges to alter their writing method.

J9-27. We try to tell the parties why we decided what we decided, with a bit of a nod to the record. But truly 99.9% of the unpublished cases do not decide any law *or* provide new factual insights.

J9-28. Problems with citations to unpublished opinions in this circuit arise from our volume of cases and our practice of writing detailed unpublished dispositions to inform the parties.

J9-29. It would increase the volume of citable cases by a factor of 5 or 6 to 1. We only allow citation of about 18% of all dispositions on the merits.

J9-30. Our circuit provides fewer opportunities to compromise and reach consensus. In some cases rifts would be magnified.

4. Federal Circuit

Eight Federal Circuit judges said that citations to their court's unpublished opinions would create special problems; four judges said that they would

not, and two judges said that they did not know. Two judges did not return an answer to this question.

a. Quality of Unpublished Opinions

Three judges expressed concerns about the quality of the court's non-precedential (unpublished) opinions.

JF-1. We are a national court. Thus, barring unusual intervention by Congress or the Supreme Court, we establish national rules. We therefore would have to be even more careful than we now are with each statement we make in an opinion so that what is cited back to us does not unintentionally preclude the proper resolution of later cases. And, frankly, it is very possible, even likely, that once non-precedential opinions become citable, a move will ensue to make them precedential. Thus, what we originally write with the understanding that it is non-precedential, albeit citable, may become precedent as well.

JF-2. Many of our non-precedential opinions are in pro se appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made. Allowing citation of these decisions would add to the clutter of briefs and suggest that the court has reached considered decisions on particular issues when in fact that is often not true.

JF-3. The majority of our jurisdiction is exclusive. We circulate all published panel opinions to the whole court for comments before they are released and all members of the court carefully review them. Counsel should not be able to cite opinions that have not been through that process.

b. Unpublished Opinions Would Become Shorter

Two judges predicted that unpublished opinions would become shorter if they could be cited.

JF-4. All opinions are "published" in one form or another—what we are talking about is *non-precedential* opinions. If our non-precedential opinions could be cited, then the pro se petitioners would get less useful opinions; there would be more summary affirmances; and non-precedential citations would only clutter up the briefs. A terribly short-sighted idea.

JF-5. If attorneys could cite our non-precedential opinions, I would push for summary dispositions or have non-precedential opinions say as little as possible.

c. Slippery Slope to Precedent

Two judges predicted that allowing the citation to unpublished opinions could ultimately result in their being precedential. (In addition to comment JF-6, see comment JF-1.)

JF-6. First, we have many complex patent cases that are best resolved by non-precedential opinion. Second, the law develops in a more orderly fashion when some cases are not made precedential.

d. Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload.

JF-7. Courts that favor the citation of non-precedential opinions employ legions of staff attorneys to process them, while in this court non-precedential opinions are handled in chambers. In light of budgetary constraints, the central staffs of courts can be expected to decline, and the work returned to chambers where it belongs. I would expect this to affect the views of the proponents of a new role.

e. Government Advantage

One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage.

JF-8. The government is a party to most appeals here and can fully read non-precedential opinions. It will have many more opinions to cite in briefs under a revised rule.

Appendix B: Attorneys' Thoughts on the Impact of the Proposed Rule

Attorneys were asked what impact they would expect to result from the proposed lifting of restrictions on citation to unpublished opinions. Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 298 attorneys who answered this question, most were supportive of the proposed rule (162, or 54%), many opposed the proposed rule (61, or 20%), and many were neutral (75, or 25%).

We classified the attorneys' responses by theme and sub-theme: the availability of additional authority (more authority, bias, more work, already reviewed), the usefulness of unpublished opinions (strategy, not precedent, not useful, poor quality, good quality), access to unpublished opinions (accessible, less accessible), impact on the court (more consistency, less consistency, higher quality opinions, shorter opinions, longer opinions, delay), and broad policy issues (accountability, a blurred distinction between published and unpublished opinions, whether opinions should even be unpublished). Several comments fell into more than one category.

The comments are compiled here. Generally comments falling into more than one category are compiled in the category with the fewest comments. Generally supportive comments are presented before neutral and opposing comments, with longer comments presented first.

We present the attorneys' responses anonymously and essentially verbatim, with some copyediting. Each response is identified with an "A" for attorney and a number for ordinal position in this report. So, for example, response A-148 is the 148th response presented here.

1. The Availability of Additional Authority

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Ninety-one attorneys saw this as having access to additional valuable resources, but four attorneys worried about bias in the additional authority. Thirty-one attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but six attorneys said that they already review the unpublished opinions anyway.

a. More Authority

Ninety-one attorneys observed that the ability to cite unpublished opinions gives them more options in the way of authority to support their arguments. Most of these attorneys (82) were supportive of the new proposed rule; nine were neutral. In addition to the attorney comments compiled here, 25 other attorneys mentioned more authority: attorneys A-71 (supportive), A-72 (neutral), and A-73 (neutral) (comments compiled under *1.c. More Work*); attorneys A-85 (supportive), A-86 (supportive), A-87 (supportive), and A-88 (supportive) (comments compiled under *1.d. Already Reviewed*); attorney A-94 (supportive) (comment compiled under *2.a. Strategy*); attorneys A-96 (supportive), A-97 (supportive), A-99 (supportive), A-102 (neutral), and A-103 (neutral) (comments compiled under *2.b. Not Precedent*); attorney A-118 (supportive) (comment compiled under *2.c. Not Useful*); attorney A-149 (supportive) (comment compiled under *3.a. Accessible*); attorneys A-167 (supportive), A-170 (supportive), and A-171 (supportive) (comments compiled under *4.a. More Consistency*); attorney A-186 (supportive) (comment compiled under *4.b. Less Consistency*); attorneys A-190 (supportive), A-191 (supportive), A-194 (supportive), A-196 (supportive) (comments compiled under *4.c. Higher Quality Opinions*); attorney A-207 (supportive) (comment compiled under *4.f. Delay*); and attorney A-219 (supportive) (comment compiled under *5.b. Blurred Distinction*).

A-1 (supportive, Tenth Circuit). I am in favor of a new Federal Rule of Appellate Procedure uniformly allowing citation of unpublished opinions. Such a rule would promote consistency and eliminate the maddening situation where, as a litigant, you have found a case directly on point, but are unable to cite it. Although the Tenth Circuit—where I practice predominantly—has a fairly lenient rule on citation of unpublished opinions, the Ninth Circuit, for example, has a much harsher rule. I have been in the frustrating position in district courts of the Ninth Circuit where I am forbidden from citing an unpublished Ninth Circuit case to the district court—authority which presumably would be quite persuasive, if not dispositive. Although courts and commentators frequently state that unpublished opinions only deal with propositions that can be found in published decisions, I have not found that to be the case. Even when that is true to some extent, fact patterns are always different and sometimes critical. An unpublished decision is self-evidently so; even if not binding, I have never understood the rationale behind not being able to cite it at all.

A-2 (supportive, Seventh Circuit). Such a rule would be helpful in two respects in particular. In some cases, such a rule would permit citation to the court's most recent application of a settled rule, making it clear that earlier published decisions are still good law and have not been superseded by more recent decisions. This would be helpful where the court has begun issuing unpublished decisions after issuing a series of published decisions

on the same topic, and the most recent published opinion is several years old. In other cases, such a rule would permit citation to cases involving similar or identical facts. This would be helpful in cases in which all of the court's published decisions on a particular issue may be distinguished based on their facts, whereas, in an unpublished decision, the court has applied the same legal rule to facts similar or identical to those involved in the case pending before the court.

A-3 (supportive, District of Columbia Circuit). My practice has been almost exclusively in the U.S. Court of Appeals for the D.C. Circuit. I would expect little impact overall, in terms of numbers of cases impacted by the change. However, I would expect the rule to have a beneficial impact with respect to certain cases. I have experienced instances (before the rule in the D.C. Circuit was changed in Jan. 2002 to permit citation to unpublished opinions issued by that Circuit) where the *only* case comparable to the issue I was addressing involved an unpublished opinion, or where an unpublished opinion would have been a useful example of an additional comparable situation, but I could not bring this to the court's attention, because the rule barred citation to unpublished opinions. I believe both my client (the federal government) and the court were ill served by the rule in these instances.

A-4 (supportive, Seventh Circuit). I think it would be very helpful. It is difficult to predict the future, so judges who order an opinion to be unpublished cannot foresee what effect that opinion would have in the future. In other cases, I have found unpublished opinions to be directly on point with my issue, but I could not cite them.

Many years ago, the Illinois Appellate Court would direct that only "abstracts" of opinions be published, which turned out to be the West headnotes. There have been more than a few times when one of these "abstracts" was directly on point with my issue. You get the idea.

In the long run, publishing all opinions is better for the profession, because it provides a better basis to obtain on-point precedent. To save space, perhaps "non-published" opinions should only be available on-line.

A-5 (supportive, District of Columbia Circuit). I suppose that I would favor permitting citation to unpublished opinions, as there is just a chance that one of these "red-headed stepchildren" will contain the nugget of wisdom that will guide the court to a correct decision.

The case I was selected for was an unusually weak case for the plaintiffs and appellants, so it did not present any difficult legal questions that might have prompted us to research unpublished opinions. As I recall, it was decided without argument and resulted in an unpublished decision (which always feels anticlimactic). I think that most opinions should be published and that the issuance of non-precedential decisions is hard to

justify, but I honestly do not think that this case would give much guidance to anyone.

A-6 (supportive, Second Circuit). I expect that the impact would be a favorable one from the perspective of an office such as mine (United States Attorney's Office). In many appellate cases, it would be useful to bring other similar cases to the court's attention, even though they are unpublished. This did not apply to the appellate immigration case that is the subject of this survey because there is now a wealth of published immigration case law in this circuit and others. I am not aware of the percentage of lawyers who do not have access to unpublished opinions through Westlaw, Lexis, or another computerized service, although lack of access problems could be addressed to some extent by requiring a party who cites to an unpublished opinion to provide a copy of it.

A-7 (supportive, District of Columbia Circuit). In my experience, I occasionally find an unpublished decision that is the closest precedent for the case on which I am working. The ability to cite the unpublished decision could facilitate our presentation of the argument in such an occasional situation. But many times I find that the unpublished decision is cumulative to many other published decisions on the same or similar point. And the unpublished decision itself may cite and rely on an earlier, published decision that may be cited without limitation. The D.C. Circuit has modified its local rule to permit citation of its unpublished decisions issued after Jan. 1, 2002. In a sense, the proposed national rule would not have much impact on our practice.

A-8 (supportive, Eleventh Circuit). I do not believe such a rule change would have an appreciable impact in the Eleventh Circuit, in which I practice, since such citations are currently citable—although not binding, of course. In those circuit courts of appeal that currently prohibit citation to unpublished decisions, the proposed rule change would have an impact, I believe. Advocates would be inclined to research and cite such unpublished decisions, where before they did not. I think it would enhance the breadth and quality of briefs, since persuasive, well-reasoned, unpublished decisions could provide further logical and policy arguments for both counsel and appellate courts to ponder in fashioning arguments and decisions, respectively.

A-9 (supportive, Tenth Circuit). I expect that the proposed rule would have a tremendous impact on the litigants and the courts. In my practice, I often read unpublished cases that support a position favorable to my client. Sometimes an unpublished case is the only available source to support a particular position for my client. In such an instance, a rule permitting citation to courts of appeals' unpublished opinions would provide me with the opportunity to support my client's position with some authority. It would

promote a fair outcome of the proceedings because litigants would be permitted to more fully advise the court of similar cases.

A-10 (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instances we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in ensuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A-11 (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instances we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in ensuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A-12 (supportive, District of Columbia Circuit). My impression is that unpublished cases can be useful and there would be no detrimental effect in citing to them (as long as the unpublished status is noted in the citation). Although I have not studied the issue, I feel like unpublished cases sometimes make explicit generally assumed legal principles that otherwise are not cited or discussed (this especially seems to be the case in unpublished opinions deciding matters brought pro se).

A-13 (supportive, First Circuit). I think the rule would have a salutary effect. When an unpublished opinion is squarely on point, particularly one from the same circuit, it is eminently sensible to permit its citation. More than once I have been precluded from citing and discussing a persuasive and well-reasoned unpublished opinion that is on all fours, or close to it, with the case being briefed. As long as the parties understand the precedential limitations of unpublished opinions, their citation should be permissible.

A-14 (supportive, Eleventh Circuit). I believe the ability to cite unpublished opinions would be helpful. Many times legal analysis by appellate courts on a new issue, or slightly new issue, is useful to the parties and the courts. If parties are permitted to cite law reviews, they should be able to cite unpublished opinions, which are likely more useful. The reason I did not cite or would not have cited unpublished opinions in my case was because the area of law had already been thoroughly vetted.

A-15 (supportive, Tenth Circuit). I think such a national rule permitting citation to unpublished opinions would be especially useful, particularly in some areas of the law where, for whatever reason, published opinions are as a rule exceptionally rare. This is particularly true in the context of habeas appeals under 28 U.S.C. § 2255 with respect to which there is a surprising dearth of “published” authority. I am, in other words, very much in favor of the proposed new rule.

A-16 (supportive, Eighth Circuit). It would be of significant value. Whether the opinion is published or unpublished, it is still the opinion of the appellate court and has some value. I have experienced a number of occasions where I could not locate a published opinion that is as squarely on point on a specific issue as any unpublished opinion. A less restrictive rule on the citation to an unpublished opinion would be of value and is recommended.

A-17 (supportive, District of Columbia Circuit). I believe the proposed rule would improve decision making and briefing. Often unpublished decisions have salient analysis that should be brought to the court’s attention. As a practitioner, it is frustrating to find a recent unpublished decision directly on point, and not to be able to cite the decision. As a practical matter, “unpublished” decisions are being published anyway.

A-18 (supportive, Eighth Circuit). I believe the proposed rule would be beneficial to the court in providing the court with all applicable precedent. In a number of cases, language in unpublished opinions addresses an issue more completely than in published opinions. Being able to cite such language, particularly from unpublished cases in our circuit, would enhance the arguments made to the court.

A-19 (supportive, Second Circuit). I believe the impact would be to encourage greater advocacy through citation to cases without precedential impact but with persuasive merit. The rule, however, should require the author of the brief to attach a copy of the unpublished decision and to cite any electronic source for the same (e.g., Westlaw). I strongly support the proposed new national rule.

A-20 (supportive, District of Columbia Circuit). To the extent that unpublished opinions are non-binding, such a rule would nonetheless permit drawing the court’s attention to dispositions of similar cases. This would essentially operate like an “accord” citation. To the extent that unpublished opinions are non-binding, there should be no requirement, only permission, to cite to such opinions.

A-21 (supportive, Seventh Circuit). From my own perspective, being engaged in many habeas corpus cases on appeal, there are some procedural practices that would be reflected in unpublished opinions that would occasionally be helpful to illustrate through judicial opinions. Short of that,

I'm not sure I would often take advantage of a more lenient rule to this effect.

A-22 (supportive, Seventh Circuit). Any time you expand the universe of cases on which you can rely, you provide an attorney with more and presumably better reasoning to present. Since I never saw any real legitimate basis for limiting citations to published opinions (sometimes the unpublished cases are better), I would be happy to see this rule change.

A-23 (supportive, First Circuit). I believe a more lenient rule of citation would be beneficial to my appellate practice, and to the circuit court, because often times an unpublished opinion will possess an analogous fact pattern or more clear statement of the law. Even if the opinion is not binding precedent, it can be beneficial to guide the court.

A-24 (supportive, First Circuit). Given the availability of unpublished opinions on services such as Westlaw, it would allow practitioners access to cases which may be more on point factually to their own. The ability to cite these cases should assist in presenting argument in a more cogent and relevant manner.

A-25 (supportive, Ninth Circuit). The impact would be positive since frequently there are numerous unpublished decisions from this circuit and other circuits that are directly on point with the facts of a case. Because the cases are unpublished, the attorney is constrained from using the cases as precedent.

A-26 (supportive, First Circuit). It would make it more likely that I would find cases "on point." My only concern is that the holdings in these opinions are (sometimes) not explained as thoroughly as in published opinions, which could lead to the cases being used improperly (out of context).

A-27 (supportive, Eighth Circuit). I have, in the last two years, seen approximately three or four unpublished opinions with factual bases directly on point with the facts of my own case. Relaxation of the rule would aid me in responding to readings when such a thing occurs.

A-28 (supportive, Fifth Circuit). Attorneys may then have access to additional cases that are on-point or close to it. Often times I encounter cases that resemble the factual pattern of my case, but I am unable to use the information, because the case is unpublished.

A-29 (supportive, Second Circuit). While I did not come across useful unpublished cases during this appeal, I have done so in other cases. I have never fully understood why such decisions should be off-limits, particularly when they are on-point and well reasoned.

A-30 (supportive, Fourth Circuit). To the extent that a court has addressed a particular legal issue, albeit in an unpublished decision, I may be

able to address issues raised by the court through my brief or oral argument in a more direct and thorough manner.

A-31 (supportive, First Circuit). Unpublished opinions can facilitate, in many instances, the presentation of an argument. Many times the facts are squarely applicable to the matter under consideration. Often they present authority in a very precise manner.

A-32 (supportive, Third Circuit). This rule would have a positive impact because it might permit additional arguments to be raised to the court's attention. The court could then give the unpublished opinion whatever weight it deems appropriate.

A-33 (supportive, First Circuit). Very little, but only positive in my opinion. It is not unusual for me to want to cite 1-3 such opinions in a brief in the First Circuit, but I do *not* because of the rule strongly discouraging it.

A-34 (supportive, Tenth Circuit). It would make analysis of the law more comprehensive and give the courts better guidance. Some unpublished opinions contain good surveys of an area of law, which should be helpful to all.

A-35 (supportive, Second Circuit). I think it would be helpful—there are cases that could be cited that I am unable to cite now (although I've learned to ignore unpublished opinions because I cannot use them).

A-36 (supportive, Sixth Circuit). Greater ability to direct the appellate court to cases in which similar, but *unique or unusual*, fact patterns were handled in a manner consistent with my client's position.

A-37 (supportive, Sixth Circuit). It would allow practitioners to cite to more current authority. (It seems as if the amount of unpublished opinions in the past several years has significantly increased.)

A-38 (supportive, Second Circuit). I would support the new rule. Judges will give the weight that such decisions deserve. I have always found it frustrating to see an opinion but not be able to use it.

A-39 (supportive, Fifth Circuit). I occasionally find unpublished authority from this circuit that would be helpful in supporting arguments to a district court or appellate panel.

A-40 (supportive, Federal Circuit). I am in favor of this rule. Many of the circuit's opinions I deal with are unpublished but are extremely important, because they pronounce new legal principles.

A-41 (supportive, Sixth Circuit). Such a rule would result in utilizing more court of appeals precedent in support or opposition to my legal arguments. I would rarely cite to other circuits.

A-42 (supportive, Fifth Circuit). We would have more resources available along with factual instances or scenarios useful in explaining a theory we may be either defending or attacking.

A-43 (supportive, Eleventh Circuit). It would widen the pool of cases available and would give one greater confidence as to the predictability of the outcome of the court's decision.

A-44 (supportive, Sixth Circuit). I would expect the proposed rule to have a positive impact, allowing the citation to additional material without imposing substantial burdens.

A-45 (supportive, Ninth Circuit). It would allow more comprehensive understanding of trends in the law in the different courts and allow reference to broader legal analysis.

A-46 (supportive, Ninth Circuit). Allow a lot more case law for the court to consider, allowing easier references so the court would see what is happening in other courts.

A-47 (supportive, Third Circuit). It will be of assistance in some cases, because there are many unpublished opinions that contain useful analysis of critical issues.

A-48 (supportive, Eighth Circuit). Extremely helpful. The rule would expand the range of citable precedent and enable the preparation of more thorough briefs.

A-49 (supportive, Third Circuit). The proposed rule would allow appellate advocates to advance persuasive reasoning from unpublished opinions.

A-50 (supportive, Eighth Circuit). I believe that such a rule would allow the court to be better-informed about potentially relevant case law.

A-51 (supportive, Eleventh Circuit). I think this would be a good rule change causing few if any problems, but making research a bit easier.

A-52 (supportive, Second Circuit). There would be more law that could be referenced that might address otherwise unaddressed questions.

A-53 (supportive, District of Columbia Circuit). Slightly more work, but some unpublished opinions would be of significant value in my cases.

A-54 (supportive, Eighth Circuit). It would enable us to cite a broader array of case authority. I think it would be helpful.

A-55 (supportive, Eleventh Circuit). It would improve and make more equitable the access to and use of important decisions.

A-56 (supportive, Fifth Circuit). I think it could facilitate more thorough treatment of some issues before the court.

A-57 (supportive, Fourth Circuit). I think it would be a good rule. Sometimes the cases most on point are unpublished.

A-58 (supportive, Tenth Circuit). It would be helpful because the Tenth Circuit has so many unpublished opinions.

A-59 (supportive, Second Circuit). I would expect such a rule to assist me in the presentation of my arguments.

A-60 (supportive, District of Columbia Circuit). Such a rule would be helpful in addressing novel issues of law.

A-61 (supportive, District of Columbia Circuit). Positive. There is useful precedent in them.

A-62 (neutral, Fifth Circuit). The times when we have found it necessary to cite to unpublished dispositions have occurred when there is no precedent available in our circuit. Indeed, when the Fifth Circuit issues an opinion on a new issue they have not ruled upon, you will often see them citing to their own previously unpublished dispositions on the issue.

I cannot imagine such a rule having any appreciable impact on our side of the fence.

A-63 (neutral, Fifth Circuit). I practice primarily in the Fifth Circuit, which already has a very workable Local Rule 47.5.4 for citing unpublished opinions. In my experience, citing to unpublished cases often allows me to provide the court with a fact pattern similar to the case at bar. In this sense, it makes my work more effective. Citations to unpublished opinions is neither more nor less burdensome than not citing to them.

A-64 (neutral, Tenth Circuit). None for me, but for the practice across the country, it would improve appellate practice because parties can cite to whatever persuasive authority is available. The circuit in which I practice, the Tenth Circuit, allows citation to unpublished cases as long as they are attached to the briefs. That is why the proposed rule would have no effect on my practice.

A-65 (neutral, Third Circuit). Twofold impact. On the one hand, allow me to cite unpublished opinions in support of my client's position, and therefore potentially make my work a little less burdensome in that I have more chances to find support for my client's position. On the other hand, it enables my opposing counsel to do the same thing, thereby making my job harder.

A-66 (neutral, Third Circuit). It would clear up confusion between the circuits' different rules; it will enable citation of persuasive authority; it will, however, also increase misuse of non-precedential authority; it may increase the accuracy of judicial dispositions.

b. Bias

Four attorneys predicted that the additional authority provided by unpublished opinions would have a disproportionate impact on the government. Two attorneys representing appellants in criminal appeals predicted a disproportionate bias in favor of the government and two attorneys representing the government predicted a disproportionate impact against the government. All four of these attorneys opposed the proposed rule.

A-67 (opposed, Eighth Circuit). A negative impact. It would open the door to citation of older cases not intended to be authority or cited, and it would change the nature of future cases resulting in more delay in issuing otherwise simple decisions. We also believe that most unpublished opinions are weighted heavily toward affirming convictions, which is fundamentally unfair to defense research efforts.

A-68 (opposed, Third Circuit). I do criminal defense work and have never had occasion to cite or rely on an unpublished opinion. In my experience, most unpublished opinions on the criminal side tend to favor the government, so the proposed rule would just add more arrows to its quiver.

A-69 (opposed, Seventh Circuit). Besides making the work of attorneys litigating in the federal courts of appeals more burdensome, if it is applied retroactively, it will have a disproportionately adverse impact on the government's litigation. This is because one of the factors used to decide whether the government will seek further review of an adverse decision is whether the decision has been published.

A-70 (opposed, First Circuit). Because I anticipate that defense attorneys would be using them more than we would.

c. More Work

Thirty-one attorneys observed that the ability to cite unpublished opinions would create more work for them. Most of these attorneys (23) opposed the proposed rule, three attorneys supported it, and five were neutral. In addition to the attorney comments compiled here, 17 other attorneys mentioned more work: attorney A-53 (supportive) (comment compiled under *1.a. More Authority*); attorney A-69 (opposed) (comment compiled under *1.b. Bias*); attorney A-92 (opposed) (comment compiled under *2.a. Strategy*); attorneys A-112 (opposed) and A-116 (opposed) (comments compiled under *2.b. Not Precedent*); attorney A-129 (opposed) (comment compiled under *2.c. Not Useful*); attorneys A-134 (opposed), A-138 (opposed), A-139 (opposed), A-140 (opposed), and A-142 (opposed) (comments compiled under *2.d. Poor Quality*); attorney A-158 (opposed) (comment compiled under *3.b. Less Accessible*); attorneys A-179 (supportive), A-184 (neutral), and A-185 (neutral) (comments compiled under *4.a. More Consistency*); attorney A-200 (neutral) (comment compiled under *4.c. Higher Quality Opinions*); and attorney A-204 (opposed) (comment compiled under *4.d. Shorter Opinions*).

A-71 (supportive, Seventh Circuit). While it would add to research time, it would open up available arguments, especially for unsettled or changing areas of law, such as immigration. I would welcome the change.

A-72 (neutral, Tenth Circuit). The new rule would make my appellate work both more burdensome and less burdensome. Legal research would

be more burdensome as I would feel compelled to search for relevant unpublished cases rather than limiting my research to published opinions. However, when dealing with novel legal issues or fact patterns it would be helpful to be able to freely cite to unpublished decisions, especially those from other circuits.

A-73 (neutral, Sixth Circuit). It would be helpful when such an unpublished opinion was favorable but generally put a heavier burden on a practitioner when he did research to locate and distinguish all such decisions.

A-74 (opposed, Fourth Circuit). It would probably result in more frivolous motions and arguments. If we can freely cite unpublished opinions of all circuits many will make motions and objections that they would otherwise not have made. Many attorneys, especially those who practice criminal law, will feel they are duty bound to press matters only supported in unpublished opinions. Not to do so will leave them open to a section 2255 attack. The fact that the unpublished opinions are still not binding will not change this. The rule change sends a mixed message: the case is *not binding*, but you can cite it. But why cite if it's not binding? How will courts interpret this? I vote, no change.

A-75 (opposed, Sixth Circuit). In a very few cases with truly "novel" issues, it may well be helpful in directing the reviewing court to relevant legal reasoning applied in prior cases as to that unique question. However, the rule will have the unfortunate effect of opening the floodgates to a myriad of arguments (based on dicta, in many instances) premised on unpublished opinions relative to questions and issues not novel or unique that have been well settled in prior published opinions, thereby increasing the burden of drafting appellate briefs, particularly responsive briefs.

A-76 (opposed, First Circuit). Such a change would dramatically increase the time it takes to prepare a brief. I am an immigration attorney and, as the courts know, there are thousands of such cases pending at any given time, and thousands of unpublished immigration cases. Increasing my reason to include all of these cases—which would be the prudent course to take if both sides may cite them—would be unduly burdensome.

A-77 (opposed, Tenth Circuit). It might significantly increase research time, as I would be more inclined to search unpublished opinions for holdings on point. It would not significantly help my arguments because my circuit's rules already allow citation to unpublished opinions if it is the only authority on point. If there is a published case on point, I would not cite to an unpublished opinion anyway.

A-78 (opposed, Fourth Circuit). I would expect such a rule would result in attorneys citing unpublished opinions in an effort to change precedent. Thus, I would anticipate each brief would contain a section that

would argue for a change in precedent, citing unpublished opinions for the reason for the change.

A-79 (opposed, Ninth Circuit). It will cause confusion and more work for attorneys, because in some cases unpublished opinions or the reasoning therein will be inconsistent with other unpublished opinions, and attorneys will have to spend time reconciling the cases.

A-80 (opposed, Ninth Circuit). It would require much more time to write each brief—given the sheer numbers of unpublished decisions—to ensure that you were not in conflict or overlooking something.

A-81 (opposed, Seventh Circuit). Would require additional research into hundreds more unpublished opinions. Would likely increase the time necessary to complete any given appeal.

A-82 (opposed, Federal Circuit). More time expended in briefing responses to citations to unpublished opinions by opposing counsel. No appreciable impact upon outcome of appeals.

A-83 (opposed, First Circuit). Would increase the universe of cases to find and read, create more work, and take longer to write and file briefs.

A-84 (opposed, First Circuit). It would make research take longer.

d. Already Reviewed

Six attorneys said that they already review unpublished opinions, so the opportunity to cite them would not entail additional work. Five of these attorneys supported the proposed rule; one was neutral.

A-85 (supportive, Second Circuit). In considering my response to the survey, it is important to note that in my brief to the U.S. Court of Appeals for the Second Circuit, I cited one unpublished opinion of the Second Circuit using the Westlaw citation, and a second opinion of the Second Circuit that is reported in the *Federal Appendix*.

Because of the wide reliance on electronic libraries, “unpublished” opinions are equally as accessible as published opinions. Although unpublished opinions are not considered binding precedent, attorneys generally believe that they are nonetheless important as they provide a basis for at least a subtle argument for consistency by the court. Moreover, if the unpublished opinion is premised upon facts and circumstances very close to those presented by the attorney’s case, then the citation to the unpublished opinion is viewed as particularly appropriate. For an attorney preparing a submission, the use of unpublished opinions does not involve any additional work or research, as unpublished opinions necessarily come to the attorney’s attention during a Westlaw or Lexis computer inquiry.

From the practitioner’s standpoint, unpublished opinions provide an additional source of reference material. The writer hopes that the use of unpublished opinions will not be perceived by the judiciary as increasing

its workload by necessitating an increase of effort and care in drafting unpublished opinions.

A-86 (supportive, Fifth Circuit). In theory, opinions are to be unpublished only when the result is in all respects clearly dictated by existing precedent. In practice, however, judges may have a tendency to use the unpublished opinion as a mechanism for results-oriented adjudications of a particular case, comfortable that the analysis in the opinion will not negatively impact the court's jurisprudence more generally as it applies to other cases. If the national rule renders all opinions, published and unpublished, binding precedent, it should curb the tendency for such misuse of unpublished opinions. I would personally favor such a rule.

If the rule merely authorizes citation to unpublished opinions but leaves in place local rules regarding whether such opinions have precedential value, then in my estimation, the rule will have little impact, beyond obviously expanding the universe of cases that may be cited in briefs. Practitioners who research electronically (this is the exclusive method for all attorneys in my firm) are required to cull through unpublished opinions anyway, as they are included in the federal court of appeals databases of the major online research companies. So there should be no appreciable impact on research time. The rule would simply expand the range of cases that may actually be cited in briefs.

A-87 (supportive, Second Circuit). It would not make the work any more or less burdensome because most research is done electronically—pulling up both published and unpublished cases. It would, however, be beneficial to both the parties as well as the courts (I believe), because it would provide more reasoned decisions from which to draw from, especially in areas where there are few cases on point. While of course not precedential, additional reasoning is always helpful.

A-88 (supportive, Tenth Circuit). I believe it would allow for better-reasoned arguments and greater intellectual honesty. Unpublished opinions are readily available on Westlaw and Lexis/Nexis, and I read them, even though I cannot cite to them. The work level for me is therefore the same, but it may be a disservice to my client and the court not to be able to point out to the court that a comparable fact pattern had a certain outcome.

A-89 (supportive, Fifth Circuit). I support the change as proposed. Attorneys in the Fifth Circuit cite them frequently, particularly in cases involving novel issues. Work would be a little less burdensome if we did not have to attach them to the brief.

A-90 (neutral, Tenth Circuit). I do not believe it would have a significant impact on my work. To some extent it would make research slightly less frustrating because I would not come across cases that I would be unable to cite.

2. The Usefulness of Unpublished Opinions

Many attorneys commented on how unpublished opinions are used. Four attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-six attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 16 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Fifteen attorneys opined that unpublished opinions tend not to be of as high quality as published opinions in their drafting, but one attorney said that their quality is good.

a. Strategy

Four attorneys mentioned strategies for bringing unpublished opinions to the attention of the court when they are not permitted to cite them directly. Attorney A-91 said that an attorney can cite a decision that the unpublished opinion reviewed so that the citation to the unpublished opinion appears as part of the subsequent history of the cited decision. Attorneys A-92 and A-93 suggest that attorneys can simply incorporate the argument of unpublished opinions without citing them. Attorney A-94 wonders if this would be plagiarism.

Two of these attorneys supported the proposed rule, one was neutral, and one opposed it.

A-91 (supportive, District of Columbia Circuit). It will have a positive impact, insofar as it will allow litigants to point to the actual case that contains the language on which they want to rely. As it stands now, we cite to the lower court or agency decision and add the “enforced” citation (unpublished) in hopes that the court or clerks will read the unpublished appellate citation. This is a ridiculous way to get these citations to the court’s attention, especially when the lower court or agency decision, which was published, does not really contain language directly on point, but the unpublished appellate decision does. Appellate courts respect other appellate courts, even if the precedent is not binding, but without the ability to cite directly to an unpublished appellate decision, we are left with having to cite to a district court or agency opinion which, even if published, is not as persuasive as a decision by an appellate panel. (I have not addressed unpublished district court decisions because they just do not come up much in my practice (labor), because district courts do not deal with labor issues, and because these questions seem geared to unpublished appellate decisions.) Also, speaking from my clerking experience at the district court level, there were many cases in my circuit in which the appellate court had essentially announced or decided a new rule, but had not published it, for some unknown reason. Given that there is no requirement that courts ex-

plain why they do not publish a decision, and given that there's no standard for what to publish or not, the rule against citing to unpublished decisions seems unfairly arbitrary.

A-92 (opposed, District of Columbia Circuit). I believe that the proposed rule would make the preparation of appellate briefs somewhat more burdensome. It would also impose an ethical duty on counsel to check unpublished opinions, for which counsel would have to absorb the additional time or costs if not passed on directly to the client. This invites citation to any unpublished opinion, whether specifically provided for by rule or not. In my opinion, counsel should simply incorporate the argument of such unpublished authority. If the logic is persuasive, it matters little whether it originated with another court or the parties' lawyers. The burden of the proposed rule outweighs the benefits.

A-93 (neutral, Federal Circuit). On occasion, I have found that the most relevant case is unpublished. In those circumstances, we tend to follow the reasoning, without citation to the unpublished opinion. In those instances, I would still present my appellate argument in a similar fashion but would also cite the unpublished opinion to show that the reasoning had previously been considered and accepted by the court. I would still search for the most relevant published opinion because binding precedent is more persuasive.

A-94 (supportive, Eleventh Circuit). The proposed rule change seems directed to circuits that publish their unpublished decisions on Westlaw and Lexis but then do not allow the cases to be cited. My circuit, the Eleventh Circuit, does not make its unpublished decisions available on Westlaw or Lexis, but allows attorneys in the circuit to cite unpublished decisions. So, in some circuits, you can read the cases but not cite them. Here, you can cite them but not read them.

[Footnote added by attorney:] It is worthwhile to note the unfairness of this. Attorneys who practice in Atlanta, who can pick up hard copies of unpublished cases in the clerk's office, and government attorneys, who are always counsel of record in federal criminal cases and get copies of every unpublished criminal case, have access to and can cite unpublished circuit cases the rest of us do not know exist.

So the proposed rule change would have little impact in the Eleventh Circuit until the Eleventh Circuit makes its unpublished decisions readily available online. In general, the proposed rule may increase citation of unpublished decisions, but not significantly. The block-lettered warning that appears atop unpublished cases on Lexis and Westlaw has a chilling effect that may wane if the rules limiting citation of those cases are eliminated, but attorneys will still prefer to cite cases with precedential value. I can cite unpublished cases from other circuits freely now, but I do it only one or two appeals each year.

That being said, I feel strongly that when I find good arguments that may help my clients I should make them, regardless of whether I find the arguments in published or unpublished cases. Rules that prohibit citation to unpublished cases must create a bit of an ethical dilemma for attorneys in circuits that have them. When those attorneys find good arguments in unpublished cases, I wonder: do they (1) ignore them, (2) make the arguments without acknowledging their sources (and thereby commit plagiarism), or (3) cite the cases in violation of the circuit rules?

b. Not Precedent

Twenty-six attorneys observed that it is well understood that unpublished opinions are not binding precedents in the way that published opinions are. Five of these attorneys were supportive of the proposed rule, 10 were neutral, and 11 were opposed to it. In addition to the attorney comments compiled here, three other attorneys reminded us that unpublished opinions are not precedent: attorney A-153 (neutral) (comment compiled under *3.a. Accessible*); attorney A-204 (opposed) (comment compiled under *4.d. Shorter Opinions*); and attorney A-209 (opposed) (comment compiled under *4.f. Delay*).

A-95 (supportive, Third Circuit). I would appreciate a rule permitting such citation as long as it was clear that those cases could not be offered for any precedential value. Often unpublished cases lack strong analysis (or any analysis) of a given issue. As a result, they are not “worth” much. Every once in a while, however, they provide helpful analysis which could help judges form their opinions. Such a rule would not necessarily create more work for me, but I could see judges having to work harder if they feel compelled to actually read unpublished cases cited in the parties’ briefs.

A-96 (supportive, Tenth Circuit). If the rule does not change the fact that unpublished decisions are not binding precedent, I think the new rule would have no impact. I prepare a lot of appeals, and unpublished decisions can be very useful if they are very close to the facts of your case or the number of similar unpublished decisions is significant for some reason. I regularly cite to them, and their use does not affect my work, because all my research now is done electronically.

A-97 (supportive, Ninth Circuit). I believe that this would make the writing of briefs easier. I am not sure that the rule would have a great impact on the decisions of the courts, as they would not view unpublished decisions as precedent. On the other hand, to the extent that judges are able to get more information, including a clearer picture of what has happened at the administrative level, reference to unpublished decisions could make a difference.

A-98 (supportive, Third Circuit). I personally favor the proposed rule, but do not believe it would have a great impact. A good lawyer cites pre-

cedential opinions where possible. If there is no published authority on a particularly obscure point, however, why should the parties and the court not have the benefit of looking at how a different court or panel approached the issue, even if it is not precedential?

A-99 (supportive, Tenth Circuit). As long as these opinions continue to lack value as precedent, I do not think such a rule would be unduly burdensome. It is helpful to practitioners to cite unpublished opinions for persuasive authority, and I would think it would be helpful to members of the court to know the results reached by their colleagues.

A-100 (neutral, Eleventh Circuit). I think it might be useful to cite to the facts of unpublished opinions and how the court issuing the unpublished opinions applied the existing case law to the facts of the particular case. This would be for illustration purposes only. I cannot really envision the citation to unpublished opinions being of much help in light of their non-binding nature. Other than to illustrate how an appellate court analyzed a case, I see little use. However, I do not have a significant appellate practice at the present time and do not have a great deal of appellate experience compared to many practitioners.

A-101 (neutral, Eleventh Circuit). I do not believe it would have much of an effect on my work, nor on my colleagues', since we are currently permitted to cite unpublished decisions. The hesitancy in citing such decisions stems from their lack of binding effect, a circumstance that will not be affected by the proposed rule change.

A-102 (neutral, Seventh Circuit). If such an opinion were favorable it might be useful by analogy. But if not binding as precedent, the fact that unpublished opinions could go either way would make the process very burdensome, especially if they are not Shepardized.

A-103 (neutral, Ninth Circuit). Allowing citation to all opinions would make formulating arguments easier in many cases, but would not necessarily make the arguments any more persuasive if unpublished opinions remain without binding precedent authority.

A-104 (neutral, Fifth Circuit). I would resort to unpublished opinions only in the event of a total lack of supporting precedent in published opinions and then only to provide the court guidance in the instant case.

A-105 (neutral, Seventh Circuit). The courts will take notice of such unpublished opinions, but if such opinions are not binding precedent, there will not be much influence on legal opinions and courts' decisions.

A-106 (neutral, District of Columbia Circuit). Very little, because such opinions still hold no precedential weight. It will only encourage show-boating by legal nerds who want the court to know that they know some law.

A-107 (neutral, Federal Circuit). Not a significant impact because I believe that the federal appellate courts will continue to follow the *stare decisis* with respect to published decisions only.

A-108 (neutral, Eleventh Circuit). Unless the unpublished opinions have some precedential value the rule change would probably have minimal impact.

A-109 (opposed, Fifth Circuit). As a civil and criminal appellate attorney with experience in both the private and government sectors, I can honestly say there is already enough abuse with citation of cases. The use of unpublished cases would make this situation worse. The Fifth Circuit's rules already allow for the citation of unpublished opinions in certain appropriately limited circumstances. As a former intermediate appellate staff attorney, I also believe that courts should have the right to shield certain decisions from use as precedent. It is part and parcel of the percolation effect for legal issues and the occasional need for decisions based solely on the facts of a particular case. In short, allowing citation to all opinions would have a negative impact on the appellate process and would lead to further abuses on briefing. I oppose such a rule.

A-110 (opposed, First Circuit). The decision of a court to publish or not publish a particular adjudication of an issue or a case is usually tied to their intent of it having prospective generalized application. For one reason or another, a judge may dispose of an issue or a case in a manner that promotes judicial management, but without pretension to precedent; and that distinction is usually reflected in the decision to publish or not. If an unpublished opinion has no precedential value, it should not be relied upon by a party; if it does, it should be published. I do not fathom the logic of the recommendation.

A-111 (opposed, District of Columbia Circuit). Citing to unpublished opinions, which have no precedential value, would seem to complicate the task of the brief writer. Why cite opinions that have no binding effect? The *American Wrecking* case, for which I was attorney of record, was an OSHA case. The OSHRC has promulgated rules providing that ALJ decisions can be cited but have no precedential value. As a result, I devote substantial time agonizing over whether or not to cite to such decisions, which can be disregarded by the OSHRC. To me, the real issue here is the policy reasons underlying unpublished opinions.

A-112 (opposed, Sixth Circuit). The diligent practitioner would feel a need to consider the universe of unpublished opinions, increasing the time spent on an appeal. Even with the assistance of computers, that time could prove considerable in some cases at least. Yet the unpublished opinions would have no binding effect (as question 5 above indicates). Therefore, the practitioner would wonder about the utility of the additional work

while also feeling obligated to engage in the work. Thus the impact could prove more negative than positive and a source of frustration.

A-113 (opposed, Tenth Circuit). There is a reason unpublished opinions are not cited in the official reporters. It seems that allowing attorneys to cite to unpublished opinions would simply inject more uncertainty into the already uncertain business of interpreting case law. Moreover, practically speaking, judges will probably accord less deference to unpublished opinions, thereby making their use of little real value.

A-114 (opposed, Ninth Circuit). As long as the unpublished opinions remained non-binding, it would seem that the effort in using the unpublished opinions would be somewhat wasted. Either they should mean something (and I do not think they should), and that would make it worth citing and replying to the unpublished opinions, or they should not *mean* anything and therefore should not be cited to.

A-115 (opposed, Fifth Circuit). Such references would unnecessarily clutter the appellate briefs and divert the parties' attention from the published opinions that control the issue under review.

A-116 (opposed, Third Circuit). It would be much more burdensome to have to respond to and distinguish cases of no precedential value.

A-117 (opposed, First Circuit). Generally, if the unpublished decisions are not going to have precedential value, why bother?

c. Not Useful

Sixteen attorneys observed that unpublished opinions generally are not useful. Most of these attorneys (nine) were neutral concerning the proposed rule, six opposed it, and one attorney supported it. In addition to the attorney comments compiled here, two other attorneys mentioned that unpublished opinions are seldom useful: attorney A-133 (opposed) (comment compiled under 2.d. *Poor Quality*); and attorney A-206 (opposed) (comment compiled under 4.e. *Longer Opinions*).

A-118 (supportive, First Circuit). I think the impact would be modest. The case law in my practice area (energy law) is fairly well established, and there are very few instances in which I would find unpublished case law to be applicable. That said, the proposed rule would be helpful in those rare instances in which I could cite to an unpublished opinion.

A-119 (neutral, Eighth Circuit). The impact would be to essentially replicate briefing methods currently utilized in the local district court, where unpublished opinions appear to be routinely cited regardless of the court issuing the opinion. Any additional burden would fall most heavily on the judges and law clerks of the court of appeals who would be required to review the significantly greater number of cases made available for citations. Given the rather perfunctory legal analysis of most unpublished

opinions, many of which are cited only because the opposing party is also utilizing unpublished opinions, it seems doubtful that much of significant value would be added to appellate briefing by a new rule on this issue.

A-120 (neutral, Third Circuit). None. I have rarely found unpublished court of appeals cases helpful. My experience is that unpublished opinions are unpublished for a reason; i.e., either there is nothing remarkable about the case or the opinion is not worthy as precedent. Allowing citation of unpublished cases of lower courts, however, could be helpful. In many states, court of chancery opinions are generally unpublished, but often times are the only opinions available discussing corporate law.

A-121 (neutral, First Circuit). It strikes me as silly that unpublished opinions are readily available on Westlaw but cannot be cited. Nevertheless, only very seldom is an unpublished opinion critical. In most instances the published opinion is more fully explained than an unpublished one and thus more helpful.

A-122 (neutral, Seventh Circuit). I do not believe that permitting the citation of unpublished opinions would have an appreciable impact, because the occasions where I have wanted to cite such a decision have been so few.

A-123 (neutral, Fourth Circuit). No significant impact. There are enough published cases already. Cases are unpublished for a reason, and I expect few unpublished cases will find their way into appellate briefs.

A-124 (neutral, First Circuit). None. Usually the unpublished opinions are cases where the facts or factual scenario have been already resolved under controlling and binding published opinions.

A-125 (neutral, Eleventh Circuit). Very little. In my circuit, I attempt to cite the binding precedent on each issue, and I cannot ever remember this being an unpublished opinion.

A-126 (neutral, Second Circuit). The impact would be very minimal as unpublished opinions deal with basic hornbook issues.

A-127 (neutral, Eighth Circuit). None. There are plenty of published cases on which to rely.

A-128 (opposed, Federal Circuit). A few appellate lawyers will advance extremely broad interpretations of the law, based upon unpublished decisions. These arguments will be tedious to rebut. The problem lies in the circuits' rationale for unpublished decisions: that they do not break new legal ground. It is but a short step from that premise to the argument that unpublished decisions are next-best-to-precedential, because, by definition, they (merely) reflect a panel's reading of existing law. This would inevitably encourage lawyers to make use of the ambiguity and place great emphasis upon unpublished decisions that are helpful to the clients, while ac-

knowledging in lip service that the unpublished decisions themselves do not control.

A-129 (opposed, Second Circuit). I would spend additional and significant time searching through unpublished decisions. I guess they would remain as terse as they are now. Thus, it would be difficult to discern whether the cases are factually similar, as many unpublished decisions are fairly light on the facts. The judges might spend more time on the unpublished decisions (i.e., give more information and explanations). I take it on faith that the unpublished decisions do not add anything new to the law. However, I have seen a few that really were significant and deserved greater exposition.

A-130 (opposed, Tenth Circuit). Except in rare instances, the need for citation to unpublished opinions is non-existent. The Commissioner of Social Security, however, uses them frequently. The Tenth Circuit, disturbingly, has begun citing as authority the unpublished opinions of other circuits. There is usually a reason that opinions are not published. Permitting citation to unpublished opinions from other circuits would be a mistake.

A-131 (opposed, Tenth Circuit). In the Tenth Circuit and in the field of immigration law there appear to be few unpublished cases that do anything but reiterate published decisions. I do not feel that it would make much difference to my practice.

d. Poor Quality

Fifteen attorneys observed that unpublished opinions are not drafted with the same degree of care as published opinions. Most of these attorneys (12) opposed the proposed rule; three were neutral. In addition to the attorney comments compiled here, two other attorneys expressed concern about the quality of unpublished opinions: attorney A-201 (neutral) (comment compiled under 4.c. *Higher Quality Opinions*) and attorney A-231 (neutral) (comment compiled under 5.c. *Should Be Precedent*).

A-132 (neutral, District of Columbia Circuit). None, though I've found generally that unpublished opinions are less detailed and less thorough than published opinions, and therefore, less useful for appellate work.

A-133 (opposed, Eleventh Circuit). In my opinion, having a federal rule allowing the citation of unpublished opinions would have a negative impact on appellate practice. My basic understanding is that if an appellate decision establishes a new rule of law or applies an established rule in a different way or to significantly different facts, the court will, and must, publish the opinion. Unpublished opinions are thus only issued when prior precedent applies directly to the issues raised. They give the parties a reason for the ruling, but do not establish new precedent. It is reasonable to conclude that courts will generally play closer attention to the language and reasoning of published decisions because they establish precedent.

My fear is that having a federal rule allowing the citation of unpublished opinions will improperly give greater weight to unpublished decisions that may not have gone through the rigors imposed on precedent-producing decisions. It is ironic that I was selected for this survey based on my filing a brief in *United States v. Urbacz*. That case directly illustrates the dangers of reliance on unpublished decisions. The appeal raised the issue of whether attempted illegal reentry was a specific intent offense. The Eleventh Circuit had ruled in a published opinion that it was not. But that decision did not offer any legal reasoning and merely adopted the reasoning of an unpublished decision from another circuit. However, a close look at that unpublished decision suggests that the other circuit was dealing with a case of illegal reentry and not attempted illegal reentry. The problem was that the unpublished decision was not clear. In fact, the other circuit later issued a published opinion contrary to that of the Eleventh Circuit. Thus, reliance on an unpublished decision resulted, in my opinion, in bad precedent that has yet to be corrected. If anything, I would hope that reliance on unpublished opinions would be lessened and not encouraged.

A-134 (opposed, District of Columbia Circuit). I think it will require counsel to invest unnecessary effort in reviewing, digesting, and distinguishing earlier decisions that were the result of poor advocacy.

In my view, there are two legitimate reasons for making a ruling (and its reasons) non-precedential: First, that the case calls for the application of well-settled rule to facts that are either peculiar (in this category should fall many sufficiency-of-evidence issues), have already arisen in a published case, or are simply too clear to cause any reasonable dispute. Second, that the case has been so poorly litigated that the court cannot be sure that the resulting decision will be of any value to anyone other than the parties.

Citations to each class of unpublished decision give rise to a different kind of burden. Fact-bound cases make for either difficult or merely duplicative reading. In the former case, opposing counsel must engage in the tedious task of distinguishing the facts; in the latter case, of organizing the various repeated factual patterns into categories, and then distinguishing them as a group.

On the other hand, cases that are poorly litigated often lead to troublesome decisions, for the simple reason that the court is not well advised as to all the possible arguments. The court's resolution was no doubt correct as to those parties because the arguments not made are necessarily waived; the court cannot decide what was not presented to it. However, the decision on the facts presented (excluding the defaults of advocacy) may not be correct as a general legal proposition. If such decisions may be cited—even for merely persuasive value—opposing counsel will be required to show why the decision is not persuasive; that is, that one or more crucial arguments were omitted to be made in the earlier case. Assuming

the prior unpublished decision is not unduly lengthy or complicated, the burden would not be tremendous, however, because those arguments would have to be made in the case at hand in any event.

A-135 (opposed, Eleventh Circuit). I disfavor allowing the citation of unpublished decisions. Generally, unpublished decisions are short memorandum-type opinions with hardly any factual discussion or legal analysis. Therefore, citing to these cases should contribute little, if anything, in the adjudication of a notice of appeal. To the contrary, it might make writing a brief more burdensome for appellees. Appellants with questionable claims could be encouraged to rely excessively on seemingly similar unpublished decisions in support of their arguments. If this rule is approved, it should at least be limited to those cases where there is no precedential case law on the matter before the court, and where no other circuit court has published an opinion addressing the issue.

A-136 (opposed, Sixth Circuit). I personally like to think that the circuit courts put more thought into their published opinions than their unpublished opinions. As such, I think citations to unpublished opinions may contribute to bad precedent—as circuit courts might be reluctant to overrule cited unpublished opinions, which though bad are on point. I would hate for the U.S. Attorney’s Office to be able to cite the opinion in my case. I believe it was thoughtless and rushed and overly deferential to the district court judge who, I believe that both parties would concede, was not even on point.

A-137 (opposed, District of Columbia Circuit). I think it is a terrible idea. Unpublished opinions are not as developed, either factually or legally, as are published decisions, and they will become precedents although they have not received the same care as published opinions. They are often drafted by staff attorneys, not even by the judges’ own clerks. The only good thing about a national rule is it would be better than all the individual rules now outstanding, but I still think the whole concept is a bad idea.

A-138 (opposed, District of Columbia Circuit). There is already ample published authority. The new rule would result in having to distinguish or otherwise argue against all kinds of unpublished orders, opinions, etc., which would be more burdensome on attorneys and the courts. It might hurt the quality of the briefing and writing. Judges, clerks, and attorneys may get distracted by opinions and orders that were never intended for publication or citation, and that could only harm the entire process.

A-139 (opposed, Second Circuit). I believe such a rule would be ill-advised, because of the number and nature of unpublished opinions available online. Research would take considerably longer and raise client costs, without producing a superior product. Many unpublished opinions are not

very well written, which could lead to mischief—namely, someone citing them in an effort to distort the law. I oppose the new rules.

A-140 (opposed, Tenth Circuit). I believe that often unpublished opinions are not as carefully crafted or thought out as published opinions, so the use of unpublished opinions should be limited. Further, the sheer number of opinions issued by the courts of appeals every year would make my work more burdensome if the rules were made more lenient.

A-141 (opposed, Eleventh Circuit). I believe the net effect of such a new rule will be negative. Published opinions are more carefully written than unpublished. Some of us who regularly do appellate work find a cacophony of voices in the law now. Unpublished opinions will only add to the discordant effect.

A-142 (opposed, Fourth Circuit). Increase citations in briefs and require responses to unpublished opinions cited in opposition's brief. Main concern is that unpublished opinions are often unpublished due to a quirk in the record not apparent in the opinion and could result in dubious precedent.

A-143 (opposed, District of Columbia Circuit). It worries me. I am concerned that, in the past, unpublished opinions may have been issued with the understanding that they would not be precedent. To allow the citation of these opinions may confer more weight on them than they were intended to carry.

A-144 (opposed, Ninth Circuit). I would expect some courts to make unpublished opinions less available to the public. Responding to arguments based on unpublished opinions will be difficult because it is often difficult to discern the factual basis for an unpublished decision.

e. Good Quality

One attorney remarked that unpublished opinions are actually of good quality. This attorney supported the proposed rule.

A-145 (supportive, Sixth Circuit). Since these cases are now readily available to practitioners in this age of computer research, I think it is reasonable to allow their citation. The court has to apply the same careful legal reasoning in reaching its decision, whether published or unpublished, so I see no reason not to allow citation of unpublished as well as published decisions.

3. Access to Unpublished Opinions

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many unpublished opinions are available electronically from attor-

neys' desktops, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 14 attorneys said that unpublished opinions are still often less accessible than published opinions.

a. Accessible

Twelve attorneys observed that in this electronic age, unpublished opinions are now quite accessible, much more accessible than they were when proscriptions on citing unpublished opinions were put in place. Most of these attorneys (nine) were supportive of the proposed rule; three were neutral. In addition to the attorney comments compiled here, three other attorneys mentioned that unpublished opinions are now very accessible: attorneys A-85 (supportive) and A-88 (supportive) (comments compiled under *1.d. Already Reviewed*); and attorney A-127 (supportive) (comment compiled under *2.e. Good Quality*).

A-146 (supportive, Third Circuit). Given the advancements in electronic case research and the wide availability of many unpublished dispositions on government and commercial electronic case research services, I believe that relaxation of the current rules on the citation of unpublished opinions would, in general, prove beneficial. In addition, I believe that promulgating a uniform rule concerning the use of unpublished opinions in the federal courts of appeals would have a positive spillover effect on lower courts. I, from time to time, have encountered disparate views even among judges within the same court concerning the utility of unpublished opinions. Presumably, a uniform rule in the federal court of appeals would encourage lower courts to follow suit.

A-147 (supportive, First Circuit). Since these decisions are readily available, although technically "unpublished," they should be available for citation without changing their status as precedent. In practice, I have found that these cases are often cited notwithstanding the current rule, especially in areas where there is little other case law. A change in the rule would obviate the need to argue both that the citation to the case was improper, and then address the case on its merits. In fact, that occurred in the subject appeal when opposing counsel cited an unpublished California case in violation of California court rules. It does not make sense to pretend these cases do not exist, when they are readily accessible.

A-148 (supportive, Sixth Circuit). I fully support the more liberal approach to citing unpublished opinions. With computer-assisted research, there is no appreciable difference in research time. Including unpublished opinions with briefs might be a little more burdensome.

A-149 (supportive, Tenth Circuit). We would have more guidance on issues that have often only been fully addressed in unpublished opinions.

With computerized research, it would be easy for the practitioner to locate the same.

A-150 (supportive, Sixth Circuit). A positive impact. No reason any more to limit citation to only published opinions. "Unpublished" opinions are available in computer research libraries.

A-151 (supportive, Third Circuit). It would be beneficial and is long overdue. Today, most lawyers are aware of the unpublished decisions and it makes sense to allow their use.

A-152 (neutral, Sixth Circuit). I think the impact would be minimal. Given the availability of unpublished opinions on electronic databases, most researchers, including the court personnel, know of the holdings in unpublished opinions, so the reasoning and ultimate decisions in unpublished cases are often reflected in final decisions of courts. Citation to unpublished opinions simply would reflect the reality of today's research capabilities. Preference should still be for published opinions if available.

A-153 (neutral, District of Columbia Circuit). I expect that the impact would be minor: (1) unpublished opinions are available on Westlaw, so accessibility of unpublished opinions should not be a significant problem; and (2) an appellate court would probably continue to give more weight to a published opinion, even if the rules permitted citation to unpublished opinions (although an appellate court might give significant weight to an unpublished opinion if it involved one of the very litigants then before the court).

A-154 (neutral, Eighth Circuit). More extensive research required equals minimal impact, given computer research methods.

An informal survey of six other attorneys in our office revealed about an *even split* on the desirability of having unpublished opinions to be citable or precedent.

b. Less Accessible

Fourteen attorneys said that unpublished opinions are not always as accessible as published opinions, at least not to everyone. Most of these attorneys (11) opposed the proposed rule; two were supportive; one was neutral. In addition to the attorney comments compiled here, three other attorneys remarked that unpublished opinions are less accessible than published opinions: attorney A-94 (supportive) (comment compiled under *2.a. Strategy*); attorney A-203 (opposed) (comment compiled under *4.d. Shorter Opinions*); and attorney A-212 (supportive) (comment compiled under *5.a. Accountability*).

A-155 (neutral, Third Circuit). Realistically, I do not know that it would have much of an impact; however, I believe such a rule may have the opposite effect to the one presumably intended. I presume the intended

effect would be to open the court's consideration to those diverse opinions it would, under the present status of procedure, otherwise dismiss. While this intent is laudable, I believe it ignores the problem of open access to opinions. Not to attorneys, mind you, as they have resources available for ready access to unpublished opinions. Rather, the non-attorney, to whom these courts are open and for whom these courts truly operate, would be prejudiced as he or she does not have (or may not have) such resources available. Now, a non-attorney may visit his or her local courthouse and retrieve all published opinions. Would he or she be able to retrieve all unpublished opinions there as well? If not, is that person truly better off being able to cite cases he or she cannot find?

A-156 (opposed, Eleventh Circuit). I think that such a rule would have minimal impact on my practice, but might not be a good idea generally. In my circuit, unpublished opinions are not available on Westlaw and not published for a reason. Although they can be useful in limited situations, in busy circuits such as ours, unpublished opinions dilute the body of law as a whole and should not be more widely used. I am not sure of the practices in other circuits but do know that many circuits do not publish much and therefore unpublished opinions are cited more. A more permissive rule might disincentive publication.

A-157 (opposed, Tenth Circuit). I have not seen this proposed rule. Nevertheless, unless the unpublished opinions of every circuit are readily available and easily accessible for all lawyers via available legal research methods, it may make it difficult for some attorneys to compete. If the rule still requires that copies of unpublished opinions must be attached to the briefs, it will make the briefs and appendix more lengthy, requiring more paper, copying time, and scanning time for electronic filing.

A-158 (opposed, Fourth Circuit). One practical problem I foresee is that the major providers—Lexis and Westlaw—do not always have the same catalogue of unpublished decisions. That has come up in trial court briefing—research cited on Westlaw by the other party was not retrievable on Lexis. That is what I see as the main pitfall of such a rule. A second problem is just that extra time needed to research other circuit's unpublished decisions. That is not hugely burdensome, but would be an effect.

A-159 (opposed, Sixth Circuit). It would reward practitioners with access to unpublished materials and penalize those without.

It is fundamentally unfair for one side to have access to law that the other side does not have.

This attempt to "liberalize" rules is really just a way to undermine the rule of precedent.

It smacks of the unprincipled disregard for law that permeates the Bush administration!

No! No! A thousand times no! And I mean it!

A-160 (opposed, District of Columbia Circuit). In my field—Freedom of Information Act litigation—and with the limited resources of an attorney who does not have access to Westlaw or Nexis, I would expect this to benefit the government, which has the capacity to comb all courts for unpublished decisions favorable to it, something I cannot do.

A-161 (opposed, Eighth Circuit). It would make brief writing and legal research more difficult for sole practitioners and lawyers from another circuit appearing in those circuits, like me. I appeared in the Eighth Circuit, but my “home” circuit is the Eleventh Circuit. Having to locate unpublished opinions would be difficult.

A-162 (opposed, Second Circuit). Am simply concerned about access to those unpublished decisions that are (1) not my own and (2) not available through the various reporting services we have access to (limited funds for access to comprehensive reporters).

A-163 (opposed, Third Circuit). It would be unfair to litigants whose attorneys do not have the resources to discover unpublished opinions. It unbalances what I believe is a level playing field.

A-164 (opposed, Eighth Circuit). Without having Westlaw or Lexis, I might be at a disadvantage, because I might miss a case that my opponent has access to.

A-165 (opposed, Tenth Circuit). It would make it more difficult for those who have no electronic research subscription.

4. Impact on the Court

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Twenty-five attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Seventeen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that they would just get shorter. Two attorneys predicted that they would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

a. More Consistency

Twenty-five attorneys predicted that their ability to cite unpublished opinions would result in more legal consistency. Most of these attorneys (22) supported the proposed rule; three were neutral. In addition to the attorney comments compiled here, five other attorneys mentioned that the ability to cite unpublished opinions could result in more legal consistency: attorneys A-190 (supportive), A-192 (supportive), A-195 (supportive), and

A-198 (supportive) (comments compiled under 4.c. *Higher Quality Opinions*); and attorney A-208 (neutral) (comment compiled under 4.f. *Delay*).

A-166 (supportive, Eleventh Circuit). I would expect a positive impact from such a rule in terms of promoting uniformity among and between panel decisions issued by the various courts of appeals, at least within the same circuit. In fact, I recently encountered a case decision in my circuit where it would have been extremely beneficial for a subsequent panel to have been exposed to and provided with a prior panel decision, both in terms of consideration of the prior panel's reasoning and ultimate decision by the new panel and, from a practitioner's standpoint, understanding and reconciling the subsequent panel's published decision with the predecessor panel's unpublished decision. In that case, the published decision clearly conflicts with the earlier rendered unpublished decision, but there is no evidence that the panel rendering that opinion had any opportunity to consider the fact that an earlier panel of the same court had reached a very different (and dispositive) conclusion on the same issue it was considering. Such a result is neither desirable from a consistency standpoint, nor does it instill confidence in the value of the decision. In my opinion, it would have been far more preferable for the subsequent panel to have had the opportunity to read and consider the prior unpublished panel decision before rendering its decision and to, thereafter, either adopt that earlier panel's reasoning, or to discuss why that prior decision was inapposite to, distinguishable from, or simply wrongly decided in terms of how it related to the new case under consideration by the court. It appears that the proposed rule change would permit such, and I would consider that to be far preferable to the "blind" manner that the decision arose in the example I have cited above.

A-167 (supportive, Fourth Circuit). It would enable federal appellate attorneys to offer courts more support and authority for the positions they take. It would foster greater consistency of decisions in each circuit. It would enable each circuit to see what issues may warrant more published decisions if the parties routinely are forced to cite only to unpublished decisions because of a dearth of published decisions. It would enable attorneys to demonstrate that the positions they take are based on the court's own rulings and not simply fashioned out of whole cloth.

A-168 (supportive, Federal Circuit). In my experience, I have had to relitigate issues previously decided in unpublished opinions. Permitting citation to such opinions might reduce the need to relitigate issues by discouraging the filing of appeals or by enabling settlements. Otherwise, I do not see a rule that simply allows citation of unpublished, non-precedential opinions having much impact, aside from saving me the trouble of figuring out what rule applies in the circuit, i.e., the general benefit of uniformity for these of us who practice in all 13 circuits.

A-169 (supportive, Eleventh Circuit). The rule change would be desirable inasmuch as abundant non-precedential material is presently cited without restriction. If the new rule allows citation by reference to a national electronic database such as Lexis or Westlaw (without attaching a copy), it will make practice easier. Attorneys should be free to argue to a court what it or other courts have done in other cases. Otherwise courts are able to conceal and disregard questionable and inconsistent dispositions.

A-170 (supportive, Third Circuit). I expect a rule permitting citation to the courts of appeals' unpublished opinions would be beneficial to the parties and the court insofar as such a rule would provide for the broadest consideration of issues relevant to any given appeal and also would help ensure consistency and fairness, two central goals of any system of justice.

A-171 (supportive, District of Columbia Circuit). It would assist counsel in the rare case in which the only cases on point (or nearly the only cases on point) are not published. It also would result in a fairer judicial process that—by eliminating the second-class status of unpublished decisions—would likely yield more consistent judicial decision making.

A-172 (supportive, Eighth Circuit). I think it would be useful, if for no other reason, as a guide or reminder to the court of what has been done in prior cases. The court will determine to what degree, if any, an unpublished opinion could provide guidance in a particular case.

A-173 (supportive, District of Columbia Circuit). It would enable attorneys, in some cases, to learn about, and to cite, cases, making the court's precedents more consistent and coherent, and might focus the court's use of precedent in a constructive way. I do not see a downside.

A-174 (supportive, Fifth Circuit). It would allow for quicker review as law is being developed and interpreted. It might prevent multiple re-argument of issues that have been considered and make it somewhat easier and quicker to explain arguments.

A-175 (supportive, Eleventh Circuit). I screen out cases that are unpublished that might be useful before looking at them. Citations to unpublished opinions would lead to greater uniformity within the circuit panels.

A-176 (supportive, First Circuit). It might require more internal consistency intra-circuit. Therefore, it may accentuate diverse and different positions within the circuits.

A-177 (supportive, Third Circuit). The proposed rule would promote consistency within the circuit and especially within the trial courts (district courts) within the circuit.

A-178 (supportive, First Circuit). Helpful to be able to cite unpublished opinions, particularly in those circuits where the panels' views vary (e.g., the Ninth Circuit).

A-179 (supportive, Eighth Circuit). It would make brief preparation moderately more expensive, but would promote consistency and better development of the law.

A-180 (supportive, Fifth Circuit). It would permit citations to opinions that may result in consistent rulings on particular issues throughout all circuits.

A-181 (supportive, Eighth Circuit). It would allow the court to consider all previous decisions and thereby render a more informed opinion.

A-182 (supportive, Sixth Circuit). I think it would be good for jurisprudence because it would encourage uniformity in the law.

A-183 (supportive, Eighth Circuit). More uniform rulings and less diversity among circuits.

A-184 (neutral, District of Columbia Circuit). (1) It could reveal the existence of unpublished opinions by different panels within the same circuit that were inconsistent. That would be a good thing. (2) It would raise a concern that a lawyer might be deemed to have committed malpractice if he/she did not discover and cite an unpublished opinion on point and favorable to his or her position. This would not be a great concern if unpublished opinions were always available through Lexis and Westlaw searches.

A-185 (neutral, Sixth Circuit). I expect such a rule would result in longer briefs on appeal, and more time. Even if precedential weight did not change, plaintiffs would seek to rely on unpublished opinions and defendants would feel compelled to distinguish them. Appellate law clerks and judges may be more burdened. However, it *could* lead to greater consistency among rulings, especially within a circuit.

b. Less Consistency

On the other hand, three attorneys predicted that the ability to cite unpublished opinions would result in less consistency in the law. Two of these attorneys opposed the proposed rule, and one supported it.

A-186 (supportive, Ninth Circuit). I think more conflicts would appear among “citable” opinions, but that a fuller presentation of relevant authority would be allowed. I am for it.

A-187 (opposed, Ninth Circuit). I would think that it would lower the quality and the certainty of the decisional law in the most important appellate courts, the federal courts of appeal, since these courts make most of the decisional law on a day-to-day basis.

A-188 (opposed, Eighth Circuit). It would lead to a less coherent body of case law. The court selects for publication its opinions that it wishes to have precedential effect. There should be a mechanism that allows the courts to decide cases without making law.

c. Higher Quality Opinions

Seventeen attorneys predicted that their ability to cite unpublished opinions could result in unpublished opinions becoming higher in quality. Most of those attorneys (14) supported the proposed rule; three were neutral. In addition to the attorney comments compiled here, four other attorneys mentioned that the ability to cite unpublished opinions might result in better unpublished opinions: attorney A-86 (supportive) (comment compiled under *1.d. Already Reviewed*); and attorneys A-224 (supportive), A-227 (supportive), and A-228 (supportive) (comments compiled under *5.c. Should Be Precedent*).

A-189 (supportive, Fourth Circuit). The immediate effect is likely to be an incremental increase in decisions cited in appellate briefs and slightly more burdensome research and brief preparation. The long-term impact could be heightened discipline by the judges who have relied too heavily on unpublished opinions as a way of disposing of cases. Most appellate lawyers with whom I have discussed this issue hold the view that a rule allowing citation of unpublished opinions will indirectly but surely improve the quality of those opinions and reduce the uncertainty and confusion that the present practice has generated. Allowing citation to unpublished opinions may lead to increased scrutiny of these opinions by the judges themselves, which may result in a slightly increased burden on them and their law clerks.

A-190 (supportive, Seventh Circuit). In a nutshell, it would be a vast improvement. (1) It will promote uniformity within circuits. (2) It will improve the quality of unpublished decisions. (3) It will help to reduce the perception (especially by the parties, as opposed to their attorneys) that their cases were not considered as important as others, because their decision was not published, while others were. (4) It will help define the law in fact-specific areas (e.g., my case in *Savage*, which dealt with several frequently recurring issues regarding informants and search warrants) by increasing the database, making it more likely that the parties can find a (citable) decision with similar facts.

A-191 (supportive, Federal Circuit). It would be beneficial, for at least two reasons. First, it would discipline courts with respect to their unpublished opinions, by subjecting them to greater sunshine. Second, it would permit courts and counsel greater resort to prior judicial analysis, if not for their controlling weight, at least for their persuasiveness.

A-192 (supportive, Federal Circuit). Relaxing the current prohibition would help promote consistency throughout all of the deliberations of the courts of appeals. It also would make it clear that all decisions are reached with equal care—there are no “second class” decisions made with less attention to the law and facts.

A-193 (supportive, Federal Circuit). It would make judges more conscientious in writing what they now render “unpublished.” All written opinions should be prepared with the expectation that others will rely on them, and such others should be permitted to do so.

A-194 (supportive, Seventh Circuit). It would not make the work more or less burdensome but it would: (1) improve the quality of advocates’ briefs by increasing the quantity of precedential resources, and (2) improve the quality of the unpublished opinions.

A-195 (supportive, Seventh Circuit). I would hope that decisions would be more consistent and carefully written if unpublished opinions could be cited. This rule may also lead to fewer unpublished opinions. I think this would be a positive development.

A-196 (supportive, Tenth Circuit). Would help lawyers who would like to cite analogous cases but are now prohibited from doing so. Would make circuit courts more careful in drafting unpublished decisions.

A-197 (supportive, Eleventh Circuit). It would force appellate courts to craft their unpublished opinions more carefully.

A-198 (supportive, Fourth Circuit). Improve consistency of holdings and quality of opinions.

A-199 (neutral, Eleventh Circuit). As far as citing cases, not a lot of impact. Where I think it would impact in the Eleventh Circuit is this: Because the court’s unpublished opinions are not available to the public, even on PACER, the judges tend to be a little less careful with precedent than they would be if we could see what they are doing in every case. I believe that the reason they do this is that they think there is just not enough time to make every case come out consistently with precedent. I realize the judges are overworked, but attempting to address that problem by not making all the court’s opinions available is not a very good answer.

For my money, a rule that requires the court to make all opinions available to publishers and PACER subscribers would solve the problem. The restrictions on citation of the courts that do make the opinions available are reasonable and understandable. They generally do not prevent the citation of an unpublished opinion as persuasive authority.

A-200 (neutral, District of Columbia Circuit). I believe that there would be two significant impacts. First, the courts of appeals will reduce the number of unpublished opinions as they give greater care to all opinions given their possible citation in future cases. Second, appellate counsel will bear an increased obligation in at least some cases to research unpublished opinions to find cases that may be helpful to their position or that opposing counsel may cite in opposition. This will add to the burdens on appellate counsel.

A-201 (neutral, Third Circuit). My impression is that unpublished opinions are less scholarly and undergo less scrutiny internally by the court than opinions that are going to be published. If unpublished opinions can be cited, hopefully the quality of those opinions will improve, which would increase the workload on the courts.

d. Shorter Opinions

Three attorneys predicted that if unpublished opinions could be cited, courts would issue unpublished opinions with less content. Two of these attorneys opposed the proposed rule; one was neutral.

A-202 (neutral, Eighth Circuit). I expect judges will say less in unpublished opinions so as to reduce the opportunity to elicit a rationale for the decision.

A-203 (opposed, Second Circuit). I expect that adoption of a new national rule permitting the citation of unpublished opinions would have a negative impact on the administration of justice in the Second Circuit. If the proposed rule is adopted and unpublished opinions can be cited as authority, the court would have two choices. The Court could write the equivalent of a published opinion in every case, or it could revert to its prior practice of deciding cases either without opinion or in a few sentences. Writing full opinions in every case would, I suspect, prove to be impossible, as Judges Kozinski and Reinhardt confirmed in their excellent article on this topic in the *California Lawyer*. This means that a return to the practice of deciding cases without opinion would be the likely outcome. In my experience the change to summary orders has been beneficial to the public perception of the courts, since litigants receive a reasoned explanation of the decision, not just an impenetrable order. It would certainly be an unintended consequence of the proposed rule to deprive litigants of the reasons for the decision in their case just because lawyers want more verbiage to cite in future cases.

The proposed rule would also have an adverse effect on the ability of many lawyers to properly represent their clients. Unlike other forms of persuasive authority, such as law review articles, every unpublished opinion on the subject will have to be accounted for in the brief. Since these opinions contain only an abbreviated statement of the facts, lawyers who wish to distinguish the cases will have to obtain the briefs. This clearly favors institutional and wealthy litigants who can spend the time and money necessary to retrieve briefs. The unconscious favoritism of large litigants over single practitioners is also apparent in the advisory committee's decision not to require that copies of unpublished decisions be served with the brief. It is easy to forget that not all lawyers have broadband Internet access or access to expensive databases such as Westlaw or Lexis. Poor clients and

lawyers in small practices will be placed at a further disadvantage if this rule is adopted. This is even more true for pro se litigants and prisoners.

A-204 (opposed, Ninth Circuit). I believe that the proposed rule will lead the circuits to render summary dispositions under Rule 36(a)(2) in cases where they would otherwise perhaps write an unpublished opinion. I practice primarily before the Federal Circuit and my experience has been that the court already summarily affirms or dismisses under Rule 36(a)(2) in many cases where at least a non-precedential opinion should have been written. Assuming that the court would afford greater attention to the content of its unpublished opinions knowing that other courts of appeals may be seeing them under the proposed rule, I believe it would utilize Rule 36(a)(2) in certain cases in lieu of spending the additional time and resources necessary to “fine tune” an unpublished opinion for possible scrutiny by other circuit judges. Given that the Federal Circuit’s caseload is a fraction of that of the regional circuits, I believe it is reasonable to assume that the regional circuits would similarly increase their use of summary dispositions.

The proposed rule’s effect on appellate practitioners would vary based on each circuit’s local rules. In circuits that would not assign precedential weight to its own unpublished opinions, there would be little reason to expend a great deal of time and resources seeking on-point unpublished opinions from any circuit. The potential persuasive benefits of such opinions would likely be outweighed by the added burden, which would ultimately be shifted to the client.

In circuits treating such opinions as precedential, practitioners’ burden would be directly proportional to the number of unpublished opinions the circuits would issue under the proposed rule. Practitioners would be ethically obligated to research unpublished opinions to the same degree as published opinions. Failure to locate a favorable, directly on-point unpublished opinion could create malpractice liability as well. If, however, the circuits substituted summary dispositions under Rule 36(a)(2) for unpublished opinions to a great extent, there would not really be that much additional authority to research.

e. Longer Opinions

Two attorneys predicted that if they could cite unpublished opinions, perhaps such opinions would become longer and richer in content. One of these attorneys opposed the proposed rule, and one was neutral.

A-205 (neutral, Third Circuit). For me, the rule would have very little impact because I cite unpublished opinions freely now. I suspect, however, that such a rule might adversely affect the productivity of the courts. Knowing that cases can and will be cited, circuit judges might be reluctant to produce two- or three-page NPOs. Instead, they might feel the need to

write and explain more, increasing the length of NPOs and adding to the significant workload that judges already have.

A-206 (opposed, Third Circuit). It has been my experience that, at least with respect to the Third Circuit's non-precedential opinions. The opinions have little value beyond the particular facts of that given case. Generally, the opinions cite other published (and precedential) opinions; as a result, attorneys can cite to the other, published opinions when drafting briefs and presenting their arguments to the court. In addition, non-published opinions often do not provide the facts in sufficient detail to fully understand the case; the court generally only gives a background of the case, with the understanding that the parties are well familiar with the case. The lack of a complete factual background makes it difficult to cite a non-published opinion in support of your argument, or to distinguish it when cited by an adversary. If the rules are amended to allow citations to unpublished opinions, the court of appeals may find itself in the position of drafting and "publishing" more detailed and comprehensive non-published opinions—i.e., opinions akin to the court's published opinions. If not, I anticipate that the appellate work will become a little bit more burdensome because practitioners will cite non-published opinions that appear to be directly applicable but which may lack a sufficiently detailed factual picture to allow for a meaningful distinction to be drawn. Ultimately, the result may be the ability to cite to non-published opinions that appear to contradict published opinions.

f. Delay

Five attorneys predicted that the ability to cite unpublished opinions could result in a delay in resolving cases in which they are issued. Three of these attorneys opposed the proposed rule, one attorney supported it, and one attorney was neutral. In addition to the attorney comments compiled here, one other attorney mentioned delay: attorney A-67 (opposed) (comment compiled under *1.b. Bias*).

A-207 (supportive, Federal Circuit). Courts may be less inclined to issue certain opinions in writing or, alternatively, may take more time to issue opinions. But this proposed rule will be beneficial to practitioners looking for precedent on narrow issues.

A-208 (neutral, Federal Circuit). I would expect it to result in some slowing in the process of getting opinions finalized. I would also expect it to provide some marginal improvement in the overall consistency of appellate decisions, since the courts should be somewhat better informed about how other appellate courts have dealt with similar situations.

A-209 (opposed, Ninth Circuit). I do not see the purpose of such a rule if unpublished decisions are not binding. I would think this would hinder judges from making certain necessary compromises to reach an eq-

uitable decision, knowing that the decision may be cited to and be used in other cases.

A-210 (opposed, Federal Circuit). It would increase the workload of the judges, who will take more time to issue “unpublished decisions.” This effect will delay cases which merit “published” decisions.

5. Broad Policy Issues

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Eight attorneys opined that the ability to cite unpublished opinions would make courts more accountable. Four attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 12 attorneys suggested that perhaps the distinction should be eliminated.

a. Accountability

Eight attorneys said that allowing citation to unpublished opinions would make the courts more accountable for their decisions. All of these attorneys supported the proposed rule. In addition to the attorney comments compiled here, one other attorney mentioned accountability: attorney A-218 (supportive) (comment compiled under *5.b. Blurred Distinction*).

A-211 (supportive, Sixth Circuit). I think it would be a significant improvement. Not only would it free litigants to cite well-reasoned unpublished opinions, but it would remind the courts that they need to take all appeals seriously even if the case does not appear to merit a published opinion, because they would know that all opinions would be a part of the body of law that contributed to decisions of all cases and the development of the law.

A-212 (supportive, Eleventh Circuit). Positive: The Eleventh Circuit often issues unpublished opinions in cases that we (the U.S. Attorney’s Office) consider important—they tend to “bury” a holding that is important to us. It is possible that such a rule would force the court to look more closely at which opinions they published. Negative: If Westlaw does not publish unpublished cases, how would we access them?

A-213 (supportive, Third Circuit). I am positive that the rule will be beneficial. I am positive that it is counterproductive and contrary to the rules of logic to have decisions that may not be cited, as if absolving the courts of any responsibility for the decisions they make and allowing them to avoid consequences of dealing with citations to those decisions.

A-214 (supportive, Seventh Circuit). Positive. Unpublished opinions allow appellate courts to hide tough decisions that many times assist criminal defendants. Unfortunately, the precedential value is then lost.

A-215 (supportive, District of Columbia Circuit). Public scrutiny of federal officials, whether in the judicial, legislative, or executive branches, always leads to more democracy.

A-216 (supportive, Seventh Circuit). It would make the appellate courts more accountable and give them incentive to more carefully draft opinions that follow the law.

A-217 (supportive, First Circuit). Potentially enhance the fairness of the process.

b. Blurred Distinction

Four attorneys observed that permission to cite unpublished opinions could result in a blurred distinction between published and unpublished opinions. Two of these attorneys supported the proposed rule, and one attorney was neutral.

A-218 (supportive, Eighth Circuit). To the extent that my responses to the rest of the survey are inconsistent with what is contained herein, this statement supersedes statements made in the informal survey form. As noted in the survey, I have done enough briefing since the appeal was argued to have difficulty remembering too much about my choice of cases.

In my circuit, the local rule allows but discourages the citation of unpublished opinions. Accordingly, a rule change permitting the citation to unpublished opinions will not change how I do an appeal. In my circuit such a rule change may cause my circuit to delete the phrase discouraging the citation to unpublished cases from that rule. Accordingly, the rule change to the Federal Rules of Appellate Procedure may encourage greater citation to unpublished cases in my circuit (or may not).

In addition to responding to the survey itself, I would respectfully submit the following observations for your consideration.

(1) The fact that some “unpublished” cases are presently being published by West, and the fact that some circuits permit the citation to unpublished opinions *may* mean that the distinction between published and unpublished cases is becoming less of a distinction. Hopefully, the survey responses will help you meaningfully determine whether local circuit rules permitting the citation of unpublished opinions in fact actually result in attorneys taking advantage of such a rule and citing to unpublished opinions.

(2) If such a rule change were to result in more attorneys citing to unpublished opinions, the rule change would serve the public objective of encouraging greater scrutiny of unpublished opinions by other jurists and the public. It may further the objective of holding judges and their clerks accountable to the public and to our system of justice to the extent that the highlighting of bad unpublished opinions makes other jurists aware of

jurisprudential error. The other judges might be able to fix the problem unless the unpublished cases are reheard en banc or unless the issue arises again in another case. However, highlighting problems in the unpublished jurisprudence may mean that judges become aware of issues that have been incorrectly resolved in unpublished opinions but for which there has not yet been a published opinion issued. Once they become aware of bad decisions, concerned judges in the circuit in which this decision was issued may then choose to hear another case en banc regarding the issue which the unpublished opinion improperly decides so that the published precedent takes the right approach to a particular problem. Potentially, depending on the timing of the hearing of this other case, this issue could result in the correction of the unpublished opinion in a hearing en banc or even in the context of a section 2255 motion (in the rare case in which the issue were important enough).

On the other hand, problems in published jurisprudence, it could be argued, are highlighted by the losing party. If a petition for rehearing en banc were filed by the alleged victim of allegedly bad jurisprudence, then the judges would arguably have the same opportunity to review and scrutinize the unpublished opinion as they would if the unpublished opinion were brought to their attention by citation to this authority in briefs in other cases. However, this argument fails, because the aggrieved party in a civil case (other than one in which counsel is appointed) may not have the money to continue to pursue the appeal after the unpublished opinion is issued. Thus, under the current system, in circuits where the citation to unpublished opinions is prohibited, the degree of scrutiny by other judges of fellow jurists' unpublished opinions may depend at least to some extent on the financial situation of the parties involved in the litigation, even if the mistake is egregious and may be repeated in future cases by the same panel of judges.

Accordingly, I feel a set of appellate rules which does not promote or permit the citation of unpublished opinions (assuming that more unpublished opinions would be cited under such a system) provides for less judicial (and possibly public) scrutiny of unpublished opinions than a system which does permit the citation of unpublished opinions.

(3) Louisiana lawyers working on cases involving state law cite in their briefs to cases from their higher courts. However, because in matters of state law Louisiana lawyers work under the French civil law system, such higher court cases are not binding on Louisiana lower courts. Accordingly, citing to any Louisiana court case in a Louisiana matter probably has the same effect as citing to unpublished case law in federal court. Because of this parallel, it *may* be possible to predict some of the effects of this proposed rule change by studying the dynamics of the effect of citing non-binding case law in Louisiana courts and how Louisiana's view of its own

case law impacts how attorneys handle appeals involving solely questions of state law.

A-219 (supportive, Seventh Circuit). I imagine that it would help practitioners because it can be frustrating to find an unpublished case that is very on point and not be able to cite it, even just as persuasive authority. But I think the effect on the courts themselves would not be entirely positive. Would such a rule eliminate the practical difference between published and unpublished opinions? Sometimes judges do not dissent in a particular instance because they know the decision will be unpublished. If a judge in that instance knew the opinion could be cited, he or she might decide to dissent after all.

A-220 (supportive, Sixth Circuit). The distinction between published and unpublished opinions is eroding, and such a new rule would assist in eliminating this distinction.

A-221 (neutral, Third Circuit). Unpublished opinions would look more like published opinions. In immigration matters, unpublished decisions tend to be denials of the alien's claims. Publishing more denials would help serve as a useful guide to practitioners to identify those claims not worth pursuing administratively or before the courts.

c. Should Be Precedent

Twelve attorneys suggested that maybe the courts' opinions should always be published or always be precedential. Most of these attorneys (nine) supported the proposed rule; three were neutral.

A-222 (supportive, Third Circuit). In *Primestone Investment Partners L.P. v. Vornado PS, L.L.C.* (3d Cir. 02-1409), I do not remember encountering any unpublished opinions that I would have liked to cite but did not cite as a result of any rule concerning the citation of unpublished opinions.

As you know, there are different kinds of unpublished opinions. If an opinion is available from Westlaw or Lexis, I do not see any reason why it should be treated any differently from an opinion published in the West reporter system. There is more reason for concern if the opinion is only published in a specialized service or periodical, and even more if it is truly unpublished and must be obtained from the court or the parties.

In general, however, I feel strongly that no court should be permitted to deny precedential effect to any of its decisions. Doing so is unfair to the losing party, who in effect is being told that the court is deciding the case against him for reasons it would not apply to other litigants. It is unfair to future litigants, who are being told that the court may not decide a case in their favor even though it decided an indistinguishable case in favor of a similarly situated party. Although it is usually undesirable for an appellate court to make a decision without any explanation at all, I think this is pref-

erable to issuing an explanation that is not based on principles to which the court is willing to give general application.

For these reasons, I think it should be permissible to cite any decision, published or unpublished. In general, I do not think that one party's citation of an unpublished opinion subjects the other party to any unfairness or significant burden so long as the other party receives a copy of the opinion and an opportunity to respond. If an unpublished opinion is cited for the first time in a reply brief, it may be desirable to give the appellee an opportunity to make a submission to address it.

A-223 (supportive, Eighth Circuit). It is difficult to say what impact such a rule would have because, in most cases, you are able to find a published decision that states the same point for which you might want to cite an unpublished opinion. However, when you *need* to cite an unpublished opinion because there is no other authority on point, there should be no obstacle to doing so. Such a rule likely will not lead to wholesale citation to unpublished opinions, but might make a considerable difference in some cases. I also support such a rule for the reasons stated in Judge Richard Arnold's withdrawn opinion on unpublished opinions in the Eighth Circuit.

A-224 (supportive, Eighth Circuit). It might give appellate courts more pause when issuing short opinions limited to the particular facts of a case. I think permitting citation to unpublished opinions is a good idea, mainly for the reasons set forth in Judge Richard Arnold's opinion on the matter, which was later withdrawn. From the advocate's standpoint, I think it will be helpful.

A-225 (supportive, Fifth Circuit). I do not know what impact this rule change will have. I do, however, support the rule change and believe all opinions should be published. In my practice of over 25 years, I have had opinions both favorable and unfavorable to my clients be designated as "unpublished" and have never understood the logic underlying the rule.

A-226 (supportive, District of Columbia Circuit). In my opinion, the core question is what impact would permitting citation to unpublished opinions have on courts of appeals, not appellate practitioners. Permitting citation to unpublished opinions could well have the beneficial effect of encouraging courts of appeals to discontinue their use.

A-227 (supportive, Second Circuit). I would expect the rule to make courts of appeals somewhat more careful about what they say in "unpublished" opinions. I believe the orderly developmental and uniform application of the law would be enhanced by a rule prohibiting the designation of opinions as "unpublished" or "non-binding."

A-228 (supportive, Federal Circuit). I believe it would be beneficial and improve the quality of legal opinions of the courts. I further believe that there should be no "unpublished" opinions.

A-229 (supportive, District of Columbia Circuit). I believe that the new proposed rule is a good idea. A better idea though would be to not have unpublished decisions except in the most routine cases.

A-230 (supportive, Eighth Circuit). I am hugely in favor of this rule. I do not think unpublished opinions should be less valuable than published opinions. A decision is a decision.

A-231 (neutral, Tenth Circuit). I would have some concern that such a rule, if enacted abruptly, would permit citation to opinions that are sometimes not well-thought-out. I believe a better rule would be to allow citation to opinions that are written after the date the rule becomes effective. At bottom, I believe there should be *no* unpublished opinions. Things should be left the way they are for previous unpublished opinions and, in future, there should be none allowed.

A-232 (neutral, Second Circuit). There would be no point to citing the unpublished opinions if they are not binding precedent. I would prefer that the opinions be considered to have the same precedential value as any other appellate decision. This would be of great help to my appellate practice.

A-233 (neutral, Tenth Circuit). The impact would depend on how the court was to consider the precedential value of the unpublished opinion. If such opinions have some value, then it makes no sense to allow the courts of appeals to issue unpublished opinions.

6. Other Comments

Sixty-five attorneys provided other comments: 31 were supportive of the proposed rule, 31 were neutral, and three were opposed to it.

a. Other Supportive Comments

Thirty-one attorneys provided other supportive comments.

A-234 (supportive, Fifth Circuit). I would hope that all written decisions, whether published or not, could be cited in any appeal brief. The reasoning of the written decision and how a particular panel addressed an issue should always be available to other panels deciding the same issue.

Besides, it makes no sense to have a “class” of decisions that cannot be relied on in any manner.

A-235 (supportive, District of Columbia Circuit). I believe that the proposed rule is a good one, and one that will have a very minimal impact on the workload of the attorneys preparing appellate briefs. I have never understood the reasoning behind the rule forbidding the citation of an unpublished decision.

A-236 (supportive, Sixth Circuit). I think it would improve federal court practice, and I doubt that it would make federal practice any more burdensome. Attorneys might spend a bit more time researching, but could probably reduce time spent writing memoranda.

A-237 (supportive, Third Circuit). I think the rule permitting citation to the courts of appeals' unpublished opinions should be enacted. Courts should determine whether all cases are applicable, not just those deemed to be worthy of publication.

A-238 (supportive, Sixth Circuit). It would help ensure awareness of counsel and court personnel of case law development. Assistance in tracking trends would be of such benefit so as to outweigh any detriment in research time and cost.

A-239 (supportive, District of Columbia Circuit). Allowing these opinions to carry persuasive weight affords a reasonable compromise between the Ninth Circuit's concerns regarding judicial economy and the Eighth Circuit's constitutional concerns.

A-240 (supportive, Eighth Circuit). I believe that permitting citations to unpublished opinions would be helpful to the appellate court when the opinions are relevant to the case.

A-241 (supportive, First Circuit). It would be occasionally helpful for the reviewing court, without being more burdensome for litigators. I favor the rule change.

A-242 (supportive, Sixth Circuit). It would make the appellate attorney's work somewhat easier when there is a desire to cite unreported cases with similar issues.

A-243 (supportive, Fifth Circuit). Other than my answer to question 5 above (much less burdensome), I do not have an expectation.

A-244 (supportive, Fifth Circuit). It would make a positive impact. I support allowing attorneys to cite to an unpublished opinion.

A-245 (supportive, Sixth Circuit). Such a rule would certainly benefit the participants as well as the courts.

A-246 (supportive, Sixth Circuit). It is an important change. All decisions should be available for citation.

A-247 (supportive, Tenth Circuit). Little or no impact. Unpublished opinions are often more helpful than not.

A-248 (supportive, Third Circuit). I think it's a good idea but it probably will not make that much difference.

A-249 (supportive, Tenth Circuit). The new rule would actually aid in the presentation of cases.

A-250 (supportive, Sixth Circuit). It would be an improvement over the status quo.

A-251 (supportive, First Circuit). It would be helpful to counsel and the courts.

A-252 (supportive, Eleventh Circuit). I believe that it would be a good rule to adopt.

A-253 (supportive, District of Columbia Circuit). Same. I would welcome this rule change.

A-254 (supportive, Eighth Circuit). It would assist appellate research.

A-255 (supportive, Second Circuit). I would fully support the change.

A-256 (supportive, Ninth Circuit). Would be helpful and appreciated.

A-257 (supportive, Third Circuit). I think it would be useful.

A-258 (supportive, Second Circuit). This would be a good idea.

A-259 (supportive, Third Circuit). It would promote justice.

A-260 (supportive, District of Columbia Circuit). Beneficial impact.

A-261 (supportive, Fourth Circuit). Extremely helpful.

A-262 (supportive, District of Columbia Circuit). A positive effect.

A-263 (supportive, Federal Circuit). A positive impact.

A-264 (supportive, Eighth Circuit). Positive.

b. Other Neutral Comments

Thirty-one attorneys provided miscellaneous neutral comments.

A-265 (neutral, Second Circuit). The primary impact would be that I would rely more upon computer searches of Lexis and Westlaw than I currently do. Now I find the digests of unreported cases in statutory and other compilations provide a thorough review of the law on a particular topic. If unpublished decisions may be cited, I would supplement my current digest and computer research with greater computer research.

A-266 (neutral, Sixth Circuit). None. The Sixth Circuit's Rule 26(a) allows a party to cite unpublished opinions if one feels the need to do so. In practice, I believe lawyers will cite the cases if they are helpful. I think there might be an impact if the rule explicitly stated that there is no distinction in precedential value, but only after a long period of time operating under such a rule.

A-267 (neutral, Eleventh Circuit). Unpublished opinions may be cited as persuasive authority in the Eleventh Circuit. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (citing 11th Cir. R. 36-2); *United States v. Rodriguez-Lopez*, 365 F.3d 1134, 1138 n.4 (11th Cir. 2004); *United States v. Liss*, 265 F.3d 1220, 1228 n.2 (11th Cir. 2001).

A-268 (neutral, Sixth Circuit). The Sixth Circuit would surrender totally to its fear of commitment and stop publishing anything; the *Federal Appendix* would take on value and, in time, further enrich West Publishing.

A-269 (neutral, Third Circuit). I do not see such a rule as having a “sea change” impact on appellate practice. Rather, it would be a common sense way of putting on the table issues that are under discussion already.

A-270 (neutral, Tenth Circuit). I think it should be limited to your own circuit. Otherwise it would be considerably more work with little consequence on the outcome.

A-271 (neutral, Seventh Circuit). It would make citations to unpublished opinions on points that should be made by courts in published opinions.

A-272 (neutral, Federal Circuit). Very little, because I work only before the Federal Circuit and its published opinions are normally sufficient.

A-273 (neutral, Sixth Circuit). Minimal. The Sixth Circuit, where I practice, already freely allows citation of unpublished opinions.

A-274 (neutral, Eighth Circuit). No impact on the parties. It would probably impact the court more.

A-275 (neutral, District of Columbia Circuit). I would not expect it to have any significant impact.

A-276 (neutral, Seventh Circuit). It would have no appreciable impact on the work.

A-277 (neutral, Seventh Circuit). It would have no appreciable impact.

A-278 (neutral, Tenth Circuit). More people would cite them.

A-279 (neutral, Eighth Circuit). No appreciable impact.

A-280 (neutral, District of Columbia Circuit). No appreciable impact.

A-281 (neutral, Sixth Circuit). Very little impact.

A-282 (neutral, Eighth Circuit). Not much impact.

A-283 (neutral, Third Circuit). Little or none.

A-284 (neutral, Ninth Circuit). Little impact.

A-285 (neutral, First Circuit). Very little.

A-286 (neutral, Third Circuit). Very little.

A-287 (neutral, Sixth Circuit). Very little.

A-288 (neutral, Fifth Circuit). Don’t know.

A-289 (neutral, Sixth Circuit). Uncertain.

A-290 (neutral, Eighth Circuit). Not much.

A-291 (neutral, Eighth Circuit). Unknown.

A-292 (neutral, Fifth Circuit). Minimal.

A-293 (neutral, Eleventh Circuit). Minimal.

A-294 (neutral, Eighth Circuit). None.

A-295 (neutral, Tenth Circuit). None.

c. Other Comments in Opposition

Three attorneys provided miscellaneous comments in opposition to the proposed rule.

A-296 (opposed, Third Circuit). I presume that the courts act with care in designating opinions as precedential or not and issue the precedential opinions as guides. I would expect the proposed rule to have the effect of complicating and diluting these guiding principles.

A-297 (opposed, Sixth Circuit). It would make appellate practice more burdensome.

A-298 (opposed, Ninth Circuit). A bad impact.

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Appendix C: Citations to Unpublished Opinions in Federal Appellate Case Files

We examined 650 cases selected at random from among the appeals filed in 2002 in the 13 federal courts of appeals—50 cases for each circuit. We examined how the case was resolved—published opinion, unpublished opinion, or docket judgment—and we examined all citations in the counseled briefs and opinions in the case files. This appendix includes descriptions of all citations to unpublished opinions in the case files.

Of the 650 cases in this sample, 537 are appeals from district courts,²⁴ five are appeals from the United States Tax Court,²⁵ 47 are appeals from the Board of Immigration Appeals,²⁶ and 61 are appeals from other courts and agencies.²⁷

*1. First Circuit*²⁸

Until recently, the First Circuit did not permit citation to unpublished opinions in unrelated cases; but now the circuit permits such citation if the opinion is persuasive and there is no published opinion on point.²⁹

24. This includes 495 appeals in the numbered circuits, ranging from 36 in the Ninth Circuit to 49 in the Eleventh Circuit.

25. This includes one case in the Second Circuit, one case in the Fifth Circuit, two cases in the Sixth Circuit, and one case in the Eighth Circuit.

26. The sample includes appeals from the Board of Immigration Appeals (BIA) in all numbered circuits except for the Eighth Circuit. In this sample there are 14 BIA appeals in the Ninth Circuit, 12 in the Second Circuit, and from one to four in each of the other numbered circuits with BIA appeals.

27. This includes 20 District of Columbia Circuit cases and 38 Federal Circuit cases. The other three cases are an appeal from the Federal Energy Regulatory Commission in the First Circuit, an appeal from the National Labor Relations Board in the Eighth Circuit, and an appeal from the Office of Workers Compensation Programs in the Tenth Circuit.

28. Docket sheets and opinions are on PACER. Both published and unpublished opinions are also on Westlaw. Briefs are usually filed electronically, but we have to contact court staff to receive the documents.

29. 1st Cir. L.R. 32.3(a)(2) (“Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.”).

Of the 50 cases randomly selected, 45 are appeals from district courts (23 from the District of Massachusetts, 17 from the District of Puerto Rico, four from the District of Maine, and two from the District of New Hampshire),³⁰ three are appeals from the Board of Immigration Appeals, and one is an appeal from the Federal Energy Regulatory Commission.³¹

The publication rate in this sample is 24%. Twelve of the cases were resolved by published opinions (11 signed and one per curiam), two were resolved by unpublished per curiam opinions published in the *Federal Appendix*, and 36 were resolved by docket judgments.

Published opinions averaged 4,335 words in length, ranging from 1,955 to 9,157. Unpublished opinions averaged 904 words in length, ranging from 270 to 1,538. One opinion was under 1,000 words in length (7%, an unpublished opinion), and this opinion was also under 500 words in length.³²

Sixteen of the appeals were fully briefed. In 27 of the appeals no counseled brief was filed, and in seven of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in seven of the cases. In two cases the citations are only to opinions in related cases; in five cases there are citations to unpublished opinions in unrelated cases. In one case the court cited unrelated unpublished opinions; in four other cases only the parties cited unrelated unpublished opinions.

The two unrelated unpublished opinions cited by the court in one of these cases are by the court of appeals for another circuit. Of the unrelated unpublished opinions cited by the parties in these cases, one is by the court of appeals for the First Circuit, one is by the court of appeals for another circuit, two are by First Circuit district courts, two are by other district courts, and two are by state courts.

C1-1. In an unsuccessful pro se appeal of the district court's refusal to modify a sentence for carjacking, *United States v. Quiñones Rodríguez* (1st Cir. 02-2616, filed 12/19/2002, judgment 06/17/2003), resolved by unpublished opinion at 70 Fed. Appx. 591, 2003 WL 21699845, the court distinguished in a footnote two unpublished opinions by the court of appeals for the Eleventh Circuit apparently cited by the appellant in his pro se brief.

The court adopted a rule proscribing citation to its unpublished opinions in 1971, but on December 16, 2002, the court adopted the current rule permitting such citation if there is no published opinion on point.

30. This sample did not include any appeals from the District of Rhode Island.

31. In 2002, 1,732 cases were filed in the court of appeals for the First Circuit.

32. The 36 docket judgments averaged 142 words in length, ranging from 21 to 1,186. All but one was under 1,000 words in length; all but two were under 500 words in length.

C1-2. In an unsuccessful appeal of a malpractice award, *Primus v. Galgano* (1st Cir. 02-1419, filed 04/26/2002, judgment 05/21/2003), resolved by published opinion at 329 F.3d 236, both parties cited unpublished opinions.

The doctor's brief cites three published opinions by Massachusetts's supreme judicial court and one unpublished opinion by Massachusetts's superior court in a string headed by "*see, e.g.*," to support a statement that "The Plaintiff must demonstrate the injuries sustained were more likely caused by the negligent acts of the treating physician than any other possible source of the injury."

The plaintiff cited an unpublished 1997 opinion by the court of appeals for the First Circuit as the first in a string of three opinions, including a published 1976 First Circuit opinion, supporting a statement that the defendant precluded himself from arguing the application of the statutory damages cap by failing to ask for a jury instruction on the cap or object to the instructions given.

C1-3. In an unsuccessful appeal of a district court judgment that insurance coverage for legal defense did not include legal representation as a custodian of records in an investigation by the United States Attorney, *Center for Blood Research, Inc. v. Coregis Insurance Co.* (1st Cir. 02-1011, filed 01/10/2002, judgment 09/30/2002), resolved by published opinion at 305 F.3d 38, both parties cited unpublished opinions.

The insured's brief cites an unpublished opinion by the court of appeals for the Seventh Circuit with published opinions by Maryland's court of special appeals and the court of appeals for the Sixth Circuit to support a statement that "a mere letter identifying a person as the target of an investigation, or requesting information, did not 'demand something of right' and therefore did not constitute a claim." The brief cites an unpublished opinion by the district court for the Northern District of Illinois with a published decision by Massachusetts's appeals court to support a statement that "it would have been unfair to the insured to require it to place itself at risk by subjecting itself to further legal process in order to obtain the litigation defense protection for which it paid." The brief notes that the unpublished opinion was reversed on other grounds by a published opinion by the court of appeals for the Seventh Circuit with quoted language that supports the argument.

The insurance company's brief cites an unpublished opinion by California's court of appeal and a published opinion by Minnesota's court of appeals to support a statement that "an investigative subpoena is not a proceeding in which the insured 'may be subjected to a binding adjudication of liability for damages or other relief.'" The insurance company's reply brief informs the court that the insured's citation to an unpublished opinion by California's court of appeal is in opposition to California's rules of court and also distinguishes the opinion.

C1-4. In an unsuccessful appeal of summary judgment that an insurance company's termination of the plaintiff's long-term disability benefits did not violate ERISA, *Lopes v. Metropolitan Life Insurance Co.* (1st Cir. 02-2273, filed 10/04/2002, judgment 06/09/2003), resolved by published opinion at 332 F.3d 1, both parties cited unpublished opinions.

In a discussion of "the issue when the plan administrator is also the issuing insurance company," the insured's brief quotes an unpublished opinion by the district court for the Middle District of Pennsylvania. The quotation begins: "A heightened arbitrary and capricious standard will be applied because there is a conflict of interest since the defendants both issued the policy and administer claims made thereunder."

The insurance company's brief states "This Court has not expressly decided whether a reviewing court should consider evidence outside of the administrative claim file. At times, however, this Court has indicated that it is appropriate for a reviewing court to limit its consideration to the information available to the administrator." The brief cites five district court opinions to support a statement that "District courts in this circuit have expressly and repeatedly held that such a limited review is appropriate, particularly when conducting a review under an arbitrary and capricious standard." One of these is an unpublished opinion by the district court for the District of Massachusetts, three are published opinions by the district court for the District of Massachusetts, and one is a published opinion by the district court for the District of Maine.

C1-5. In an unsuccessful appeal of a 10-year drug sentence, *United States v. Palmero* (1st Cir. 02-1398, filed 04/10/2002, judgment 02/07/05), resolved by docket judgment, the government noted that the Supreme Court had granted review of a published opinion by the court of appeals for the Seventh Circuit and an unpublished opinion by the district court for the District of Maine in a case that was subsequently resolved by *United States v. Booker*, 125 S. Ct. 738 (2005).

2. *Second Circuit*³³

The Second Circuit does not permit citation to its unpublished opinions in unrelated cases.³⁴

Of the 50 cases randomly selected, 37 are appeals from district courts (14 from the Eastern District of New York; 13 from the Southern District of New York; three each from the District of Connecticut, the Northern District of New York, and the Western District of New York; and one from the District of Vermont), one is an appeal from the United States Tax Court, and 12 are appeals from the Board of Immigration Appeals.³⁵

The publication rate in this sample will be from 14% to 22% once all the cases are resolved. Seven of the cases were resolved by published opinions (six signed and one per curiam), six were resolved by unpublished summary orders (five of which were published in the *Federal Appendix*), 33 were resolved by docket judgments, and four cases have not yet been resolved.

Published opinions averaged 6,733 words in length, ranging from 1,927 to 22,255. Unpublished summary orders averaged 937 words in length, ranging from 390 to 1,728. Four opinions were under 1,000 words in length (31%, all unpublished), and two of these were under 500 words in length (15%).

We expect 15 of the appeals to be fully briefed. In 32 of the appeals no counseled brief was filed, in three of the appeals a counseled brief was filed only for one side, and in two of the appeals briefs are still due.

There are citations to unpublished court opinions in nine of these cases. In one case the citation is only to an opinion in a related case; in eight

33. Docket sheets are on PACER. Most opinions are on the court's website and on Westlaw. (Of the 13 cases in this sample resolved by published opinions or unpublished summary orders, all but one published opinion and all unpublished summary orders are on the court's website, and all published opinions and all but one unpublished summary order are on Westlaw.) Briefs are on Westlaw for most cases with opinions on Westlaw. (Of the 12 published opinions and unpublished summary orders in this sample on Westlaw, all briefs are on Westlaw for all but one case resolved by a published opinion.)

34. See 2d Cir. L.R. § 0.23 ("Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.").

The court adopted its rule prohibiting citation to its unpublished opinions in unrelated cases on November 31, 1973.

35. In 2002, 5,384 cases were filed in the court of appeals for the Second Circuit.

cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Second Circuit, four are by courts of appeals for other circuits, 12 are by Second Circuit district courts, and four are by district courts in other circuits.

C2-1. An unsuccessful criminal defendant, see *United States v. Fricker* (2d Cir. 02-1038, filed 01/16/2002, judgment 09/06/2002), resolved by unpublished summary order, cited two unpublished opinions by the court of appeals for the Second Circuit in a discussion of whether a convicted defendant merits a two-level upward sentencing adjustment if the defendant testifies at his trial. The brief cites a Supreme Court opinion to support an argument that an upward adjustment was not merited in this case and then cites two unpublished and one published Second Circuit opinions to support a statement that such upward adjustments should be reserved for clear lies.

C2-2. Both the appellant and the appellee cited unpublished opinions in an unsuccessful appeal of the district court's refusal to set aside an arbitration decision concerning the shipping of steel slabs, *Duferco International Steel Trading v. T. Klaveness Shipping A/S* (2d Cir. 02-7238, filed 03/07/2002, judgment 06/24/2003), resolved by published opinion at 333 F.3d 383.

The appellee cited an unpublished opinion by the court of appeals for the Second Circuit with two published opinions by the same court to support a statement that the court reviews legal issues de novo and findings of fact for clear error in a review of a district court's confirmation of an arbitration award.

The appellee also cited three unpublished opinions by the district court for the Southern District of New York. Its brief cites two of these opinions in its discussion of the standard of review of an arbitration award. The brief cites the third unpublished Southern District of New York opinion as part of quoted text from the published district court opinion in this case.

The appellant quoted an unpublished Southern District of New York opinion concerning the relationship between liability for damages and selection of a port.

C2-3. Both the school district and a parent cited unpublished opinions in a successful appeal by the school district of a determination that it failed to provide a disabled student with an adequate individualized education program, *Grim v. Rhinebeck Central School District* (2d Cir. 02-7483, filed 04/30/2002, judgment 10/08/2003), resolved by published opinion at 346 F.3d 377.

The school district's appellant brief cites unpublished opinions by the courts of appeals for the Fourth and Tenth Circuits extensively. The brief

also includes an unpublished opinion by the district court for the Southern District of New York in a string citation including a Supreme Court opinion and three published opinions by courts of appeals for the Sixth, Eighth, and Tenth Circuits.

The parent's appellee brief cites an unpublished opinion by the district court for the Northern District of Illinois to support a statement recognizing deference to a school district over educational policy.

C2-4. A fire department's reply brief cites two unpublished opinions in the department's successful appeal of a judgment against it concerning efforts to shut down group housing for recovering alcoholics and drug addicts, *Tsombanidis v. City of West Haven* (2d Cir. 02-7470, filed 04/29/2002, judgment 12/15/2003), resolved by published opinion at *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565. (The city's consolidated appeal was unsuccessful.) The brief includes 13 opinions in a nine-page string citation to support a statement that mere enforcement of state law is not sufficient to establish liability where incorporation of state law into local regulations might. One of these opinions is an unpublished opinion by the district court for the Northern District of Illinois, and the citation shows that it was affirmed by the court of appeals for the Seventh Circuit. Another of these citations is a published opinion by the district court for the Southern District of Ohio, and the citation shows that it was affirmed in part and vacated in part by an unpublished opinion by the court of appeals for the Sixth Circuit.

C2-5. Both the appellants and the appellees cited unpublished district court opinions in a mostly unsuccessful appeal by non-settling defendants of a partial settlement agreement in a multidistrict investment fraud case, *Ellis v. Daiwa Securities America, Inc.* (2d Cir. 02-7084, filed 01/23/2002, judgment 05/15/2003), resolved by published opinion at *Gerber v. MTC Electronic Technologies Co.*, 329 F.3d 297, *cert denied*, 540 U.S. 966 (2003).

The non-settling defendants and appellants cited unpublished opinions by the district courts for the Southern District of New York and the Northern District of California. Their brief includes the unpublished Southern District of New York opinion with a published Southern District of New York opinion in a "see also" string citation following a two-and-a-half page argument that a plaintiff cannot circumvent the Private Securities Litigation Reform Act over settlements by joining actions filed before its effective date. The brief includes the unpublished Northern District of California opinion with two other district court opinions in a string citation supporting a statement concerning which claims the Private Securities Litigation Reform Act controls.

The plaintiffs and appellees cited one unpublished opinion by the district court for the Eastern District of New York and three unpublished opinions by the district court for the Southern District of New York. Their

brief includes the unpublished Eastern District of New York opinion in a string citation with five published opinions (one by the court of appeals for the Second Circuit, three by other federal courts of appeals, and one by a Second Circuit district court) to support an argument that the one-satisfaction rule applies only where the settlement and judgment represent common damages. The brief cites one unpublished Southern District of New York opinion as an example of a case that deferred judgment reduction until trial, another unpublished Southern District of New York opinion to argue that it was both wrongly decided and distinguishable, and the third unpublished Southern District of New York opinion to rebut the appellants' reliance on it.

The settling defendants and appellees cited two unpublished opinions by the district court for the Southern District of New York and one unpublished opinion each by the district courts for the Eastern District of Pennsylvania and the Northern District of California. Their brief includes an unpublished Southern District of New York opinion with a published opinion by another district court as examples of courts barring non-settling defendants from asserting claims in an attempt to shift their liability to settling defendants. The brief cites the other Southern District of New York opinion only to argue that the appellants' citation to it is inapposite. The brief cites the unpublished opinion by the district court for the Eastern District of Pennsylvania with a published opinion by another district court to support a statement that adding plaintiffs after the effective date of the Private Securities Litigation Reform Act does not alter the commencement date of a pending action. And the brief cites the unpublished Northern District of California opinion to rebut the appellants' reliance on it.

C2-6. In a pending asylum appeal, *Ni v. United States Department of Justice* (2d Cir. 02-4764, filed 11/18/2002, judgment pending), the government cited two unpublished opinions—one by the court of appeals for the Ninth Circuit and one by the district court for the Southern District of New York. The Ninth Circuit citation notes that a published Ninth Circuit opinion cited by the petitioner has been superseded by regulations. The brief cites the Southern District of New York opinion as in accord with a federal regulation and a U.S. Supreme Court opinion to support a statement that the court reviews a refusal by the Board of Immigration Appeals to reopen or remand a case for abuse of discretion.

C2-7. In an unsuccessful appeal of a crack cocaine conviction, *United States v. King* (2d Cir. 02-1460, filed 08/05/2002, judgment 09/17/2003), resolved by published opinion at 345 F.3d 149, the defendant cited an unpublished opinion by the district court for the Southern District of New York concerning child pornography to support an argument that he did not knowingly possess more than five grams of cocaine unless he knew the amount was more than five grams.

C2-8. In an unsuccessful appeal of a defendant's bankruptcy relief by a successful civil plaintiff, *In re Dairy Mart Convenience Stores, Inc.* (2d Cir. 02-5010, filed 02/01/2002, judgment 11/20/2003), resolved by published opinion at 351 F.3d 86, the standard of review section of the defendants' appellee brief includes a short "see also" string citation, which is headed by a published opinion by the court of appeals for the Second Circuit, and which then includes an unpublished opinion by the district court for the Southern District of New York, which in turn is cited as citing another published opinion by the court of appeals for the Second Circuit.

3. *Third Circuit*³⁶

Citations to unpublished opinions are permitted in the Third Circuit, but there is a tradition against such citations in court opinions.³⁷

Of the 50 cases randomly selected, 46 are appeals from district courts (18 from the Eastern District of Pennsylvania, 11 from the District of New Jersey, 10 from the Middle District of Pennsylvania, four from the Western District of Pennsylvania, two from the District of Delaware, and one from the District of the Virgin Islands) and four are appeals from the Board of Immigration Appeals.³⁸

The publication rate in this sample will be from 10% to 14% once all the cases are resolved. Five of the appeals were resolved by published signed opinions (including one with a concurrence, one with a partial concurrence, and one with a dissent), 19 were resolved by unpublished opinions (13 of which were signed and published in the *Federal Appendix* and six

36. Docket sheets are on PACER. Published opinions and most unpublished opinions (17 out of 19 in this sample) are on the court's website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 25 cases with counseled briefs in this sample, all briefs are on Westlaw for seven cases, and some briefs are on Westlaw for two cases.)

37. See 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").

The court's internal operating procedure rule discouraging the court's citation to its unpublished opinions was adopted July 1, 1990. The original form did not include the words "by tradition."

Before 1994, the court's internal operating procedures allowed for four different types of opinions: for publication, memorandum, signed not for publication, and per curiam. In 1994 the last two categories were merged into one: non-precedential. On February 21, 2002, the court merged the memorandum and non-precedential categories, resulting in the two current categories of opinions: precedential and non-precedential.

38. In 2002, 3,686 cases were filed in the court of appeals for the Third Circuit.

of which were per curiam opinions—including one opinion published in the *Federal Appendix* and five opinions tabled in the *Federal Appendix*), 24 were resolved by docket judgments, and two cases have not yet been resolved.

Published opinions averaged 8,470 words in length, ranging from 2,470 to 16,512. Unpublished opinions averaged 1,190 words in length, ranging from 176 to 5,892. Eleven opinions were under 1,000 words in length (46%, all unpublished), and one of these was under 500 words in length (4%).

Twenty of the cases were fully briefed. In 25 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.³⁹

There are citations to unpublished court opinions in 14 of the cases. In four cases the citations are only to opinions in related cases; in 10 cases there are citations to unpublished court opinions in unrelated cases. One published opinion and one published concurrence cite unpublished district court opinions; in the other eight cases the citations to unrelated unpublished opinions are only in the briefs.

The four unrelated unpublished opinions cited by the court in these cases are all opinions by the district court for the Eastern District of Pennsylvania. Five of the unrelated unpublished opinions cited by the parties are by the court of appeals for the Third Circuit, one is by a court of appeals for another circuit, seven are by Third Circuit district courts, one is by a Third Circuit bankruptcy court, four are by district courts in other circuits, one is by a bankruptcy court in another circuit, and one is by Delaware's court of chancery.

C3-1. In a published opinion, *W.V. Realty Inc. v. Northern Insurance Company of New York*, 334 F.3d 306 (3d Cir. 2003) (overturning a Middle District of Pennsylvania jury award based on a finding of insurance bad faith, because irrelevant and prejudicial evidence concerning discovery misconduct was admitted at trial), resolving 02-2910 (filed 07/15/2002, judgment 06/27/2003), the court of appeals for the Third Circuit cited three unpublished opinions by the district court for the Eastern District of Pennsylvania to show how trial courts in Pennsylvania have handled discovery misconduct in bad-faith cases.

The opinion cites two of these opinions and a published opinion by the district court for the Middle District of Pennsylvania to support the

39. It is possible that the two cases not yet resolved may ultimately be fully briefed. One was stayed by a filing of bankruptcy after the appellant brief was filed but before the appellee brief was filed. The other is a prisoner's appeal in which appointed counsel requested by motion a remand for development of a more complete record.

statement that “those cases in which courts have permitted bad faith claims to go forward based on conduct which occurred after the insured filed suit all involved something beyond a discovery violation, suggesting that the conduct was intended to evade the insurer’s obligations under the insurance contract.”

In two places, the court’s opinion also cites an unpublished opinion by the district court for the Eastern District of Pennsylvania that the insurance company cited in its briefs, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 178367 (E.D. Pa. 1999). First, the court’s opinion cites a published opinion by Pennsylvania’s superior court that quotes *Slater*. Second, the court’s opinion cites *Slater* and a published opinion by Pennsylvania’s court of common pleas following a discussion of a published opinion by Pennsylvania’s superior court amplifying the statement that “[i]n those cases in which nothing more than discovery violations were alleged, courts have declined to find bad faith.”

The insurance company’s appellant brief cites four unpublished opinions by the district court for the Eastern District of Pennsylvania. The brief cites *Slater* and another unpublished opinion by the district court for the Eastern District of Pennsylvania in an argument that discovery misconduct is not relevant to insurance bad faith. The brief cites another two unpublished opinions by the district court for the Eastern District of Pennsylvania and a published opinion by Pennsylvania’s superior court to support the statement that the state’s bad-faith statute clearly mandates that certain issues be tried without a jury.

To rebut an assertion by the insured that the insurance company’s opening brief misstates the holding of a published opinion by Pennsylvania’s court of appeals, in its reply brief the insurance company quoted the Pennsylvania opinion extensively, and the quotation includes a citation by the Pennsylvania superior court to *Slater*. The brief also states that a published opinion by the district court for the Middle District of Pennsylvania cites *Slater* with approval.

C3-2. In an unsuccessful appeal of a preliminary allocation of attorney fees in pending multidistrict litigation over fen-phen diet drugs, *Brown v. American Home Products Corp.* (3d Cir. 02-4074, filed 11/07/2002, judgment 03/20/2005), resolved by published opinion at *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143 (finding the preliminary allocation not yet appealable), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania with seven published district court opinions from various circuits as examples of “decisions in which courts have delegated the task of allocating fees among counsel to lead counsel or have relied on an agreement reached by counsel.”

In its appellee brief, the plaintiffs' management committee cited an unpublished opinion by the district court for the Eastern District of Pennsylvania and an unpublished opinion by the bankruptcy court for the District of Colorado. The brief includes the Eastern District of Pennsylvania opinion in a string of citations supporting a statement that "It is by now an unassailable proposition that a federal district court presiding over a mass tort MDL may properly award a fee to the plaintiffs' management structure appointed by it, payable out of the fees derived from the representation of the individual litigants whose cases are subject to coordinated pre-trial proceedings in the MDL transferee court." The string includes citations to published opinions by four federal courts of appeals, two district courts within those circuits, and the Federal Judicial Center's *Manual for Complex Litigation, Third*. The brief includes the bankruptcy court opinion in a string of citations to support a statement that: "This material [referring to material assembled by the committee for the benefit of other plaintiffs' attorneys] is classic 'attorney work product' entitled to protection against compelled disclosure to any person who does not provide fair compensation for the effort involved in creating it." The other citations in the string are three published opinions by the court of appeals for the Third Circuit.

C3-3. In a case affirming a cocaine conviction on the granting of an *Anders*⁴⁰ motion, *United States v. Shaw* (3d Cir. 02-2269, filed 05/09/2002, judgment 05/22/2003), resolved by unpublished opinion at 65 Fed. Appx. 851, 2003 WL 21197052, the government's appellee brief includes one published and two unpublished Third Circuit opinions in a footnote string citation supporting a statement that the court has disposed of wholly frivolous appeals by dismissal and by affirmance.

C3-4. Similarly, in a case affirming a conviction for illegally entering the United States after conviction for an aggravated felony on the granting of an *Anders* motion, *United States v. Douglas* (3d Cir. 02-4103, filed 11/07/2002, judgment 06/16/2003), resolved by unpublished opinion at 67 Fed. Appx. 733, 2003 WL 21380555, the same government attorneys who appeared in the *Shaw* case included the same Third Circuit opinions—one published and two unpublished—in a footnote string citation supporting a statement that the court has disposed of appeals with *Anders* motions by dismissal and by affirmance.

C3-5. In an unsuccessful appeal of the denial of summary judgment to emergency medical technicians who responded to a 911 call for a man having a seizure and responded to his erratic behavior by calling the police,

40. See *Anders v. California*, 386 U.S. 738 (1976) (holding that court-appointed appellate counsel may seek to withdraw on the grounds that the appeal would be frivolous only upon briefing the court of "anything in the record that might arguably support the appeal").

after which the man died, *Rivas v. City of Passaic* (3d Cir. 02–3875, filed 10/17/2002, judgment 04/26/2004), resolved by published opinion at 365 F.3d 181, the briefs cite several unpublished opinions.

The technicians cited an unpublished opinion by the court of appeals for the Third Circuit in their appellant brief to support their argument that “the court below failed to comb the record and Local Rule 56.1 statement.”

The plaintiffs cited two unpublished district court opinions. Their appellee brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania as holding that “it was foreseeable that a 911 call misdirected to a private ambulance company rather than the authorized Fire Department Rescue units appropriately staffed to respond to such emergencies would result in serious harm or death.” The brief also cites an unpublished opinion by the district court for the Northern District of Illinois as holding that the “plaintiff had a valid claim against paramedics for failure to intervene to protect decedent’s safety when the police placed decedent face down in the street, handcuffed him, choked him and inflicted additional injuries on him.”

The technicians’ reply brief includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of two citations intended to show that “Consistent with the Third Circuit’s holding in *Anela v. City of Wildwood*, 790 F.2d 1063 (3d Cir. 1986)], other courts have granted summary judgment for defendants in § 1983 cases where the plaintiff could not identify the accountable state actors and the circumstantial evidence of said actors’ identities was too attenuated.” The other opinion cited in the string is a published opinion by the court of appeals for the Tenth Circuit.

C3–6. In an unsuccessful pro se appeal of an injunction against a malicious prosecution claim in a securities and bankruptcy action, *Signator Investors v. Olick* (3d Cir. 02–3437, filed 09/06/2002, judgment 11/07/2003), resolved by unpublished opinion tabled at *Signator Investors v. Olick*, 85 Fed. Appx. 874, 2003 WL 22881726, an investment company’s appellee brief twice cites an unpublished opinion by the court of appeals for the Third Circuit as concluding that “the Supreme Court would not create a distinct cause of action for the spoliation of evidence brought outside an existing personal injury or products liability action.”

C3–7. In an unsuccessful ERISA appeal of summary judgment in favor of an employer in an action for severance benefits, *Young v. Pennsylvania Rural Electric Ass’n* (3d Cir. 02–3946, filed 10/25/2002, judgment 11/17/2003), resolved by unpublished opinion at 80 Fed. Appx. 785, 2003 WL 22701472, the employer’s appellee brief cites one unpublished and two published opinions by the court of appeals for the Third Circuit to support a statement that “‘Serious consideration’ of changes in plan benefits is sufficient to trigger a fiduciary duty to provide complete and truthful information about such changes in response to an employee’s inquiry.”

C3–8. In an unsuccessful appeal of a jury verdict in favor of an insurance company in which the claimant claimed damage to his furniture store from a boulder dislodged by hurricane Floyd, *McGinnis v. Ohio Casualty Insurance Co.* (3d Cir. 02–2802, filed 06/28/2002, judgment 05/23/2003), resolved by unpublished opinion at 67 Fed. Appx. 127, 2003 WL 21205882, the insurance company cited one unpublished opinion and two published opinions by the district court for the Eastern District of Pennsylvania in its appellee brief to support a statement that “It is clear that in the Eastern District, the Court is the gatekeeper in bad faith.”

C3–9. In an unsuccessful appeal of the denial of a preliminary injunction in a dispute over intellectual property rights in a french fry vending machine, *Silver Leaf, LLC v. Tasty Fries, Inc.* (3d Cir. 02–2767, filed 06/27/2002, judgment 10/30/2002), resolved by unpublished opinion at 51 Fed. Appx. 366, 2002 WL 31424691, the distributor’s appellant brief cites two unpublished opinions by the district court for the Southern District of New York to support a statement that “bad faith on the part of the party seeking to enforce an exculpatory clause will invalidate such a clause.” One of the opinions is included in a string citation with two published opinions by the appellate division of New York’s supreme court, and the other is included in a footnote appended to the string citation and headed “*see also.*”

C3–10. In a voluntarily dismissed appeal of the dismissal of a bankruptcy case by the district court for the District of Delaware, *In re Primestone Investment Partners L.P.* (3d Cir. 02–1409, filed 02/08/2002, judgment 05/28/2002), resolved by docket judgment, both the debtor and the creditor cited unpublished opinions in their briefs.

In addition to citing three unpublished orders issued in this case, the debtor’s brief cites an unpublished opinion by the district court for the District of South Carolina. The brief includes this unpublished opinion in a string of three opinions that “have recognized that ‘[p]etitions in bankruptcy arising out of a two-party dispute do not per se constitute a bad-faith filing by the debtors.’” The other two opinions in the string are published opinions by the Ninth Circuit’s bankruptcy appellate panel and the Middle District of Florida’s bankruptcy court.

The creditor’s brief cites two unpublished opinions—one by the bankruptcy court for the Middle District of Pennsylvania and one by a Delaware court of chancery. The brief cites the unpublished bankruptcy court opinion as quoted by a published opinion by the district court for the Eastern District of Pennsylvania listing good-faith factors. The brief cites the chancery court opinion and a law review article to support the theory that businesses on the verge of bankruptcy have an incentive to take large financial risks.

4. *Fourth Circuit*⁴¹

The court of appeals for the Fourth Circuit disfavors citation to its unpublished opinions in unrelated cases, but permits it if an opinion has “precedential value” and there is no published opinion on point.⁴²

Of the 50 cases randomly selected, 48 are appeals from district courts (15 from the Eastern District of Virginia, 12 from the Eastern District of North Carolina, five from the District of South Carolina, four each from the Western District of Virginia and the Northern District of West Virginia, three from the District of Maryland, two each from the Middle District of North Carolina and the Western District of North Carolina, and one from the Southern District of West Virginia), and two are appeals from the Board of Immigration Appeals.⁴³

The publication rate in this sample is 2%. One of the appeals was resolved by a published signed opinion, 30 were resolved by unpublished per curiam opinions published in the *Federal Appendix* (four of which were printed and the rest of which were typewritten⁴⁴), and 19 were resolved by docket judgments.

The published opinion was 7,716 words in length. Unpublished opinions averaged 273 words in length, ranging from 28 to 2,143. Twenty-eight opinions were under 1,000 words in length (90%, all unpublished), and all of these were under 500 words in length.

41. Docket sheets and opinions are on PACER. Opinions are also on the court’s website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 12 cases with counseled briefs in this sample, all briefs are on Westlaw for two cases, and some briefs are on Westlaw for one case.)

42. 4th Cir. L.R. 36(c) (“In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court’s unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. [¶] If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.”).

The court’s rule on citation to its unpublished opinions has been in effect essentially as it is since October 8, 1976.

43. In 2002, 4,698 cases were filed in the court of appeals for the Fourth Circuit.

44. The court used to “print” substantive unpublished opinions for distribution to a mailing list of interested parties, but as of fiscal year 2005, for budget reasons, the court now formats all unpublished opinions as “typewritten” and distributes them only electronically.

Six of the appeals were fully briefed. In 39 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 20 of these cases. In 17 cases the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Fourth Circuit and one is by a Fourth Circuit district court.

C4-1. In *McWaters v. Rick* (4th Cir. 02-1436, filed 04/25/2002, judgment 12/27/2002), in which the court of appeals decided that a complaint by a former county supervisor against the county should be dismissed, *McWaters v. Cosby*, 54 Fed. Appx. 379, 2002 WL 31875539, the supervisor's appellee brief quotes an unpublished Fourth Circuit opinion: "A panel of this Court has said that 'the fundamental tenet of equal protection jurisprudence is not changed by [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)].'"

C4-2. *Bailey v. Kennedy* (4th Cir. 02-1818, filed 07/31/2002, judgment 11/17/2003), in which the court of appeals dismissed the plaintiffs' appeal as improperly interlocutory, was consolidated with the defendants' unsuccessful appeal of the denial of qualified immunity, see *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003). The defendants' appellant brief in the consolidated case, which is also the defendants' cross-appellee brief in the selected case, includes an unpublished Fourth Circuit opinion in a string citation to support a statement that "In responding to calls involving a possible danger to human life, both the United States Supreme Court and the Fourth Circuit have repeatedly recognized that warrantless entries into homes by law enforcement officers are objectively reasonable." A parenthetical note in the citation suggests that the reason for the citation is to show the court's application of text from a Supreme Court opinion.

C4-3. In an unsuccessful pro se employment discrimination appeal from the district court for the Eastern District of North Carolina, *Sharp v. Fishburne* (4th Cir. 02-2016, filed 09/10/2002, judgment 02/14/2003), resolved by unpublished opinion at 56 Fed. Appx. 140, 2003 WL 329404, the defendants' informal appellee brief cites an unpublished opinion by the district court for the Western District of North Carolina to support a statement that "One court has held that erroneous advice by a government agency causing plaintiff to delay her filing may toll the 180-day period if 'but for' that poor advice, plaintiff's charge would have been timely filed." The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit that partially affirmed a published district court opinion in order to complete the citation of the district court opinion.

5. Fifth Circuit⁴⁵

As of January 1, 1996, unpublished opinions by the court of appeals for the Fifth Circuit are no longer precedent, but they may be cited as persuasive authority.⁴⁶

Of the 50 cases randomly selected, 45 are appeals from district courts (11 from the Southern District of Texas; eight from the Eastern District of Texas; seven from the Western District of Texas; six from the Northern District of Texas; three each from the Eastern District of Louisiana, the Middle District of Louisiana, and the Southern District of Mississippi; and two each from the Western District of Louisiana and the Northern District of Mississippi), one is an appeal from the United States Tax Court, and four are appeals from the Board of Immigration Appeals.⁴⁷

The publication rate in this sample is 6%. Three of the appeals were resolved by published signed opinions, 16 were resolved by unpublished per curiam opinions (11 of which are published in the *Federal Appendix*—six in cases on the court's conference calendar and five in cases on the court's summary calendar; and five of which are tabled in the *Federal Appendix*⁴⁸—three in cases on the court's conference calendar and two in cases on the court's summary calendar), and 31 were resolved by docket judgments.

45. Docket sheets are on PACER. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished opinions are on the court's website and its intranet site. Most unpublished opinions are also on Westlaw. (Of the 16 cases in this sample resolved by unpublished opinions, the opinions for 11 of the cases are on Westlaw.) Most briefs are on Westlaw. (Of the 16 cases with counseled briefs in this sample, all briefs are on Westlaw for 11 cases, and some briefs are on Westlaw for one case.)

46. 5th Cir. L.R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document.").

The court adopted a rule distinguishing published from unpublished opinions on October 15, 1981. Until 1996, the court regarded even unpublished opinions as precedential.

47. In 2002, 8,810 cases were filed in the court of appeals for the Fifth Circuit.

48. The court only sends published opinions to Westlaw. But as of July 2003, the court now posts unpublished opinions on the Internet and Westlaw retrieves them from there. So Westlaw has the text of only some unpublished opinions issued before July 2003, but is expanding its collection over time to include opinions back to 1998.

Published opinions averaged 4,805 words in length, ranging from 2,845 to 7,489. Unpublished opinions averaged 390 words in length, ranging from 41 to 1,266. Fourteen opinions were under 1,000 words in length (74%, all unpublished), and 13 of these were under 500 words in length (68%).

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

None of the unrelated unpublished opinions cited are by the court of appeals for the Fifth Circuit. One of the opinions is by a Fifth Circuit district court, one is by a district court in another circuit, and two are by Texas's courts of appeals.

C5-1. In a partially successful appeal by the plaintiff in an action for automobile accident insurance benefits, *Hamburger v. State Farm Mutual Automobile Insurance Co.* (5th Cir. 02-21126, filed 10/14/2002, judgment 03/02/2004), resolved by published opinion at 361 F.3d 875, the appellant cited an unpublished opinion by the district court for the Northern District of Texas in a discussion of the reasonableness of the insurer's conduct in actions for bad faith.

C5-2. In a successful civil appeal by the manufacturer of plumbing products in an action by a distributor for breach of a distribution contract, *Coburn Supply Co. v. Kohler Co.* (5th Cir. 02-41317, filed 09/18/2002, judgment 08/06/2003), resolved by published opinion at 342 F.3d 372, the defendant cited a different unpublished opinion in each of its briefs. The defendant's appellant brief devotes 21 lines of text, encompassing two paragraphs, to an unpublished opinion by the district court for the District of Massachusetts concerning reasonable notice in terminating a contract to distribute dental equipment. The reply brief identifies an unpublished opinion by a Texas court of appeals as a "particularly demonstrative example from Texas case law" concerning franchise agreements.

C5-3. In an unsuccessful appeal of summary judgment awarded to a store in an action for false imprisonment of a suspected shoplifter, *Vilandos v. Sam's Club Wal-Mart Stores Inc.* (5th Cir. 02-20762, filed 07/15/2002, judgment 04/03/2003), resolved by unpublished opinion at 65 Fed. Appx. 509, 2003 WL 1923003, the shopper's appellant brief devotes 14 lines of text to a discussion of an unpublished opinion by a Texas court of appeals concerning how much time is reasonable to detain a suspected shoplifter.

6. Sixth Circuit⁴⁹

The Sixth Circuit disfavors citation to an unpublished opinion in an unrelated case, but permits it if the opinion has “precedential value” and there is no published opinion on point.⁵⁰

Of the 50 cases randomly selected, 46 are appeals from district courts (12 from the Eastern District of Michigan; seven from the Northern District of Ohio; five from the Western District of Michigan; four each from the Eastern District of Kentucky, the Western District of Kentucky, the Eastern District of Tennessee, and the Western District of Tennessee; and three each from the Southern District of Ohio and the Middle District of Tennessee), two are appeals from the United States Tax Court, and two are appeals from the Board of Immigration Appeals.⁵¹

The publication rate in this sample will be from 12% to 14% once all the cases are resolved. Six of the cases were resolved by published signed opinions (one with a dissent), 19 were resolved by unpublished opinions published in the *Federal Appendix* (including six signed opinions, three per curiam opinions, and 10 orders), 24 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 3,592 words in length, ranging from 1,602 to 5,095. Unpublished opinions averaged 1,467 words in length, ranging from 508 to 4,497. Ten opinions were under 1,000 words in length (40%, all unpublished), and none of them was under 500 words in length.

We expect 19 of the appeals to be fully briefed. In 24 of the appeals no counseled brief was filed, in seven of the appeals a counseled brief was filed only for one side, and in one appeal briefs are still due.

49. Docket sheets are on PACER. Published opinions are on the court’s website, its intranet site, and Westlaw. Unpublished opinions are on Westlaw and most of them are also on the court’s intranet site. (Of the 19 unpublished opinions resolving cases in this sample, 16 are on the court’s intranet site. One of them is also on the court’s website.) Briefs are not available electronically.

50. 6th Cir. L.R. 28(g) (“Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.”).

The court adopted a rule prohibiting citation to unpublished opinions effective April 11, 1973. The court amended its rules effective February 1, 1982, to permit citation to unpublished opinions if there is no published opinion on point.

51. In 2002, 4,612 cases were filed in the court of appeals for the Sixth Circuit.

There are citations to unpublished court opinions in 16 of the cases. In four cases the citations are only to opinions in related cases; in 12 cases there are citations to unpublished opinions in unrelated cases. In four cases the court cited unrelated unpublished opinions; in eight other cases only the parties cited unrelated unpublished opinions.

Of the unrelated unpublished opinions cited by the court in these cases, three are by the court of appeals for the Sixth Circuit and one is by a district court in another circuit. Of the unrelated unpublished opinions cited by the parties in these cases, 51 are by the court of appeals for the Sixth Circuit, four are by district courts in the Sixth Circuit, five are by district courts in other circuits, three are by the United States Tax Court, and three are by state courts.

C6-1. In an unsuccessful appeal of summary judgment by the district court for the Western District of Michigan in favor of a sheriff's department that denied non-emergency services to the plaintiff who complained about his neighbor, a senior officer on the force, *Klimik v. Kent County Sheriff's Department* (6th Cir. 02-1774, filed 06/21/2002, judgment 01/30/2004), resolved by unpublished opinion at 91 Fed. Appx. 396, 2004 WL 193168, the court quoted one of its other unpublished opinions' specification of how a "class of one" can be established.

In its appellee brief, the sheriff's department cited an unpublished opinion by the district court for the Western District of Michigan as an opinion relied on by the district court in this case, an opinion holding that a sheriff's department is not a legal entity subject to suit. The brief identifies five opinions cited by the district judge in the unpublished opinion, including an unpublished Sixth Circuit opinion.

C6-2. In a successful appeal of summary judgment for the postal service in an employment discrimination case, *Smith v. United States Postal Service* (6th Cir. 02-6073, filed 09/06/2002, judgment 07/15/2004), resolved by published opinion at *Smith v. Henderson*, 376 F.3d 529 (6th Cir. 2004), the court cited one of its unpublished opinions and the Code of Federal Regulations to support a statement that there was a material issue of fact whether a letter was a request for reasonable accommodations. The citation acknowledges the unpublished opinion's citation to a published opinion by a court of appeals for another circuit.

C6-3. In an unsuccessful pro se plaintiff's employment discrimination appeal, *Moore v. Potter* (6th Cir. 02-5465, filed 04/17/2002, judgment 09/18/2002), resolved by unpublished opinion at 47 Fed. Appx. 318, 2002 WL 31096673, the court cited an unpublished Sixth Circuit order along with two Supreme Court opinions to support a statement that courts apply the state personal injury limitation period to Rehabilitation Act claims.

C6-4. In an unsuccessful pro se tax appeal, *Hauck v. Commissioner of Internal Revenue* (6th Cir. 02-2301, filed 11/05/2002, judgment 05/02/2003),

resolved by unpublished order at 64 Fed. Appx. 492, 2003 WL 21005238, the court cited an unpublished opinion by the district court for the Western District of Texas to support a statement that a computerized reporting system established by the Internal Revenue Service has replaced Form 23C, which was used before 1984.

In its appellee brief, the government cited six unpublished opinions—three by district courts and three by the United States Tax Court. The brief cites unpublished opinions by the district courts for the District of Nevada, the Northern District of Oklahoma, and the Eastern District of Virginia to rebut the taxpayer’s argument that Form 23C is the only authorized assessment form. The brief cites three unpublished Tax Court memoranda to support the position that the government may rely on a non-certified transcript of account to verify a tax assessment.

C6–5. The State of Michigan cited 31 unpublished opinions in unrelated cases in its appellee brief in an unsuccessful pro se appeal by a prisoner of the district court for the Eastern District of Michigan’s judgment awarding costs to the defendants, *Jones v. Kolb* (6th Cir. 02–2112, filed 09/13/2002, judgment 12/10/2003), resolved by unpublished order at 84 Fed. Appx. 560, 2003 WL 23095569.

The brief discusses four unpublished Sixth Circuit opinions to support a statement that “In a number of unpublished decisions, this Court has addressed what constitutes meritless claims, grievances, or lawsuits.”

The brief cites another unpublished Sixth Circuit opinion as stating that “this Court for the second time announced *what should be an absolute rule*: ‘a finding of guilt based upon some evidence of a violation of prison rules “essentially checkmates [a] retaliation claim.”’” The brief notes that the unpublished opinion cites a published opinion by the Eighth Circuit and the brief cites another unpublished opinion by the Sixth Circuit as quoting the Eighth Circuit opinion. And the brief quotes seven lines of text from an unpublished Sixth Circuit opinion to support a statement that “This Court has also stated that there is no constitutional violation where an inmate is found guilty of a misconduct.”

The brief cites five unpublished Sixth Circuit opinions to support a statement that “A number of unpublished decisions of this Court have found that a guilty finding on a major misconduct does not constitute adverse action.” Two of these opinions are also cited elsewhere. The brief cites five unpublished Sixth Circuit opinions to acknowledge “Other unpublished decisions of this Court have found to the contrary.”

In a footnote, the brief cites eight unpublished Sixth Circuit opinions to support a statement that “a number of cases have held that a guilty finding on a major misconduct is sufficient proof under the burden shifting analysis that the prison official would have taken the same action in the absence of any retaliatory intent, i.e. that the state officials win on the cau-

sation element.” In another footnote, the brief cites five unpublished Sixth Circuit opinions to support a statement that “Here, Jones was found to be guilty. Where an inmate is found to be not guilty, this Court has entered contradictory opinions on whether a retaliation claim is cognizable.” Two of the opinions are cited as holding that a claim is not possible and three are cited as holding to the contrary. One of these five opinions is also cited elsewhere in the brief.

The brief cites an unpublished Sixth Circuit opinion to support a statement that “This Court has held that spitting in an inmate’s food or serving them contaminated food, which Jones alleges Kolb did in retaliation, is adverse action.”

The brief observes that the court of appeals for the Sixth Circuit said in a published opinion that it would reserve “to another day the question of whether ‘exhausted claims’ in a ‘mixed complaint’ should be addressed when such claims would otherwise meet the pleading requirements or whether such claims should be dismissed in their entirety.” The brief cites an unpublished Sixth Circuit opinion to support its footnote observation that “This Court made this statement despite having apparently decided in an unpublished decision two months earlier that total exhaustion was not required.” The brief then notes, “District Courts within Michigan have split on this issue.” The brief identifies one published opinion by the district court for the Western District of Michigan holding that total exhaustion is not required and two unpublished opinions by the district court for the Western District of Michigan holding that total exhaustion is required.

C6-6. The State of Ohio cited seven unpublished Sixth Circuit opinions in an unsuccessful appeal of its summary judgment in a case alleging retaliation against nursing homes for speaking out against state policies, *King v. Haas* (6th Cir. 02-4141, filed 10/10/2002, judgment 01/06/2004), resolved by unpublished opinion at 85 Fed. Appx. 480, 2004 WL 74649.

The brief cites an unpublished Sixth Circuit opinion and a published Second Circuit opinion to support a statement that “In order to state a claim for retaliation under the Due Process Clause and the First Amendment, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected, and that retaliation against the protected conduct was a substantial or motivating factor in the defendant’s actions.” In a footnote, the brief also cites the unpublished Sixth Circuit opinion to support a statement that “This Court has consistently rendered summary judgment in a defendant’s favor when the complained-of conduct would have occurred regardless of the protected activity.” The brief also cites this opinion in the summary of argument as the support for one of 13 enumerated points, which begins, “The District Court properly rendered summary judgment in Defendants’ favor on Plaintiffs’ First Amendment and Due Process ‘retaliation’ claims.”

The brief cites an unpublished Sixth Circuit opinion to support a statement that “This Court has held that a district court may impose monetary sanctions upon an attorney who fails to cooperate during discovery and/or engages in abusive litigation practices.” The brief also cites this opinion in the summary of argument as the support for the last of 13 enumerated points: “The District Court properly sanctioned Plaintiffs’ counsel for engaging in discovery abuses that impeded Defendants’ ability to prepare for trial.”

The brief quotes an unpublished Sixth Circuit opinion as stating that “If any conceivable legitimate state interest is rationally furthered by the faulted state action, it [is] not ‘arbitrary and capricious’ or ‘abusive.’” The brief cites another unpublished Sixth Circuit opinion to support a statement that “Plaintiffs have not proven that Defendants engaged in any conduct that is so oppressive or ‘conscience shocking’ that it would give rise to a substantive due process claim.”

The brief cites an unpublished Sixth Circuit opinion to support a statement that “As for Plaintiffs’ allegations of ‘prejudice’ or ‘bias,’ this Court has held that ‘a judge’s adverse rulings against a party do not render him biased.’”

To counter the appellants’ argument that a particular item of evidence was not considered, the brief cites in a footnote an unpublished Sixth Circuit opinion to support a statement that “It should be presumed that the District Court considered all of the relevant evidence even if such evidence is not painstakingly listed in its decision.”

The brief cites an unpublished Sixth Circuit opinion and a published Sixth circuit opinion to support a statement that “In order to hold a defendant liable for an alleged ‘failure to train,’ a plaintiff must show that: 1) the defendant is directly responsible for the training; 2) the training program is inadequate to the task that must be performed; 3) the inadequacy ‘is the result of deliberate indifference’; and 4) ‘the inadequacy is closely related to or actually caused’ the alleged injury.”

C6–7. Both sides cited unpublished opinions in a voluntarily dismissed appeal by a corporation of the refusal by the district court for the Middle District of Tennessee to order arbitration of a claim by a departing chief executive officer for severance benefits, *Reardon v. Cambio Health Solutions, LLC* (6th Cir. 02–6274, filed 10/24/2002, judgment 10/28/2003).

The appellant’s brief cites an unpublished Sixth Circuit opinion to support a statement that “This Court has held that where a District Court has denied a party’s motion for stay pending arbitration, or to compel arbitration, it will accord no deference to the District Court’s Opinion, and instead conduct a *de novo* review.” The brief also asks the reader to “*see also*” an unpublished opinion by the district court for the Western District of Kentucky after citing a published opinion by the court of appeals for the

Second Circuit to support a statement that “The Second Circuit has held that where, as here, an arbitration clause is broad, ‘there arises a presumption of arbitrability’ and arbitration of even a collateral matter will be ordered if the claim alleged ‘implicates issues of contract construction or the parties’ rights and obligations under it.’” The brief cites two unpublished opinions by Delaware’s court of chancery and a published opinion by Delaware’s supreme court to support a statement that “Delaware Courts have . . . recognized that contemporaneous documents in the same transaction be construed together.”

The appellee’s brief devotes three pages to an argument that “this case is readily distinguishable from this Court’s unpublished opinion” cited by the appellants. The brief cites another unpublished Sixth Circuit opinion to support a statement that “A party waives its right to arbitrate when it acts inconsistently with its rights to proceed with arbitration and thereby prejudices the other party.”

The appellant’s reply brief cites an unpublished Sixth Circuit opinion, which cites published decisions by Tennessee’s supreme court and Tennessee’s court of appeals, to support an assertion of “a cardinal rule of contract interpretation under Tennessee law requiring a court to give effect to parties’ intent and not to enforce an absurd result.” The brief devotes a page-long paragraph to discussion of another unpublished Sixth Circuit opinion supporting the corporation’s argument that it has not waived its right to arbitration. The next paragraph of the brief discusses the unpublished opinion by the district court for the Western District of Kentucky that the appellant cited in its opening brief, asserting that “The court found that to establish that a party waived its right to arbitrate, it must be proven that the party knew of their right to arbitrate, yet took actions inconsistent with such right to the other party’s prejudice.”

C6–8. In a successful civil appeal involving interpretation of a commercial lease, *Tel-Towne Properties Group v. Toys “R” Us–Delaware, Inc.* (6th Cir. 02–1251, filed 03/01/2002, judgment 01/26/2005), resolved by unpublished opinion at 123 Fed. Appx. 656, 2005 WL 180985, both parties cited unpublished opinions.

To support a statement that “reluctance to grant summary judgment *sua sponte* applies equally to *sua sponte* entry of judgment on the pleadings,” the appellants cited an unpublished Sixth Circuit opinion and a published Sixth Circuit opinion that was “superseded by statute on other grounds.” The appellee cited these opinions to rebut the appellants’ reliance on them, stating that the two cases involved “pro se plaintiffs where the courts were understandably concerned about protecting the rights of the unrepresented.” The appellants cited the unpublished opinion in their reply brief to respond to the appellee’s rebuttal.

The appellants also cited a second unpublished Sixth Circuit opinion as an example of a case holding that it was improper for the district court to deny the plaintiff's motion to amend the complaint. In their reply brief they also cited an unpublished opinion by Michigan's court of appeals to support the statement that "reasonable ambiguity . . . means that parol evidence is admissible to determine what the parties actually intended, despite the existence of an integration clause in the lease."

The appellee also cited an unpublished Sixth Circuit opinion to support a statement that "The interpretation and construction of a written contract are matters of law and are reviewed *de novo*."

C6-9. Both parties cited unpublished Sixth Circuit opinions in the plaintiffs' appeal, dismissed by stipulation, of the district court's refusal to order a docket sheet correction, *Kraft v. Worrall, Scott & Page* (6th Cir. 02-5554, filed 05/02/2002, judgment 03/26/2003).

The plaintiffs cited an unpublished Sixth Circuit opinion to support statements that "Given the inaccuracies of the other docket sheet entries, it is clear that the notations on the documents in the file more accurately reflect when events occurred in this matter. Under such circumstances, it is appropriate for the district court to direct the clerk to correct the docket sheet."

The defendants cited two unpublished Sixth Circuit opinions to support an argument that "The district court docket complies with [the Federal Rules of Civil Procedure] as it indicates that the judgments were entered on September 27, 1991." One opinion is cited as holding that "Rule 79 entry occurs when 'the substance of the separate document is reflected in an appropriate notation on the docket sheet.'" The other opinion is cited as holding that "a judgment is entered 'when the judgment is noted in the civil docket of the district court.'"

C6-10. In a successful appeal by the state in a case in which prisoners challenged interference with their religious practices, *Miller v. Wilkinson* (6th Cir. 02-3299, filed 03/15/2002, judgment 11/07/2003), the court held in a published opinion that the Religious Land Use and Institutionalized Persons Act is unconstitutional, *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 308 (2004). Parties on both sides cited unpublished opinions in their briefs.

The state's brief cites two unpublished opinions by district courts for the Northern District of California and the Northern District of Indiana in a footnote along with eight published opinions, including three by courts of appeals for other circuits, one by a Sixth Circuit district court, and four by district courts in other circuits, as examples of how the Religious Freedom Restoration Act had caused disruptive effects on the operation of other states' prisons.

The prisoner's brief cites an unpublished Sixth Circuit opinion in addition to published opinions by the courts of appeals for the Sixth, Ninth, and Tenth Circuits to support a statement that the "current law in the circuit courts of appeal . . . requires that prison officials accommodate religious exercise only when the exercise involves a tenet or belief that is central to the religion."

C6-11. In an unsuccessful appeal of a directed verdict in favor of a police sergeant in an action for excessive force, *Frohmuth v. Bourk* (6th Cir. 02-6284, filed 10/28/2002, judgment 06/03/2004), resolved by unpublished opinion at *Frohmuth v. Metropolitan Government of Nashville and Davidson County*, 101 Fed. Appx. 56, 2004 WL 1238919, the sergeant cited two unpublished Sixth Circuit opinions. His brief devotes two paragraphs to a discussion of an unpublished Sixth Circuit opinion cited as a case in which "this Court held that the minimal amount of force utilized by officers making an arrest could not be deemed excessive as a matter of law." The next paragraph discusses another unpublished Sixth Circuit opinion in which "This Court found that pushing the metal door open hard enough to allegedly injure plaintiff did not amount to excessive force as a matter of law."

C6-12. In an unsuccessful appeal by a surviving wife against a surviving sister in a civil case involving proceeds of a life insurance policy, *Life Insurance Company of North America v. Leeson* (6th Cir. 02-3401, filed 04/15/2002, judgment 11/06/2003), resolved by unpublished opinion at 81 Fed. Appx. 521, 2003 WL 22682432, the wife cited an unpublished Sixth Circuit opinion to rebut the district court's reliance on it, observing that the unpublished opinion "does not state the applicable policy language."

7. Seventh Circuit⁵²

The Seventh Circuit does not permit citation to unpublished opinions in unrelated cases.⁵³

52. Docket sheets have been on PACER since January 1, 2005. Before then, they were on the court's website. They are also on the court's intranet site. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished orders are only on Westlaw. Almost all briefs are on the court's website and its intranet site. (Of the 17 cases with counseled briefs in this sample, all briefs are on the court's website and its intranet site for 16 cases, but only the appellant's brief, not the appellee's brief or the appellant's reply brief, is on the court's website and intranet site for one case.) A few briefs are on Westlaw. (Of the 17 cases with counseled briefs in this sample, briefs are on Westlaw for three cases.)

53. 7th Cir. L.R. 53(b)(2)(iv) ("Unpublished orders: . . . Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (A) in any federal court within the circuit in any written document or oral argument; or (B) by any such court for any purpose.").

Of the 50 cases randomly selected, 48 are appeals from district courts (20 from the Northern District of Illinois, 10 from the Northern District of Indiana, six from the Southern District of Indiana, four each from the Eastern District of Wisconsin and the Western District of Wisconsin, three from the Central District of Illinois, and one from the Southern District of Illinois) and two are appeals from the Board of Immigration Appeals.⁵⁴

The publication rate in this sample is 16%. Eight of the appeals were resolved by published signed opinions, seven were resolved by unpublished orders published in the *Federal Appendix*, and 35 were resolved by docket judgments.

Published opinions averaged 4,147 words in length, ranging from 1,536 to 8,070. Unpublished opinions averaged 1,451 words in length, ranging from 373 to 3,106. Three opinions were under 1,000 words in length (20%, all unpublished), and one of these was under 500 words in length (7%).

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citation is only to an opinion in a related case; in three cases there are citations to unpublished opinions in unrelated cases. One published opinion cites a depublished district court opinion from another circuit; in the other two cases the citations to unrelated unpublished opinions are only in the briefs.

None of the unrelated unpublished opinions cited are by courts of appeals. Three of the unrelated unpublished opinions cited are by the district court for the Northern District of Illinois and one is by the district court for the Eastern District of New York. In addition, one case includes citations to a depublished opinion by the district court for the Eastern District of Pennsylvania.

C7-1. In an unsuccessful appeal of a conviction for a counterfeit check scheme, *United States v. Mustapha* (7th Cir. 02-4000, filed 11/12/2002, judgment 04/14/2004), resolved by published opinion at *United States v. George*, 363 F.3d 666 (7th Cir. 2004), the appellant's brief cites an opinion by the district court for the Eastern District of Pennsylvania that was initially published, but subsequently withdrawn by the court and replaced by a new published opinion. The brief acknowledges the vacation and reconsideration of the depublished opinion, but cites it extensively to support an ar-

The court adopted a distinction between published and unpublished opinions on February 1, 1973, and has proscribed citation to its unpublished opinions in unrelated cases since then.

54. In 2002, 3,463 cases were filed in the court of appeals for the Seventh Circuit.

gument against the reliability of fingerprint identification. The court cited the same depublished opinion in its rejection of the appellant's argument.

C7-2. In an unsuccessful pro se appeal seeking habeas corpus relief for ineffective assistance of counsel, *United States v. Sims* (7th Cir. 02-2397, filed 05/30/2002, judgment 07/01/2003), resolved by docket judgment, the government's brief cites three unpublished district court opinions—two by the district court for the Northern District of Illinois and one by the district court for the Eastern District of New York.

The brief cites one unpublished opinion by the district court for the Northern District of Illinois to support a statement that "a large number of unsuccessful pleadings" filed by the appellant in district court "do not toll the period in which to file a timely Rule 60(b)(6) motion." The brief cites the other unpublished opinion by the district court for the Northern District of Illinois and a published opinion by the Northern District of Indiana to support a statement that "The final order or judgment denying a § 2255 motion becomes effective when docketed."

The brief cites an unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for the Second Circuit to support a statement that "What is a 'reasonable time' for purposes of Rule 60(b) is a 'question to be answered in light of all the circumstances.'" The brief also cites this unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for the Third Circuit to support a statement that "Other courts have held delays of roughly the same time or less to be unreasonable under Rule 60(b)(6) where the errors alleged were or should have been known earlier."

C7-3. In an unsuccessful appeal by an employer of bricklayers of a judgment in favor of the bricklayers' union requiring an audit of the employer's payroll records, *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restorations, Inc.* (7th Cir. 02-3512, filed 09/27/2002, judgment 09/22/2004), resolved by published opinion at 385 F.3d 761, both parties cited an unpublished opinion by the district court for the Northern District of Illinois. The employer urged the court of appeals to follow the lead of a district court judge in requiring a signed agreement between an employer and a union for the employer to be bound by a collective bargaining agreement. The union countered that the unpublished opinion is consistent with the district court's judgment in the case appealed.

8. Eighth Circuit⁵⁵

Unpublished opinions by the court of appeals for the Eighth Circuit are not precedent; citation to them in unrelated cases is disfavored, but permitted if they “have persuasive value” and there is no published opinion on point.⁵⁶

Of the 50 cases randomly selected, 48 are appeals from district courts (11 from the Eastern District of Missouri; eight from the Eastern District of Arkansas; six from the Western District of Missouri; five each from the Southern District of Iowa and the District of Nebraska; four from the Western District of Arkansas; and three each from the Northern District of Iowa, the District of Minnesota, and the District of South Dakota),⁵⁷ one is an appeal from the United States Tax Court, and one is an appeal from the National Labor Relations Board.⁵⁸

The publication rate in this sample is 34%. Seventeen of the appeals were resolved by published signed opinions (including one with a concurrence and a dissent), 10 were resolved by unpublished per curiam opinions published in the *Federal Appendix*, and 23 were resolved by docket judgments.

Published opinions averaged 2,596 words in length, ranging from 1,521 to 6,149. Unpublished opinions averaged 220 words in length, ranging from 62 to 495. Ten opinions were under 1,000 words in length (37%, all unpublished), and all 10 of these were under 500 words in length.

55. Docket sheets and opinions are on PACER. Opinions and most briefs are on the court’s Web and intranet sites. (Of the 27 cases in this sample with counseled briefs, two briefs—one brief each in two cases—are not on the court’s Web and intranet sites.) Opinions and some briefs are on Westlaw. (Of the 27 cases in this sample with counseled briefs, all briefs are on Westlaw for three cases, some briefs are on Westlaw for seven cases, and no briefs are on Westlaw for eight cases.)

56. 8th Cir. L.R. 28A(i) (“Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”).

The court adopted a distinction between published and unpublished opinions on January 1, 1973, and originally prohibited citation to its unpublished opinions in unrelated cases. In 1996, the court amended its rules to allow citation to unpublished opinions if they are persuasive and there is no published opinion on point.

57. This sample did not include any appeals from the District of North Dakota.

58. In 2002, 3,189 cases were filed in the court of appeals for the Eighth Circuit.

Twenty of the appeals were fully briefed. In 23 of the appeals no counseled brief was filed, and in seven of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 12 of these cases. In four cases the citations are only to opinions in related cases; in eight cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Four of the unrelated unpublished opinions cited are by the court of appeals for the Eighth Circuit, two are by courts of appeals for other circuits, two are by Eighth Circuit district courts, three are by district courts in other circuits, and five are by the United States Tax Court.

C8-1. The State of Nebraska cited two unpublished opinions by the court of appeals for the Eighth Circuit in its appellee brief in an unsuccessful pro se prisoner appeal, *Brunzo v. Clarke* (8th Cir. 02-2553, filed 06/14/2002, judgment 03/06/2003), resolved by unpublished opinion at 56 Fed. Appx. 753, 2003 WL 873986. Both of these opinions were issued on rehearings following vacations of published opinions cited by the pro se appellant, but the state cited the opinions for their holdings concerning the constitutionality of disciplinary segregation as well as to show the invalidity of the appellant's authorities.

C8-2. In an unsuccessful appeal that challenged sentencing enhancements based on the victim's vulnerability and the fact that the defendant physically restrained the victim during the offense, *United States v. Brings Plenty* (8th Cir. 02-3971, filed 12/06/2002, judgment 07/08/2003), resolved by published opinion at 335 F.3d 732, both parties cited an unpublished opinion by the court of appeals for the Eighth Circuit. The government cited the opinion in its appellee brief to support a statement that "There appears [to be] only one case in this circuit addressing whether physical restraint enhancement applies in an instance in which a perpetrator dragged his victim from room to room in the course of assaulting her. In that case, this Court upheld the imposition of the physical restraint enhancement." The defendant's reply brief devotes more than a page to a discussion of this opinion, factually distinguishing it and also stating that "since *Sazue* decided the issue before it without discussion, analysis, or citation to authority concerning the issue before this Court, it provides no persuasive value. Therefore, the government's citation of the case is inconsistent with Eighth Circuit Local Rule 28A(i)."

C8-3. In an unsuccessful criminal sentence appeal, *United States v. Gammons* (8th Cir. 02-1003, filed 01/02/2002, judgment 10/02/2002), resolved by unpublished opinion at 47 Fed. Appx. 419, 2002 WL 31175539, the government's appellee brief cites an unpublished opinion of the court of appeals for the Eighth Circuit to support its argument that the defendant's sentence was within the sentencing guidelines range.

C8-4. An employee cited several unpublished opinions in both his appellant brief and his reply brief in his successful appeal of the district court's conclusion that his previous discrimination settlement agreement with his employer barred a challenge to denial of disability retirement benefits, *Seman v. FMC Corp. Retirement Plan* (8th Cir. 02-1883, filed 04/09/2002, judgment 07/01/2003), resolved by published opinion at 334 F.3d 728.⁵⁹ Two of these opinions are by courts of appeals for other circuits, one is by the Eighth Circuit district court from which the case is appealed, and one is by a district court in another circuit.

Both briefs cite an unpublished opinion from the court of appeals for the Tenth Circuit to support an argument that release of an employer from future actions does not necessarily release the employer's benefit plan. The reply brief also notes that a published district court opinion was reversed in part "on other grounds" by an unpublished opinion by the court of appeals for the Sixth Circuit.

The opening brief also quotes an unpublished opinion by the district court for the Eastern District of Louisiana to support the principle that release of an employer only releases the benefit plan if the plan is unfunded so that an action against the plan is really an action against the employer.

The brief cites an unpublished opinion by the district court for the District of Massachusetts and a published opinion by Minnesota's supreme court to support a statement that "a court is to construe a settlement agreement in a manner that reflects the intent of the parties."

C8-5. In an employer's unsuccessful appeal of a remand to state court of a sexual harassment case, *Lindsey v. Dillard's, Inc.* (8th Cir. 02-1455, filed 02/21/2002, judgment 10/07/2002), resolved by published opinion at 306 F.3d 596, the employer cited an unpublished opinion by the district court for the Western District of Missouri, in both its appellant brief and its reply brief, to support the relevance of the amount of a settlement demand to the amount in controversy for jurisdictional purposes.

C8-6. In an unsuccessful pro se prisoner's *habeas corpus* appeal, *Gibson v. Reese* (8th Cir. 02-3030, filed 08/09/2002, judgment 02/10/2003), resolved by unpublished opinion at 55 Fed. Appx. 793, 2003 WL 262491, the government's appellee brief includes in a string citation an unpublished opinion by the district court for the Eastern District of Pennsylvania. The issue concerns applying custody credit for parole revocation to the sentence for the crime that violated the terms of parole.

C8-7. In an unsuccessful pro se appeal of the dismissal of an action to enjoin foreclosure on a mortgage, *Young v. United States Department of Housing and Urban Development* (8th Cir. 02-3117, filed 08/23/2002, judgment 10/20/2003), resolved by unpublished opinion at 78 Fed. Appx. 553, 2003

59. *See on remand*, 2004 WL 329237 (D. Minn. 2004).

WL 22383010, the Department of Housing and Urban Development's appellee brief includes an unpublished opinion by the district court for the Northern District of Texas in a string citation concerning private rights of action against the department under the Fair Housing Act.

C8-8. The Internal Revenue Service cited five unpublished tax court opinions in its appellee brief in an unsuccessful pro se appeal of a judgment denying a tax deduction for law school expenses by a legal librarian, *Galligan v. Commissioner of Internal Revenue* (8th Cir. 02-3734, filed 11/17/2002, judgment 04/15/2003), resolved by unpublished opinion at 61 Fed. Appx. 314, 2003 WL 1877174. The IRS's brief cites two unpublished tax court opinions to support a statement that "The Tax Court has also denied deductions to taxpayers who would have been economically disadvantaged by a switch to the career for which they were newly qualified." The brief includes the other three in a string citation supporting a statement that "Courts have thus routinely disallowed deductions for the law school expenses of taxpayers in any number of law-related occupations."

9. Ninth Circuit⁶⁰

The court of appeals for the Ninth Circuit does not permit citation to its unpublished opinions in unrelated cases.⁶¹

Of the 50 cases randomly selected, 36 are appeals from district courts (10 from the Central District of California; six from the Southern District of California; four from the District of Arizona; three each from the Eastern District of California, the Northern District of California, the District of Nevada, and the Western District of Washington; two from the District of

60. Docket sheets are on PACER. Published opinions are on the court's website and intranet site, and on Westlaw. Unpublished memorandum dispositions are on Westlaw and some are also on the court's intranet site. (Of the 12 cases in this sample resolved by unpublished memorandum dispositions, the memoranda are on the court's intranet site for four cases.) For cases resolved by published opinions or unpublished memorandum dispositions, most briefs are on Westlaw. (Of the 14 cases in this sample with counseled briefs resolved by opinion or memorandum disposition, all briefs are on Westlaw for 10 cases and some briefs are on Westlaw for two cases.)

61. 9th Cir. L.R. 36-3(b) ("Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit, except in the following circumstances. [Enumerated related-case circumstances follow.]").

The court adopted a distinction between published and unpublished opinions on March 1, 1973, and has proscribed citation to its unpublished opinions since then.

Idaho; and one each from the District of Alaska and the District of Montana)⁶² and 14 are appeals from the Board of Immigration Appeals.⁶³

The publication rate in this sample will be either 6% or 8% once all of the cases are resolved. Three of the appeals were resolved by published signed opinions, 12 were resolved by unpublished memorandum opinions published in the *Federal Appendix* (including one with a dissent), 34 were resolved by docket judgments, and one case has not yet been resolved.

Published opinions averaged 2,284 words in length, ranging from 1,632 to 3,108. Unpublished opinions averaged 557 words in length, ranging from 123 to 1,495. Ten opinions were under 1,000 words in length (67%, all unpublished), and eight of these were under 500 words in length (53%).

Eleven of the appeals were fully briefed, but the briefs in one of these cases are under seal, apparently because of trade secrets. In 34 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. All of these are citations to unrelated cases. All of these citations are in briefs, not opinions.

Two of the unrelated unpublished opinions cited are by the court of appeals for the Ninth Circuit, but citation to these opinions may have just been to complete citations to published opinions. The other unrelated unpublished opinions cited are district court opinions, one by a Ninth Circuit district court and three by other district courts.

C9-1. In an unsuccessful appeal of the denial of asylum, *Reyes-Mota v. Ashcroft* (9th Cir. 02-72782, filed 08/29/2002, judgment 09/19/2003), resolved by unpublished opinion at 76 Fed. Appx. 159, 2003 WL 22176700, the petitioner cited a depublished opinion by the court of appeals for the Ninth Circuit. The brief notes that the depublished opinion was superseded by a published opinion and it may be that only citation to the superseding opinion was intended.

C9-2. In a pending case concerning federal sentencing guidelines, *United States v. Murillo* (9th Cir. 02-50200, filed 04/24/2002, judgment pending), the government's appellee brief notes that a cited published opinion by the court of appeals for the Ninth Circuit was amended on denial of rehearing by a published opinion concerning the sentence and an unpublished opinion concerning the conviction.

C9-3. In a successful reopening of an immigration case because of ineffective assistance of counsel, *Algarne v. Immigration and Naturalization Ser-*

62. This sample does not include any appeals from the District of Guam, the District of Hawaii, the District of the Northern Mariana Islands, the District of Oregon, or the Eastern District of Washington.

63. In 2002, 12,365 cases were filed in the court of appeals for the Ninth Circuit.

vice (9th Cir. 02–72045, filed 07/10/2002, judgment 05/20/2003), resolved by unpublished opinion at *Algarne v. Ashcroft*, 65 Fed. Appx. 167, 2003 WL 21186544, the petitioner cited an unpublished order by the district court for the Northern District of California to support a statement that his case was “squarely controlled by” a published opinion by the court of appeals for the Ninth Circuit.

C9–4. The Bureau of Prisons cited three unpublished opinions by district courts in other circuits (one by the district court for the District of Kansas and two by the district court for the District of Minnesota) in an unsuccessful prisoner’s appeal, *Bramwell v. United States Bureau of Prisons* (9th Cir. 02–55516, filed 03/27/2002, judgment 10/27/2003), resolved by published opinion at 348 F.3d 804, *cert. denied*, 125 S. Ct. 45 (2004). The unpublished opinions are listed in the Bureau’s appellee brief in a footnote headed “*accord*” and appended to a string citation of 10 published opinions supporting the Bureau’s main legal argument.

10. Tenth Circuit⁶⁴

The Tenth Circuit disfavors citation to unpublished opinions in unrelated cases, but permits it if they are persuasive and there is no published opinion on point.⁶⁵

Of the 50 cases randomly selected, 46 are appeals from district courts (11 from the District of Utah, 10 from the District of Colorado, eight from the District of New Mexico, six from the Western District of Oklahoma, five from the District of Kansas, four from the Northern District of Oklahoma, and two from the District of Wyoming),⁶⁶ three are appeals from the Board

64. Docket sheets and some opinions are on PACER. (Of the 25 cases in this sample resolved by opinions, the opinions are on PACER for three cases.) Opinions are on the court’s intranet site and on Westlaw. A few briefs are on Westlaw. (Of the 17 cases in this sample that were resolved by opinions and in which counseled briefs were filed, all briefs are on Westlaw for two cases and some briefs are on Westlaw for two cases.)

65. 10th Cir. L.R. 36.3(B) (“Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.”).

Until 1986, the court permitted citations to its unpublished opinions. The court adopted a rule prohibiting citation to its unpublished opinions in unrelated cases November 18, 1986. On November 29, 1993, the court relaxed its rules to permit citation to persuasive unpublished opinions if there is no published opinion on point.

66. This sample did not include any appeals from the Eastern District of Oklahoma.

of Immigration Appeals, and one is an appeal from the Office of Workers' Compensation Programs.⁶⁷

The publication rate in this sample will be from 18% to 22% once all the cases are resolved. Nine of the cases were resolved by published opinions (including one with two concurrences; one with a dissent; and a per curiam en banc opinion with two opinions concurring in part and dissenting in part, one opinion concurring, and one opinion dissenting), 16 were resolved by unpublished orders published in the *Federal Appendix* (13 with the designation "order and judgment"—one with a dissent—and three with the designation "order"), 23 were resolved by docket judgments, and two cases have not yet been resolved.

Published opinions averaged 9,535 words in length, ranging from 2,981 to 33,814. Unpublished orders averaged 1,428 words in length, ranging from 327 to 6,003. Ten opinions were under 1,000 words in length (40%, all unpublished), and five of these were under 500 words in length (20%).

Seventeen of the appeals were fully briefed. In 30 of the appeals no counseled brief was filed, and in three of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 12 of the cases. In three cases the citations are only to opinions in related cases; in nine cases there are citations to unpublished opinions in unrelated cases. In four cases the court cited unrelated unpublished opinions; in five other cases only the parties cited unrelated unpublished opinions.

Of the unrelated unpublished opinions cited by the court in these cases, three are by the court of appeals for the Tenth Circuit and three are by courts of appeals for other circuits. Of the unrelated unpublished opinions cited only by the parties in these cases, eight are by the court of appeals for the Tenth Circuit, three are by courts of appeals for other circuits, six are by district courts for Tenth Circuit districts, and 20 are by other district courts.

C10-1. In a published opinion affirming a drug sentence, *United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003), resolving 02-2290 (filed 10/22/2002, judgment 08/11/2003), the court cited one of its own unpublished opinions and an unpublished opinion by the court of appeals for the Ninth Circuit.

In a discussion of whether the defendant waived his right to counsel in prior misdemeanor prosecutions used to enhance his sentence, the opinion states the following: "There is, however, no precedential authority from this court regarding whether an involuntary or unknowing waiver of counsel causes a 'complete denial of counsel.'" The opinion then cites an unpublished Tenth Circuit opinion with the signal "*but cf.*"

67. In 2002, 2,656 cases were filed in the court of appeals for the Tenth Circuit.

To support the court's determination of which subsection of the sentencing guidelines controls enhancement for a prior sentence to probation and time served, the opinion cites four opinions by other circuits, including an unpublished opinion by the court of appeals for the Ninth Circuit.

C10-2. In a published opinion determining that an immigration judge should have afforded the petitioner's claims of Chinese ethnicity more credibility and evaluated the persecution of ethnic Chinese in Indonesia, *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004), resolving 02-9555 (filed 08/15/2002, judgment 04/27/2004), the court cited unpublished opinions by the courts of appeals for the Tenth and Third Circuits to support a statement that an immigrant's claim for asylum or restriction on removal depends on current conditions: "Subsequent events in Indonesia may well undercut Petitioner's claims."

C10-3. In an unpublished opinion reversing the rescission of Social Security disability benefits, *Jackson v. Barnhart*, 60 Fed. Appx. 255, 2003 WL 1473554 (10th Cir. 2003), resolving 02-5065 (filed 05/20/2002, judgment 03/24/2003), the court cited an unpublished Tenth Circuit opinion as an example of its applying a regulation concerning disability coverage for alcoholism even after other related regulations had been amended.

C10-4. In a case affirming en banc a preliminary injunction against enforcement of drug laws against religious use of a hallucinogenic tea called *hoasca*, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02-2323, filed 12/03/2002, judgment 11/12/2004), resolved by published opinion at 389 F.3d 973, *cert. granted*, 125 S. Ct. 1846 (2005), both the court and the parties cited unpublished opinions.

In an opinion by a two-judge panel staying the preliminary injunction pending resolution of the appeal, the court cited an unpublished opinion by the court of appeals for the Eighth Circuit with a published opinion by the district court for the Northern District of Indiana to support a statement that "Even after enactment of [the Religious Freedom Restoration Act], religious exemptions from or defenses to the [Controlled Substances Act] have not fared well." An opinion concurring with the en banc opinion and an opinion concurring in part and dissenting in part also cite this unpublished Eighth Circuit opinion. The first of these opinions cites the Eighth Circuit opinion for the same reason that the panel opinion does, and the second of these opinions cites it to distinguish it. The government also cited this unpublished Eighth Circuit opinion in its appellant brief to the three-judge panel that initially heard the appeal.

The plaintiffs cited unpublished opinions in both their brief to the three-judge panel that initially heard the appeal and their brief to the en banc court. Their panel brief cites an unpublished Tenth Circuit opinion with a published Sixth Circuit opinion to support a statement that "A party has not carried its burden of proof if it has not persuaded the factfinder."

In a discussion of the standard for a preliminary injunction, their en banc brief cites a different unpublished Tenth Circuit opinion to support the statement that the court has recently affirmed that the proper standard for determining the *status quo* is “the last uncontested status.” In a discussion of the relative weight of preserving the *status quo* and preventing irreparable harm, the brief cites a published Tenth Circuit opinion to support a statement that preservation of the *status quo* eclipses prevention of irreparable harm, and the brief cites an unpublished opinion by the district court for the District of Kansas to support a statement that “Other courts in this circuit have held that the purpose is dual; the prevention of irreparable harm and maintenance of the status quo.”

The government’s en banc reply brief cites the same unpublished Tenth Circuit opinion as cited by the plaintiffs en banc to support a statement that “the only possible conclusion is that the injunction here dramatically changes the status quo.”

C10-5. In a pending appeal of a dismissal of a Colorado state prisoner’s complaint, *Beierle v. Colorado Department of Corrections* (10th Cir. 02-1502, filed 11/13/2002, judgment pending), the prisoner cited four unrelated unpublished opinions—three by the court of appeals for the Tenth Circuit and one by the court of appeals for the Eighth Circuit—to support an argument for the appointment of counsel.

The brief cites two of the Tenth Circuit cases to support a statement that “Although this Court has not addressed in a published opinion the standards applicable to [a request for appointed counsel,] it has indicated in at least two unpublished decisions that if a district court finds that a plaintiff satisfies this Circuit’s standards for appointment of counsel under section 1915(e), the district court must make a ‘good faith effort to find an attorney to represent him.’” The brief cites the third unpublished Tenth Circuit opinion in a string of citations in “accord” with the Supreme Court’s statement that “section 1915 ‘informs lawyers that the court’s requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper,’ and ‘may meaningfully be read to legitimize a court’s request to represent a poor litigant and therefore to confront the lawyer with an important ethical decision.’”

The brief leads a string of citations by other jurisdictions with a citation to the unpublished Eighth Circuit opinion to support a statement that “The majority of courts to have considered the issue . . . have concluded that federal courts have the inherent power to appoint counsel for indigent parties in appropriate civil cases.” In a footnote, the opinion is cited to show that the court of appeals reached a holding in conflict with a published holding by a district court in the Eighth Circuit adverse to the prisoner’s position.

The state cited two of the unpublished Tenth Circuit opinions to rebut them, and the prisoner cited these and the unpublished Eighth Circuit opinion in his reply brief.

C10-6. In an unsuccessful appeal of an unsuccessful claim of age discrimination in employment, *Kaster v. Safeco Insurance Co.* (10th Cir. 02-3386, filed 10/28/2002, judgment 12/03/2003), resolved by unpublished opinion at 82 Fed. Appx. 28, 2003 WL 33854633, the employer's brief includes three unpublished opinions in a string citation of eight opinions supporting a statement that the plaintiff "does not attempt to distinguish the numerous . . . authorities cited by the district court in its Opinion" to support a conclusion that the plaintiff did not establish a *prima facie* case. One of the unpublished opinions is by the court of appeals for the Tenth Circuit, one is by the court of appeals for the Seventh Circuit, and one is by the district court for the Southern District of Florida. The brief also cites an unpublished opinion by the district court for the District of Kansas to support a statement that "the equitable tolling doctrine has never been applied to provide plaintiff with an additional 180 or 300 day time period to file a charge." The plaintiff's reply brief distinguishes the three unpublished opinions that the employer's brief said he had not distinguished.

C10-7. In a pending appeal concerning the constitutionality of requiring a two-thirds supermajority for Utah voters to enact legislation concerning the taking of wildlife, *Initiative and Referendum Institute v. Walker* (10th Cir. 02-4123, filed 07/24/2002, judgment pending), the appellees defending constitutionality cited an unpublished Tenth Circuit opinion as upholding, against a First Amendment challenge, Wyoming's supermajority requirement for initiatives. The plaintiffs' appellant brief distinguishes this opinion and notes in a footnote their previous objection to the defendants' citation to the unpublished opinion, but acknowledges that the district court relied on it.

An *amicus curiae* brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania to support the principle that "individuals interested in wildlife issues in general" are not a discrete and insular minority. The opinion is cited as citing published opinions by the courts of appeals for the Third and Ninth Circuits.

C10-8. In an unsuccessful appeal of a criminal sentence for bank fraud on a plea of guilty, *United States v. Gordon* (10th Cir. 02-4171, filed 09/17/2002, judgment 06/18/2003), resolved by published opinion at *United States v. Osborne*, 332 F.3d 1307 (10th Cir. 2003), the appellant's brief quotes an unpublished opinion by the court of appeals for the Tenth Circuit to support an argument that the sentence should be reduced from 84 months to 70 months to reflect "only the actual checks that were fraudulently made and intended to be cashed," acknowledging that "counsel could not find a Tenth Circuit opinion directly on point."

C10-9. In a tobacco company's partially successful appeal of a multi-million dollar judgment in favor of a smoker who lost both legs as a result of smoking-related peripheral vascular disease, *Burton v. R.J. Reynolds Tobacco Co.* (10th Cir. 02-3262, filed 07/23/2002, judgment 02/09/2005), resolved by published opinion at 397 F.3d 906, both parties, especially the tobacco company, cited unpublished opinions extensively. The tobacco company cited 18 unpublished opinions—one by the court of appeals for the Sixth Circuit, three by the district court for the District of Kansas, and 14 by district courts in other circuits. The plaintiff cited five unpublished opinions—one by the district court for the District of Kansas and four by districts in other circuits.

11. Eleventh Circuit⁶⁸

In the Eleventh Circuit, unpublished opinions are not binding precedent, but they may be cited as persuasive authority.⁶⁹

Of the 50 cases randomly selected, 49 are appeals from district courts (11 from the Southern District of Florida, eight each from the Middle District of Florida and the Northern District of Georgia, six from the Middle District of Alabama, five from the Middle District of Georgia, four from the Southern District of Georgia, and two each from the Northern District of Alabama and the Southern District of Alabama) and one is an appeal from the Board of Immigration Appeals.⁷⁰

The publication rate in this sample is 2%. One of the appeals was resolved by a published per curiam opinion, 19 were resolved by unpub-

68. Docket sheets are on PACER, and they include links to many briefs. (Docket sheets in criminal cases became available electronically December 1, 2004. Of the 23 cases in this sample with briefs, all briefs are on PACER for 11 cases, some briefs are on PACER for seven cases, and no briefs are on PACER for five cases.) Published opinions are on Westlaw. Unpublished opinions issued before April 18, 2005, are not available electronically. Most briefs are on Westlaw. (Of the 20 cases with counseled briefs resolved by opinion, all briefs are on Westlaw for 16 cases, some briefs are on Westlaw for one case, and no briefs are on Westlaw for three cases.)

69. 11th Cir. L.R. 36-2 ("Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.").

At the time the Eleventh Circuit split from the Fifth, unpublished opinions in the Fifth Circuit were precedential. The court adopted a rule designating unpublished opinions non-precedential on April 1, 1987.

70. In 2002, 7,367 cases were filed in the court of appeals for the Eleventh Circuit.

lished per curiam opinions tabled in the *Federal Appendix* (one with a partial dissent), and 30 were resolved by docket judgments.

The published opinion was 679 words in length. Unpublished opinions averaged 1,446 words in length, ranging from 93 to 3,871. Ten opinions were under 1,000 words in length (50%, one published and nine unpublished), and eight were under 500 words in length (40%, all unpublished).

Fifteen of the appeals were fully briefed. In 27 of the appeals no counseled brief was filed, and in eight of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in seven of these cases. In one case the citations are only to opinions in related cases; in six cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Eleventh Circuit, eight are by courts of appeals for other circuits, one is by a district court in another circuit, and one is by New York's supreme court.

C11-1. Both the government and the defendant cited unpublished appellate opinions in an unsuccessful appeal of a sentencing designation of career offender and an order of restitution, *United States v. Martinez* (11th Cir. 02-14267, filed 08/05/2002, judgment 03/18/2004), resolved by unpublished opinion tabled at 99 Fed. Appx. 885, 2004 WL 625765 (published opinion withdrawn on the defendant's successful motion for rehearing).

The government's appellee brief cites an unpublished opinion by the court of appeals for the Eleventh Circuit to support the statement that "as a panel of this Court has observed, an order of 'immediate' restitution may help an inmate earn higher wages while in prison through the Inmate Financial Responsibility Program." The brief also includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of nine opinions—including eight published opinions by the courts of appeals for the Eleventh Circuit, the Sixth Circuit, and two other circuits—supporting a statement that "A deferential standard of review for a district court's factual finding regarding prior offenses was followed before *Buford* [*v. United States*, 532 U.S. 59 (2001),] and, of course, after it."

The defendant's reply brief cites four unpublished federal appellate opinions. These include the same unpublished Sixth Circuit opinion in its rebuttal of the government's string citation. The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit as authority for the standard of review in determining whether the defendant was a career offender. And the brief includes two unpublished opinions—one by the court of appeals for the Second Circuit and one by the court of appeals for the Fourth Circuit—with three published opinions—one by the court of

appeals for the Eleventh Circuit and two by courts of appeals for other circuits—to support a statement that “The failure of the district court’s restitution order in this case to comply with express statutory requirements amounts to plain error.”

C11–2. In an unsuccessful appeal of a conviction for illegal reentry and use of a false passport, *United States v. Urbaz* (11th Cir. 02–11675, filed 03/28/2002, judgment 09/18/2002), resolved by unpublished opinion tabled at 49 Fed. Appx. 289, 2002 WL 31174134, the government cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion by the court of appeals for the First Circuit. The brief cites the unpublished Eleventh Circuit opinion to show that the court has already rejected an argument to overrule a published Eleventh Circuit opinion. The brief cites the unpublished First Circuit opinion in stating that a published Eleventh Circuit opinion adopted its reasoning.

C11–3. In a partially successful securities appeal, *Lockhart Holdings, Inc. v. Doyle Painting Contractors, Inc.* (11th Cir. 02–10295, filed 01/17/2002, judgment 07/03/2002), resolved by unpublished opinion tabled at 45 Fed. Appx. 886, 2002 WL 1676368, both parties cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion by New York’s supreme court.

The appellant’s brief states that the district court relied on the unpublished Eleventh Circuit opinion, which partially affirmed and partially reversed a published opinion by the district court for the Middle District of Georgia, which the brief also cites. The appellee’s brief states that in the unpublished opinion the court affirmed the portion of the lower court’s opinion adverse to the appellant’s argument.

The appellant’s brief states that “the only cases that we have been able to locate on point completely support [the appellant’s] position.” The two opinions cited are a published New York appellate opinion and an unpublished opinion by a New York trial court. In a footnote, the appellee’s brief rebuts the appellant’s reliance on the unpublished opinion.

C11–4. The appellant cites an unpublished opinion in each of its briefs in an appeal dismissed by stipulation concerning an award of attorney fees in an employment discrimination action, *Bogle v. McClure* (11th Cir. 02–14980, filed 09/12/2002, judgment 01/05/2004).

The defendants’ appellant brief twice cites an unpublished opinion by the court of appeals for the Fourth Circuit. First the brief includes the opinion with two Supreme Court opinions in a string citation following a Supreme Court quotation. In a parenthetical, the unpublished opinion is quoted as stating, “in measuring the degree of a plaintiff’s success, ‘only those changes in a defendant’s conduct which are mandated by a judgment . . . may be considered.’” On the following page, the brief cites the same opinion and parenthetically quotes it as stating that “When injunctive relief

is sought and denied, ‘there is even less occasion to permit a change in conduct to serve as the basis for a fee award under § 1988.’”

The defendant’s reply brief invites the reader to compare three opinions justifying reductions in attorney fee awards for unsuccessful claims—a published opinion by the court of appeals for the Seventh Circuit, an unpublished opinion by the district court for the Eastern District of Louisiana, and a published opinion by the district court for the District of Nevada.

C11–5. In an unsuccessful appeal by an employer of an employment discrimination judgment in favor of the plaintiff, and a partially successful cross-appeal by the plaintiff of dismissed claims, *Brewton v. Georgia Department of Public Safety* (11th Cir. 02–14782, filed 09/03/2002, judgment 07/17/2003), resolved by unpublished opinion tabled at 77 Fed. Appx. 505, 2003 WL 21804100, the defendant’s reply brief devotes a 10-line paragraph to a discussion of an unpublished opinion by the court of appeals for the Ninth Circuit in which the court “reversed an outcome-determinative sanction under Rule 37(c) as abuse of discretion.”

C11–6. In an unsuccessful appeal of a drug sentence, *United States v. Tolbert* (11th Cir. 02–11460, filed 04/11/2002, judgment 12/23/2002), resolved by unpublished opinion tabled at 55 Fed. Appx. 901, 2002 WL 31932873, the government’s appellee brief cites an unpublished opinion by the court of appeals for the Ninth Circuit to support an argument for a three-level enhancement.

12. *District of Columbia Circuit*⁷¹

Citation to unrelated unpublished opinions was proscribed before 2002, but is now permitted.⁷² But unpublished district court opinions may not be cited in unrelated cases, and unpublished opinions of other courts of appeals may only be cited as permitted in briefs to those courts.⁷³

Of the 50 cases randomly selected, 30 are appeals from the district court for the District of Columbia, nine are appeals from the Federal Energy Regulatory Commission, three are appeals from the National Labor

71. Docket sheets and disposition orders are on PACER. Published opinions and most unpublished opinions are on Westlaw. (Of the 21 cases in this sample resolved by unpublished opinions, the opinions are on Westlaw for 17.) Published opinions are also on the court’s website. A few briefs are on Westlaw. (Of the 21 cases in this sample with counseled briefs, all briefs are on Westlaw for one case and one brief is on Westlaw for another case.)

72. D.C. Cir. L.R. 28(c)(1). *See id.* R. 28(c)(1)(B) (“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.”).

73. *Id.* R. 28(c)(2).

Relations Board, two are appeals from the Environmental Protection Agency, two are appeals from the Federal Aviation Administration, two are appeals from the Federal Communications Commission, one is an appeal from the Occupational Safety and Health Review Commission, and one is an appeal from the Surface Transportation Board.⁷⁴

The publication rate in this sample will be from 26% to 30% once all the cases are resolved. Thirteen of the cases were resolved by published opinions (11 signed, including two with concurrences, and two per curiam), 21 were resolved by unpublished opinions (including eight judgments, of which six are designated per curiam and all but one of which are published in the *Federal Appendix*, and 13 per curiam orders, of which one is published in the *Federal Appendix*), 14 were resolved by clerk's orders,⁷⁵ and two cases have not yet been resolved.

Published opinions averaged 4,931 words in length, ranging from 2,755 to 10,001. Unpublished opinions averaged 261 words in length, ranging from 21 to 632. Twenty-one opinions were under 1,000 words in length (62%, all of the unpublished opinions and none of the published opinions), and 20 of them were under 500 words in length (59%).

Nineteen of the cases were fully briefed. In 29 of the appeals no counseled brief was filed, and in two of the appeals a counseled brief was filed only for one side. The two cases not yet resolved were held in abeyance before briefing, and briefs may or may not ultimately be filed in those cases.

There are citations to unpublished court opinions in eight of the cases. In three cases the citations are only to opinions in related cases; in five cases there are citations to unpublished opinions in unrelated cases. In one case the court cited an unrelated unpublished order; in four other cases only the parties cited unrelated unpublished opinions.

The unpublished order cited by the court is an unpublished consent decree filed in the district court for the District of Columbia. Of the unrelated unpublished opinions cited only by the parties in these cases, one is by the court of appeals for the District of Columbia Circuit, two are by courts of appeals for other circuits, one is by the district court for the District of Columbia, and two are by district courts in other circuits.

74. In 2002, 1,105 cases were filed in the court of appeals for the District of Columbia Circuit.

75. These are short orders resolving the cases, orders that do not bear the names of the judges to whom the cases have been assigned. We regard these as equivalent to docket judgments in other circuits. Unpublished per curiam orders and judgments, on the other hand, may be as short as clerk's orders, but they bear the names of the judges on the panel to which the cases are assigned. We regard these as equivalent to unpublished opinions in other circuits.

CDC-1. The court cited an unpublished consent decree filed in the district court for the District of Columbia in a successful petition by an environmental organization to have the Environmental Protection Agency reconsider regulations concerning “small municipal waste combustion units,” *New York Public Interest Research Group v. Environmental Protection Agency* (D.C. Cir. 02-1299, filed 09/24/2002, judgment 02/24/2004), resolved by published opinion at *Northeast Maryland Waste Disposal Authority v. Environmental Protection Agency*, 358 F.3d 936 (D.C. Cir. 2004). The consent decree apparently requires the Environmental Protection Agency to promulgate “standards to regulate units with a design capacity of 35 tpd or less” by November 30, 2005.

CDC-2. The appellant cited an unpublished order by the court of appeals for the District of Columbia Circuit in an unsuccessful appeal of the enforcement of an airline’s System Board of Adjustment ruling in favor of an airline pilot who left an aircraft full of passengers rather than begin a flight that would give him a work shift in excess of 16 hours, *Pan American Airways Corp. v. Air Line Pilots Association* (D.C. Cir. 02-7084, filed 07/18/2002, judgment 05/05/2003), resolved by unpublished per curiam judgment at 62 Fed. Appx. 356, 2003 WL 21025273. The unpublished order stayed enforcement of an administrative interpretation of the 16-hour rule. The flight at issue in the selected case occurred 15 months before the court of appeals finally determined the agency’s interpretation—an interpretation that the union favored—was correct in a published opinion also cited in the appellant’s brief.

CDC-3. Both parties cited unpublished opinions in an initially unsuccessful appeal of the district court’s judgment that federal courts did not have jurisdiction over alien prisoners held at Guantanamo Bay, Cuba, *Habib v. Bush* (D.C. Cir. 02-5284, filed 09/11/2002, judgment 07/19/2004), initially resolved by published opinion at *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The Supreme Court vacated the court of appeals’ decision, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), so the court of appeals remanded the case to the district court, *Al Odah v. United States*, 1003 Fed. Appx. 676, 2004 WL 1613572 (D.C. Cir. 2004).

The *habeas corpus* petitioners cited an unpublished opinion by the court of appeals for the Fourth Circuit with a published opinion by the court of appeals for the Fourth Circuit and a published opinion by the district court for the Eastern District of Virginia in a footnote supporting a statement that “The United States prosecutes crimes committed in Guantanamo—including crimes committed by aliens—because the enclave is ‘within its territorial jurisdiction.’” Their reply brief cites the same Fourth Circuit opinions to support a statement that “The United States, of course, has long taken the position that Guantanamo Bay is within the ‘territory’ and ‘territorial jurisdiction’ of the United States. Under the terms of the

lease, Guantanamo Bay is subject to the ‘complete jurisdiction and control’ of the United States. [Citation.] When it suits them, the federal government relies upon this language for its contention that crimes committed on Guantanamo Bay are ‘within its territorial jurisdiction.’”

The petitioners’ opening brief also cites an unpublished opinion by the district court for the Southern District of New York with published opinions by the court of appeals for the Ninth Circuit and the district courts for the District of Massachusetts, the Southern District of Florida, and the Northern District of California in a footnote supporting a statement that: “Arbitrary detention violates customary international law and is within [Alien Tort Claims Act] jurisdiction.” An *amicus curiae* brief cites the same unpublished opinion as the first of six opinions cited to support a statement that: “U.S. courts have repeatedly held that arbitrary detention violates international law.”

CDC-4. The petitioner cited an unpublished opinion by the court of appeals for the Sixth Circuit in a successful appeal of the Surface Transportation Board’s refusal to set aside arbitrators’ finding that outsourcing was causally related to a railroad merger, *Union Pacific Railroad Co. v. Surface Transportation Board* (D.C. Cir. 02-1340, filed 11/08/2002, judgment 02/03/2004), resolved by published opinion at 358 F.3d 31. The brief cites the unpublished Sixth Circuit opinion to support a statement that “Although no Court has confronted the issue directly, at least one court assumed, without analysis, that judicial review is limited to whether the Board properly applied *Lace Curtain*[, *Chicago and North Western Transportation Co.* (“*Lace Curtain*”), 3 I.C.C. 2d 729 (1987), affirmed *sub nom. International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988)].”

CDC-5. The appellant cited unpublished opinions by the district courts for the District of Columbia and the Eastern District of Michigan in an unsuccessful appeal of a refusal to enjoin the termination of employees, *Drivers, Chauffeurs, and Helpers Local 639 v. District of Columbia Public Schools* (D.C. Cir. 02-7082, filed 07/17/2002, judgment 09/17/2003), resolved by unpublished per curiam judgment at 2003 WL 22204128 (finding no error in the district court’s determination that the school district’s transformation plan was a legitimate reduction in force). The union’s appellant brief cites four opinions—three published opinions by courts of appeals for other circuits and one unpublished opinion by the district court for the District of Columbia—to support a statement that: “Deprivation of health insurance alone has been viewed by other courts as irreparable injury.” And in an argument that the school district’s incompetence rose to a violation of due process, the brief quotes a paragraph from a Supreme Court opinion and then invites the reader to “*see, e.g.,*” an unpublished opinion by the district

court for the Eastern District of Michigan and a published opinion by the district court for the Western District of Michigan.

*13. Federal Circuit*⁷⁶

The Federal Circuit does not permit citation to unpublished opinions in unrelated cases.⁷⁷

Of the 50 cases randomly selected, 12 are appeals from district courts (two from the Northern District of Illinois and one each from the Northern District of California, the Northern District of Florida, the Southern District of Florida, the Eastern District of Louisiana, the District of Massachusetts, the District of New Jersey, the Southern District of New York, the Northern District of Ohio, the Eastern District of Texas, and the Southern District of Texas), eight are appeals from the Court of Federal Claims, 16 are appeals from the Court of Appeals for Veterans Claims, one is an appeal from the Board of Patent Appeals and Interferences, one is an appeal from the Trademark Trial and Appeal Board, and 12 are appeals from the Merit Systems Protection Board.⁷⁸

The publication rate in this sample is 10%. Five of the cases were resolved by signed published opinions, 21 were resolved by unpublished opinions published in the *Federal Appendix* (13 signed, of which 11 are designated “orders,” and eight per curiam, of which four are designated “decisions”), and 24 were resolved by the equivalent of docket judgments (20 dismissal orders and four affirming judgments without opinion), all but one of which are published in the *Federal Appendix*.

Published opinions averaged 6,895 words in length, ranging from 2,124 to 19,084. Unpublished opinions averaged 692 words in length, rang-

76. Docket information is available through PACER. All opinions and almost all orders resolving cases are on Westlaw. The only exception in this sample is a dismissed appeal from the Court of Appeals for Veterans Claims. Briefs are not on Westlaw for appeals from the Merit Systems Protection Board, but they are on Westlaw for most other cases. (Of the 12 cases in this sample that were not appeals from the Merit Systems Protection Board and in which counseled briefs were filed, all briefs are on Westlaw for eight cases, some briefs are on Westlaw for two cases, and no briefs are on Westlaw for two cases.)

77. Fed. Cir. L.R. 47.6(b) (“An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent.”).

The court’s original local rules, adopted October 1, 1982, distinguished published and unpublished opinions and proscribed citation to the latter in unrelated cases.

78. In 2002, 1,793 cases were filed in the court of appeals for the Federal Circuit.

ing from 53 to 3,074. Seventeen opinions were under 1,000 words in length (65%, all unpublished), and 10 of these were under 500 words in length (38%).

Twelve of the appeals were fully briefed. In 28 of the appeals no counseled brief was filed, and in 10 of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in eight of the cases. In three cases the citations are only to opinions in related cases; in five cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Of the unrelated unpublished opinions cited by the parties in these cases, one is by the court of appeals for the Federal Circuit, three are by district courts, one is by the Court of Federal Claims, and one is by a state appellate court.

CF-1. In an unsuccessful pro se appeal by a former employee of Clark Air Force Base in the Philippines of a decision by the Merit Systems Protection Board that the Whistleblower Protection Act does not provide relief for former employees, *Guzman v. Office of Personnel Management* (Fed. Cir. 02-3173, filed 03/19/2002, judgment 12/17/2002), resolved by unpublished decision at 53 Fed. Appx. 927, 2002 WL 31863832, the government cited an unpublished Federal Circuit opinion to point out that the petitioner should not have cited it, because the court forbids citations to its unpublished opinions, and to point out that it would support the government's position anyway.

CF-2. In a voluntarily dismissed patent appeal concerning methods of using the telephone to control other devices, *Glenayre Electronics, Inc. v. Jackson* (Fed. Cir. 02-1537, filed 08/13/2002, judgment 05/29/2003), resolved by unpublished order at 66 Fed. Appx. 875, 2003 WL 21377730, the inventor—the defendant and appellant—cited an unpublished opinion by the district court for the Northern District of Illinois, the district from which the case was appealed. The inventor appealed the district court's refusal to permit him to file counterclaims against the plaintiff's customers. The brief cites the unpublished opinion to support a statement that "the district court abused its discretion by failing to accord appropriate consideration to the fact that none of [the plaintiff's] customers has agreed to be bound by a judgment against [the plaintiff]." The defendant's brief quotes a published opinion by the district court for the Western District of Pennsylvania, and the quotation includes a citation to an unpublished opinion by the district court for the District of Massachusetts.

CF-3. In an appeal by the FDIC that challenged its dismissal for lack of standing as a plaintiff in an action challenging the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 as breaching contracts with banks, *Federal Deposit Insurance Corp. v. United States* (Fed. Cir. 02-

5104, filed 04/19/2002, judgment 07/25/2003), resolved by unpublished order dismissing the appeal as moot, *WestFed Holdings, Inc. v. United States*, 70 Fed. Appx. 589, 2003 WL 21774148 (Fed. Cir. 2003), the FDIC cited an unpublished opinion by the district court for the Eastern District of Louisiana and an unpublished opinion by the Court of Federal Claims. Its brief cites the Eastern District of Louisiana opinion and a published opinion by the court of appeals for the Fourth Circuit to support a statement that “the FIRREA limitations period is tollable by agreement, the terms of which agreements will be enforced.” The brief cites the unpublished opinion by the Court of Federal Claims as collecting cases relevant to the brief’s statement that “Whether due diligence has been exercised is determined on a case-by-case basis.”

CF-4. In an unsuccessful appeal of a finding of infringement of patents for enteric coating of pills to protect them from stomach acid, *Astra Aktiebolag v. Cheminor Drugs, Ltd.* (Fed. Cir. 03-1135, filed 12/04/2002, judgment 12/11/2003), resolved by unpublished opinion at *In re Omeprazole Patent Litigation*, 84 Fed. Appx. 76, 2003 WL 22928641 (Fed. Cir. 2003), the plaintiffs’ appellee and cross-appellant brief cites an unpublished opinion by the district court for the District of Delaware in order to distinguish the opinion, because it was cited by defendants in consolidated cases.

CF-5. In an unsuccessful appeal of summary judgment in favor of the government in an action challenging the denial of a logging permit as an unconstitutional taking, *Seiber v. United States* (Fed. Cir. 03-5010, filed 11/01/2002, judgment 04/19/2004), resolved by published opinion at 364 F.3d 1356, the government cited an opinion by California’s court of appeals that originally was published, but, as the government’s brief acknowledges, was ordered depublished by California’s supreme court. The opinion is cited as an example of a court specifically recognizing “that the doctrine of public ownership of wildlife represents a ‘background principle’ of property law which bars a taking claim based on regulations designed to protect wildlife from harm.”

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Russell R. Wheeler

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.