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The Appellate Judges Speak

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THE PHILIP D. REED LECTURE SERIES
CITATION OF UNPUBLISHED OPINIONS
PANEL DISCUSSION
THE APPELLATE JUDGES SPEAK*

PANELISTS

Hon. Edward R. Becker

Judge, United States Court of Appeals for the Third Circuit

Hon. Michael Boudin

Chief Judge, United States Court of Appeals for the First Circuit

Hon. Pierre N. Leval

Judge, United States Court of Appeals for the Second Circuit

MODERATOR

Professor Patrick Schiltz

St. Thomas University School of Law

Reporter to the Judicial Conference

Advisory Committee on Appellate Rules

PROFESSOR CAPRA:** I would like to welcome you to the panel tonight on the citation of unpublished opinions. This is presented by the Philip D. Reed Chair. Our topic tonight is what to do with and how to deal with unpublished opinions by appellate courts, specifically the merits of allowing them to be cited by litigants, and more generally the usefulness of an opinion that is labeled “not for publication.” As we will see tonight, the topic of unpublished opinions has created significant controversy within the federal courts.

* This Panel Discussion was held on February 17, 2005, at Fordham University School of Law. The text of the Panel Discussion transcript has been lightly edited.

** Professor Daniel J. Capra is the Philip D. Reed Professor of Law at Fordham University School of Law.

We are extremely lucky to have an unbelievable panel to discuss this question. It is my pleasure to provide a short introduction for each of the panelists, although it is not really that short because they have done so much.

I will start with Judge Edward Becker. Edward Becker is a graduate of Yale Law School. After thirteen years of private practice in Philadelphia, he was appointed to the United States District Court for the Eastern District of Pennsylvania in December 1970, so that gives him thirty-four years on the bench. In January 1982 he was named to the United States Court of Appeals for the Third Circuit and he served as Chief Judge from 1998-2003. If you are down in Philadelphia, you should go to the courthouse to see the beautiful new Edward R. Becker Lobby of that federal courthouse, a testament to Judge Becker's impact on the Third Circuit.

In addition, Judge Becker has been active with the Judicial Conference of the United States, serving as a member or chair of numerous committees and with the ALI¹ and ALI/ABA² Committee on Continuing Professional Education. He has written a ton of law review articles.

He has received a number of awards. The most important one that I know of, and I was happy to be there for that time, was the Edward J. Devitt Distinguished Service to Justice Award, awarded at a special ceremony at the Supreme Court and given by Justice Breyer and Senator Specter. He has an honorary LLD from Temple University.

I guess I would just end this introduction by saying he has affected my career in a number of positive ways: first, his contributions to the federal law on evidence are really unparalleled in the federal judiciary, and that is indicated in the tribute to Judge Becker and his career in the *University of Pennsylvania Law Review*.³ His efforts led to the reconstitution of the Judicial Conference Advisory Committee on Evidence Rules, for which I have the honor of serving as Reporter. When he was Chief Judge, he appointed me as Reporter to the Task Force on Appointment of Counsel in Class Actions. And if ever I have an evidence question that I just cannot figure out, I know I can call Judge Becker. I am particularly touched that he came here today, as he has not been feeling very well the last few days, but he wouldn't miss this argument for the world. I know that to be the case.

Our next panelist is Judge Michael Boudin, Chief Judge of the First Circuit Court of Appeals. He is a graduate of Harvard Law School, where he served as President of the *Harvard Law Review*. He served as a law clerk to Judge Henry Friendly and then to Justice Harlan. I guess you couldn't do a whole lot better than that.

1. American Law Institute.

2. American Bar Association.

3. Marci A. Hamilton, *Chief Judge Edward R. Becker: A Truly Remarkable Judge*, 149 U. Pa. L. Rev. 1237 (2001).

He was an associate and then a partner at Covington & Burling from 1966-1987. From 1987-1990 he served as Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice. In 1990 he was appointed a United States District Judge of the District of Columbia. After two years as a trial judge, he was appointed to the First Circuit Court of Appeals, where he has been Chief Judge since 2001.

Judge Boudin is a member of the Executive Committee of the Judicial Conference and has previously served as a valued member of the Judicial Conference Standing Committee on Rules of Practice and Procedure. Having attended all of those meetings during Judge Boudin's tenure, I found it remarkable that, among all the stars that were at that table, it was Judge Boudin's comments that usually had the most impact. He was the cause of many extra hours of work on my part, I must say, because I knew that, while I could slide some technical thing past most of the Committee, he would have me on those. So many pleasant hours of work, Judge.

Judge Boudin has also taught at Harvard and Penn Law Schools, including the course on evidence. His evidence opinions for the First Circuit, which I know very well, are particularly thorough, insightful, and influential, and I am happy to have him here today.

Our third panelist is Judge Pierre Leval, a judge of the Court of Appeals for the Second Circuit. At the time of his appointment in 1993, he was a United States District Court Judge in the Southern District of New York.

Judge Leval graduated magna cum laude from Harvard Law School, where he served as Note Editor of the *Harvard Law Review*. He served in the U.S. Army in 1959. He was a Law Clerk for Judge Henry Friendly, so you have a pattern here I guess. Judge Leval was an Assistant U.S. Attorney in the Southern District of New York from 1964-1968, serving there as Chief Appellate Attorney from 1967-1968. From 1969-1975 he was in private law practice at the Cleary Gottlieb firm, and then he joined the New York County District Attorney's Office in 1975, where he served as First Assistant District Attorney, subsequently as Chief Assistant District Attorney. In 1977, he was appointed to the United States District Court for the Southern District of New York.

His medals and honors are unbelievable, but to talk about just a couple of them: the Donald Brace Memorial Lectureship by the Copyright Society of the United States and the Fowler Harper Memorial Fellowship of Yale Law School. We are definitely thankful to have him here to express the Second Circuit's view on this point.

Our final panelist and our moderator tonight is Professor Patrick Schiltz, the St. Thomas More Chair of Law at the University of St. Thomas Law School in Minneapolis.

He graduated magna cum laude from Harvard Law School, where he served as Editor of the *Law Review*. He clerked for Judge Antonin Scalia on the D.C. Circuit and then served as Justice Scalia's first law clerk when he was appointed to the Supreme Court.

Professor Schiltz entered private practice at a major firm in Minneapolis and then he was appointed to the faculty of Notre Dame. In July 2000, Professor Schiltz left Notre Dame to become the Founding Associate Dean of the University of St. Thomas Law School, where he was basically responsible for starting the school and building the beautiful building, which, if you are in Minneapolis, I'm sure he would be happy to give you a tour. It is a wonderful place.

During all of this time he has been a prolific scholar, publishing a number of important articles, particularly in the area of professional responsibility. And even more importantly, he serves as the Reporter to the Advisory Committee on Appellate Rules, and it is that Committee's proposal that starts our discussion tonight.

The format for tonight's discussion is an introduction to the problem by Professor Schiltz, commentary by each of the judges, then an open panel discussion, and then we will leave it open for questions.

Now I turn it over to Professor Schiltz.

PROFESSOR SCHILTZ: Thank you.

As Professor Capra said, I serve as the Reporter to the Advisory Committee on Appellate Rules. We are here tonight to talk about an issue that has been on the agenda of the Advisory Committee since 1991.⁴ Fourteen years now this has been on our agenda, and it has become one of the most controversial issues ever in the history of federal rulemaking.

The issue is the citation of unpublished opinions. What I am going to do tonight is spend about ten minutes or so introducing the issue and then turn the floor over to the distinguished judges who are here tonight.

In the last fiscal year, the federal courts of appeals disposed of 27,438 cases on the merits after the submission of briefs. In general, the dispositions of the appellate courts can be categorized in one of three categories.

The first category is the dispositions that are accompanied by a published opinion; that is, an opinion that is published in the *Federal Reporter* and that all the circuits would agree is binding precedent. Of the 27,000-plus cases disposed of last year, only about 5100, less than twenty percent, resulted in a published opinion.

The second category is dispositions that are accompanied by an unpublished opinion; that is, an opinion that is not published in the *Federal Reporter* and that most circuits regard as not binding on the circuit. Of course, the phrase "unpublished opinions" is a misnomer, especially now with the *Federal Appendix*, because these opinions are published, not only in the *Federal Appendix* but in numerous other sources, but it has become a term of art to refer to these as unpublished opinions, and we will do that

4. The Judicial Conference approved an amended version of Rule 32.1 in September 2005.

tonight. Of the 27,000-plus cases that were disposed of last year, more than 21,000, just under eighty percent, resulted in unpublished opinions.

The third category is the smallest; that is, dispositions that are not accompanied by any opinion. These dispositions are often referred to as “judgment orders.” They are essentially one-line orders where the court of appeals simply says, “We affirm the decision below, period.” The court does not give any reasons for its action, published or unpublished. Of the 27,000-plus cases disposed of last year, only about 800, or three percent, were disposed of with judgment orders.

Now, this evening our focus will be on the second category of cases, on unpublished opinions. I should make it clear up front that we will not be discussing, at least directly, what is generally referred to as the *Anastasoff*⁵ issue. *Anastasoff* was an opinion of the Eighth Circuit from the year 2000 written by Judge Richard Arnold, in which he held that Article III of the Constitution requires federal courts to treat all of their opinions, published or unpublished, as binding precedent.

Anastasoff itself was later vacated as moot and, although it has generated a lot of debate among judges and scholars, it is not what we are here to talk about tonight. Instead, tonight we will focus on the citation of unpublished opinions. To put the matter simply, we are going to discuss whether an attorney who submits a brief to, say, the Second Circuit, can cite in that brief an unpublished opinion of the Second Circuit.

This question is not addressed anywhere in the Federal Rules of Appellate Procedure, it is not addressed in any of the Federal Rules of Practice and Procedure; instead, it is addressed in the local rules of the circuits. None of those local rules altogether prohibit the citation of unpublished opinions. All the circuits allow unpublished opinions to be cited for what might be called “case-specific reasons.” For example, an attorney wants to argue collateral estoppel or *res judicata*, or an attorney wants to argue double jeopardy. All the circuits say that it is okay to cite unpublished opinions for that.

Where the circuits diverge is in the degree to which they allow unpublished opinions to be cited for what are called “persuasive reasons.” A party who cites an opinion for its persuasive value cites the opinion for the same reason that the party might cite the opinion of a district court judge or a foreign court, not because the opinion binds the federal court of appeals, but because the attorney hopes that the court of appeals will be persuaded by the opinion, its reasoning, or its ruling, to rule in a particular way.

Now, the circuits are divided almost in thirds on this issue, on whether unpublished opinions can be cited for their persuasive value. Four circuits, including the Second on which Judge Leval sits, take a very restrictive approach: Essentially they ban the citation of unpublished opinions for their persuasive value.

5. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000).

Four other circuits, including the Third on which Judge Becker sits, take a very liberal approach: They permit the citation of unpublished opinions pretty much without restriction. So, in these circuits, unpublished opinions are treated the same as citing state court opinions or law review articles or newspaper columns or anything else that might inform the court but does not bind the court.

The other five circuits, which include the First on which Chief Judge Boudin sits, take a middle approach: Like the Second Circuit, and unlike the Third Circuit, these circuits do single out unpublished opinions for unfavorable treatment, but they do not completely bar the citation of unpublished opinions. Instead, what they generally do is they say to attorneys, "We discourage you from citing unpublished opinions, but if you have an unpublished opinion that either addresses an issue that none of our published opinions do, or addresses it better than any of our unpublished opinions do, you may cite it." So that is sort of where the courts fall in line in those three categories.

Now, as I said a moment ago, the issue of unpublished opinions has been on the study agenda of the Advisory Committee since 1991. It was added to my Committee's study agenda in 1991 at the behest of the Federal Court Study Committee, which, after a massive study of the federal courts, expressed concern, among many, many other things, about the many problems created by non-publication policies and non-citation rules.⁶ It was also added to our agenda at the behest of what was known as the Local Rules Project, which recommended that unpublished opinions should be guided by consistent national standards, rather than by the array of conflicting local rules that I have just described.

After being put on the Committee's study agenda in 1991, this issue languished there for seven years until 1998, when the Advisory Committee voted not to pursue the issue, to drop it, to take it off the agenda. The Committee did so after the Chair of the Committee surveyed the chief judges of the circuits, and they were almost unanimous, and on the whole quite passionate, in expressing their opposition to any rulemaking on the topic of unpublished opinions. So my Committee essentially said, "Fine, we are not going to even try then."

After about a thirty-month hiatus, the issue of unpublished opinions was put back on the Advisory Committee's agenda by the Solicitor General of the United States, who serves as a member of the Committee. And although the Chair of the Committee at that time and I both argued to the Committee that it should not proceed with the suggestion because less than three years earlier the chief judges of the circuits had told us quite adamantly that they were opposed to rulemaking on this, we were in the

6. Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 107th Cong. 7 (2002) (statement of Judge Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit) ("[N]on-publication policies and non-citation rules present many problems." (internal quotation omitted)).

minority, and the Committee decided to go ahead with the Solicitor General's recommendation.

That eventually resulted in Proposed Rule 32.1,⁷ which is available in your materials. I should stress two things about Rule 32.1.

The first thing I need to stress is it is a very narrow rule. The only thing Proposed Rule 32.1 does is it says that the circuits have to allow parties to cite unpublished opinions. The Rule says nothing about what the circuits must do when those opinions are cited. The Rule explicitly takes no position on the *Anastasoff* issue—that is, on the question of whether unpublished opinions must be treated as binding—and the Rule does not require any circuit to issue a published opinion, nor issue an unpublished opinion. Circuits can do what they want. All the Rule says is that the circuits have to allow these opinions to be cited in the briefs.

The second thing I should stress is that Rule 32.1 is very controversial. It was published for comment in August of 2003. When the notice and comment period ended in February of 2004, we had received 513 written comments on the Rule, the second-most comments received in the history of federal rulemaking. Not only were the comments notable for their great number, but they were also notable for their passion. People felt very strongly. You need only review a few of the comments, comments that were not infrequently marked by anger, by sarcasm, by apocalyptic predictions of what would happen if the Rule passed, by *ad hominem* attacks on the members of the Committee, and even the Reporter—

JUDGE BECKER: Excuse me, Professor, would you tell the audience whether there was a notable geographic pattern of the source of the overwhelming number of the comments?

PROFESSOR SCHILTZ: No, I won't right now.

[Laughter.]

But I have a question—you are anticipating one of the questions I will ask the panel.

JUDGE BECKER: Well, I will tell everybody. It was from the Ninth Circuit.

PROFESSOR SCHILTZ: Which we respect and esteem. About seventy-five percent of all the comments and about eighty percent of the comments against it came from the Ninth Circuit. More later on that.

To understand the depth of feeling about this, you do not even have to read the comments; you can just read the dozens of law review articles that have been published in the last couple years about this issue.

In one recent article, for example, Judge Alex Kozinski of the Ninth Circuit, a highly respected judge on the Ninth Circuit and the leader of the anti-Rule 32.1 forces, compared unpublished opinions—which, remember, are the official public acts of Article III judges—to sausage that is unfit for

7. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony A. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure 28-29 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf>.

human consumption.⁸ And he argued that attorneys who cite unpublished opinions as if they were published opinions are guilty of a particularly insidious form of fraud on the court.⁹

Matching heated rhetoric with heated rhetoric, Lawrence Fox, who is a highly respected attorney and a supporter of Rule 32.1, responded to Judge Kozinski by saying that the reasons that he and other judges give in opposition to Rule 32.1 are “heretical,” and he even suggested that judges who bar citation may not be acting ethically.

Now, one reason why this issue has proven so controversial, I think, is that its supporters and its opponents both start from very different first principles. They have very different views on what is normal or natural, and therefore they have very different views about who is it that, if you will, has the burden of proof, who has the case to prove here.

Those who favor Rule 32.1 argue, for example, that government officials, including judges, who are government officials, generally cannot bar citizens from saying things, particularly things about the official public actions of those government officials, without some compelling reason. Or they say that, generally speaking, the government cannot tell attorneys how to represent their clients, again without compelling reason. So, for supporters of Rule 32.1, it is the opponents who have the burden of proof; it is the people who support local restrictions on the citation of unpublished opinions who have to come up with the compelling reasons for doing so.

The world looks different to those who oppose Rule 32.1. They start from the premise that a court of appeals should be free to decide how to handle its judicial business as it sees fit, unless there are compelling reasons to stop it from doing so. They say, “It is not the job of the Rules Committee to tell us how to run our circuits, it is not their job to tell us how to get our work done, and particularly at this point in time, when we are struggling to deal with increasing caseloads with diminishing resources, when each circuit needs to decide, given the local conditions of that circuit, how best to handle its business. What’s wrong here is the National Advisory Committee telling us how to run our circuits. Only if they can come up with compelling reasons should they be allowed to do so.” So, for opponents of Rule 32.1, it is the supporters of the Rule who have the burden of proof, who have to come up with a good reason for depriving circuits of their autonomy.

8. Letter from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 2 (Jan. 16, 2004) (“When the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.”).

9. Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 15 (2002) (statement of Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit) (“[T]he prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance.”).

So the question for this evening is this: Do such compelling reasons exist? Are there compelling reasons to bar altogether or restrict the citation of unpublished opinions or, alternatively, are there compelling reasons to amend the Appellate Rules to force the circuits to allow attorneys to cite the circuit's own unpublished opinions back to them?

For three different perspectives on these questions, we now turn to our panel, beginning first with Judge Becker.

JUDGE BECKER: Thank you, Professor Schiltz.

As you will see, I do not understand all the *Sturm und Drang*. For me it is not passionate, it is a matter of plain, simple logic. I support the adoption of Rule 32.1 as described by Professor Schiltz. I will not discuss the Draft Committee Note. Rather, I will limit myself to an accounting of the Third Circuit experience, to comments on the objections raised to the Proposed Rule 32.1, and the reasons that I favor the Proposed Rule.

First, a matter of nomenclature. I am not going to use the phrase "unpublished opinions." As Professor Capra said, there ain't no such thing—everything is published now. We put all of what we formerly called unpublished opinions on the Web so anybody can get them. They are all published. We refer to them as non-precedential opinions ("NPOs"). Speaking only for myself, that being the supreme affectation of an appellate judge, I think that is a better nomenclature.

Notwithstanding the *Sturm und Drang*, citations to NPOs in the Third Circuit are not frequent. We have permitted them for years and years and years. Such citation has never created a problem for us. To the contrary, when NPOs are cited, and they are from time to time, they have often been useful in a number of respects.

First, they give us the benefit of the thinking of a previous panel and help us to focus on or think through the issues. For busy judges this is a great boon.

Second, they identify issues on which we should be writing a precedential opinion. When an issue has been dealt with in an NPO and comes up again, or again and again, that is a signal that we need to clarify the law precedentially. There is a suggestion in the Committee materials, the voluminous Committee materials, if you can look at them, that in *United States v. Rivera-Sanchez*,¹⁰ the Ninth Circuit admitted that various panels had issued at least twenty unpublished opinions resolving the same unsettled issue of law at least three different ways before any precedential opinion addressed the issue. Once or twice is too much. But if people can cite NPOs to you, then you know there is an issue, there is a problem, and you can clarify the law and save the lawyers and judges a lot of time.

Third, citations to NPOs also help district judges in the same way that they help us. District judges know they are not bound by NPOs, they are judges of Article III, and they exercise independent judgment.

10. 222 F.3d 1057 (9th Cir. 2000).

Now, I do acknowledge early on that there is one chink in the armor of the Third Circuit, to my chagrin, and I am in the minority on this. We do not cite non-precedential opinions in our opinions. Let me correct that. Although lawyers can cite them to us and we consider them, we do not cite our own non-precedential opinions in our opinions. I cite non-precedential opinions of other circuits or unpublished opinions of district courts, but because of the protocols that we agreed to in our retreat, I yielded and said, "Okay, we won't cite our own," which I guess is a way of saying that we are not being bound by *Anastasoff*—i.e., that we are not precedentially bound by those opinions.

Now, let me turn to the Third Circuit practice in connection with NPOs. We write on every counseled case. Eighty percent of our opinions—and I think it is pretty similar to the national average—are NPOs. Most of our opinions are not cursory, they are not sausage, they are not a fraud on the public.

I love Judge Kozinski, he's got Philly roots, his wife is from Philadelphia, he's a charming guy, but I can't imagine a judge of the Third Article describing judicial work product of your own circuit, an opinion that decided a case, as sausage and a fraud on the public. I mean it's just typical. He wasn't serious. It's just rhetoric, it is just excess, and it reflects the politicization of this issue, which has caused it to be delayed for so long, which is the source of the huge outpouring of support for Judge Kozinski's position from the district judges and lawyers of the Ninth Circuit, and it is very unfortunate.

Our NPOs are not cursory. They average over seven pages. Because they are primarily written for the parties, they often or usually do not set forth all the facts, but some NPOs do and are fairly comprehensive. At all events they uniformly set forth the *ratio decidendi* of the decision. These opinions are prepared in chambers under the close supervision of the judge. They may be drafted by clerks, although actually in my chambers I draft them myself. Why do I draft them myself? If I gave them to a clerk, they would spend too much time on them, you know, I'd get a great big, long thing. So I do them myself and I get a short, succinct opinion, and then I give them to the clerks and let them edit them. But whoever does them, they are carefully reviewed and edited by the judge, and they are sufficiently lucid that their citation can be valuable.

All of our NPOs in counsel cases, as I said, are placed online and, hence, are reported in the *Federal Appendix*. We have not been placing our pro se cases online, but I believe that sometime in the spring, under a federal act whose name someone will supply me with will require us to put those online as well.

PROFESSOR SCHILTZ: The E-Government Act.¹¹

JUDGE BECKER: That will have some stuff that will not be all that useful to lawyers, but nonetheless we are going to have to do it.

11. 44 U.S.C.A. § 3501 (2004).

Now, let me contrast our practice with comments made to the Committee about practice elsewhere. I refer to representations that: (1) unpublished opinions are hurriedly drafted by staff and clerks and are written in loose, sloppy language; (2) because they receive little attention from judges, these opinions often contain statements of law that are imprecise and inaccurate; (3) judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself; (4) citing unpublished opinions might mislead lower courts and others about the view of its circuit's judges; and (5) it will be the rare unpublished opinion that will precisely and comprehensively describe the views of any of the panel's judges. These comments reflect the views of the Ninth Circuit, where the principal complaints about Rule 32.1 come from, and they should not be proud of these accounts.

But they do not reflect the practice of the Third Circuit, where the judges are involved. Indeed, we often do dissents and concurrences from NPOs, and when we do that we circulate them, because we have a prefiling circulation practice, and we circulate them to the full court.

The judges, notwithstanding the representations elsewhere, do not consider NPOs a burden. They do not take that much time to prepare. There is no delay in processing. They are typically filed promptly after the regularly scheduled disposition date. Most are on non-argued cases, but many are on argued cases.

Now let me turn to the criticisms of the citations of NPOs. First, the judges' time, that NPOs are burdensome to prepare. I do not think so, as I have said. Is there a moral obligation to distinguish NPOs in opinions? I don't think so. We do not have to distinguish every precedential case in our opinions, and we do not do so.

Are too many NPOs cited? As I have said, it is not our experience. Our bar is responsible. It does not want to waste its time or our own. If a useless case is cited, it takes a nanosecond to discover that fact and the citation is ignored.

Is there undue consumption of the lawyers' time? I do not think so. Same considerations at work. It doesn't take them long to discard an NPO of no utility. But if they find one that is persuasive, then it is worth the time.

And how about the argument of bloating of the *corpus juris*? Well, that is beyond our control. NPOs are online in the *Federal Appendix*. Congress has passed the E-Government Act. The bottom line is the lawyers want them, the market has spoken, and there is nothing we can do about it. And, indeed, NPOs help lawyers in other ways. NPOs can help lawyers in evaluating a case for settlement purposes. That is something that appellate judges do not think about much.

And what about the rationale of Rule 32.1? The citation issue was not a real one for us until we jettisoned our former practice of deciding about half our cases by judgment orders, or at least forty percent, and Professor Schiltz

described them as essentially one-line dispositions. In most of these cases, there was no oral argument.

When I became Chief Judge of the Third Circuit in 1998, I persuaded my colleagues that we owe a greater duty to our colleagues of the bar and to their clients. You represent the appellants, you do not get oral argument, you get a one-line disposition—boom! “Affirmed.” You are out. I viewed it as a matter of respect. I viewed the change as a matter of respect for the bar, respect for our profession. I mean, judges are nothing but lawyers with robes on, a robe and a commission, and lawyers are part of our profession. I think we owe respect to our profession. I also viewed it not just as a matter of respect for our profession, but as a matter of responsibility and accountability. My colleagues agreed, and we ceased writing judgment orders and started writing NPOs in every case.

I say that by way of background. I understand that is not the subject here, although it is to the extent that some have advocated that what we ought to do is write more precedential opinions and then do more judgment orders, which I think is an abomination. But I view it essentially the same way. How can we say, we judges, to members of our profession—remember, we work for them, we work for their clients and the public, not vice versa—that they cannot cite what we have written? We are not bound by an NPO. I do not know how you can say to a lawyer, “You cannot cite what we have written.” Leaving aside constitutional issues, it is a prudential matter, it is a matter of fairness, it is a matter of decency, it is a matter of respect. I do not know how we can do that to the bar.

My final point: why a national rule as opposed to letting each circuit decide? Well, the zeitgeist for the last several decades, animated by Congress as well as the Judicial Conference, is in favor of national laws. Local rules are for experimentation and innovation. But that principle does not apply here. We are not dealing with experimentation and innovation. Neither are we dealing with an exception for local culture, which is a local and not a circuit-wide geographic notion.

We are all affected by a national rule. There is a rule to change the en banc quorum rule that altered the Third Circuit rule. We didn’t like it, but what could we do? We are prepared to live by new and different national rules.

Moreover, the law practice is national. At our sittings in Philadelphia, we constantly have lawyers from New York, Chicago, California, and elsewhere. Procedure is complicated enough. They can look up a local rule, but they are unsure of its operation. A national rule is better.

So as I said, the strongest reasons for a national rule are those I have described above: our duty to the bar and public, respect for the bar and litigants, responsibility and accountability, and the unreasonableness of saying to the lawyers that you cannot cite what we have written.

One final comment: where does it go from here? I do not know. It has become terribly politicized. I had hoped that the Appellate Rules Committee, having referred it to the Standing Committee, that the Standing

Committee would simply refer it to the Judicial Conference. But the political forces were so strong that it was decided, "Well, let's hold it up and let's do a study." So the Federal Judicial Center is doing a study. I don't know what the study is going to show, but I hope that one of these days it will come out, and it will be up or down, and I hope it will be up, because this thing has gone on too long.

Thank you.

PROFESSOR CAPRA: Judge Leval.

JUDGE LEVAL: As my wonderful colleague Ed Becker illustrated, passions on this issue run very high, and everybody feels that their side is justified by reason and common sense.

When lawyers, including judges, get their oar in the water, the reasons given to support and oppose whatever issue is under discussion multiply and proliferate.

I am here to defend the position that circuits should be permitted to make their own choice whether they will allow citation of what we call "summary orders." I doubt that anything that I say, or anyone else on this panel says, will change the minds of those who have already passionately committed themselves to one side or the other.

Furthermore, I will probably disappoint my constituents, those who are passionately on the side of non-citability, because I do not purport to have arguments that will blow the opposition out of the water. I do not purport to have irrefutable arguments in favor of non-citability of summary orders, and I concede that there is considerable merit in some of the positions taken on the other side. The position that a litigant should always be allowed to remind a court of its precedents and call to the court's attention its prior actions, is unquestionably a respectable one.

There is also much theoretical merit in the more extreme position taken by our much-esteemed, wonderful late colleague Richard Arnold, that every court decision should be deemed a binding precedent. Judge Arnold dealt with a case in which his court had decided one way in a non-binding order and then felt free to decide the other way in a binding precedent. In Richard's view, this was not constitutional. It was not an appropriate way for a court to behave. There is a lot to be said for that view. Indeed, it is far more rational than the proposition that court actions should be citable but not precedential, which is a rather uncomfortable and odd position.

There are reasons that support having orders not be citable. I see this as a conflict between theory and practice. The theory favors Judge Arnold's view. The practice favors allowing a non-citation rule for orders issued in appropriate cases, so long as the practice is restricted to the appropriate cases and is not abused.

The Ninth Circuit is not alone in having a non-citation rule. The Second Circuit, and others as well, have a non-citation rule. We do it because we believe that, with virtually no negative effect, it permits us to produce a better quality of justice.

Although I would never argue that such a rule is ideal, there are strong pragmatic reasons that support it, which depend on facts pertaining to our calendar and work. Fact number one is that judges are very much overworked. They put in very long hours. Because they are putting in very long hours to get their work done, it is not an option for them to put in more hours. There simply are not more hours. The only way they could cause a significant change in their workload would be by reallocation of their time—taking time away from the opinions in matters of precedential importance and giving it instead to matters of no precedential importance.

Fact number two: while it is true that all cases are very important to the litigants, not all cases are important for their precedential value. Many cases, indeed a great majority of the cases, fall comfortably under previously established precedent, so that the explanation of the judgment should not alter, enlighten, or in any way change the declared law of the circuit.

Other cases, a far smaller number, are of importance as precedent. These cases are cases of which the explanation of the decision will involve new understandings, new explanations, new declarations, and interpretations of legal doctrine.

Fact number three is how difficult and time-consuming is the writing of precedential judicial opinions. This is especially so when it is done by a higher court, whose opinions serve as precedent. The explanations in such judicial decisions must be very, very clearly thought through, very clearly presented, lest they cause harmful confusion in the law. Inevitably we fail in that undertaking. I send my colleagues a draft opinion, which I think is pellucidly clear and logical. My colleagues send it back, commenting that my explanations are confusing, misleading, or in some cases just plain wrong. And often they are right. So I need to try again, and I work on it more, and it goes through thirty or forty drafts.

It is a very, very time-consuming practice process. The time-consuming care is extremely important because we can do great mischief if the verbal formulations of our explanations are not sufficiently well thought out and clear. We make a mess of the law; by making a mess of the law, we make a mess of society.

So the smallest confusions in precedential opinions can be of serious consequence. Litigants pounce on them, to use an inept formulation to the litigants' advantage in the next case. It is very much worth our effort to do all that we can to avoid confusions of that sort.

So we in the Second Circuit faced the question: How do we best allocate our time to produce the best quality of precedential opinions that we can? And we answered the question this way: We said, "Let's divide the cases into two piles. There is a pile, a small pile, representing the cases of precedential importance. That is where we will put our time, that is where we will devote our care and attention to making those opinions as good as we can. Then there is this other pile, a pretty big pile, of cases that do not have precedential importance. We will rule that orders disposing of those

cases are non-citable, and we will dispose of them very rapidly.” Why do we do them rapidly? The answer is obvious: in order to leave ourselves more time to do the precedentially important cases with care.

So what happens to these non-citable orders? They are very hastily done. As a result, they are sometimes ambiguous, overstated, and misleading in their legal explanations. Alex Kozinski, a wonderful person, who uses language in a marvelously imaginative way, likens them to sausage not fit for human consumption. The fact is that if you are producing non-citable summary orders for the purpose of saving your time for the precedentially important opinions, those summary orders will not be good. They may contain confusing language capable of causing mischief.

It is not that we are deciding cases incorrectly. It is not that we are deciding cases inconsistently, as in the case that Judge Arnold faced, where inconsistent decisions were being made on the same facts, concealing one under the non-precedential. That should not be done. If that were being done, it would be an abuse of the non-citable or non-precedential summary order.

What is happening is rather that, in the hasty preparation of these non-citable summary orders, our explanations are sometimes imperfect. That sounds terrible. Judges intentionally allow imperfection? Well, this is the real world. You do not have time to do everything as well as you are capable of doing it.

So how to deal with the problem? The solution we have adopted is one that says: choose the cases that are important as precedent. Give them the time, and do them as well as you can. Save time from the cases that have no precedential importance and make them non-citable.

Now, every attorney who practices in our court has the same complaint: “I had a case where the court had said something in a summary order that would have helped my brief, and I wasn’t allowed to cite it.” It’s an impassioned complaint. They bitterly resent our rule.

I suggest that the complaint is somewhat illusory because if attorneys were allowed to cite the summary order, the greater probability is that what they wanted to cite would not have been there. Why would it not have been there? For several reasons.

First, if summary orders were citable, the court would have taken greater care, to prepare them more carefully. The misformulation would have been spotted and corrected or removed. Alternatively, the court would be slimming down its orders to a bare few words, “Affirmed,” or just a little bit more than that, so they would not really be of much use to anyone. Under either alternative, the lawyer would not have the morsel to cite, and the quality of justice would have suffered.

Now, if the caseload in our circuit were what it was back at the time when Mike and I clerked for Judge Friendly, the considerations would be different. Caseloads then were very much lighter, and the Second Circuit had all the time in the world to deal with all of its cases. I would be on the

other side of this dispute. In those circumstances, there would be no justification for a non-cite rule or for a non-precedential rule.

But as our court is today, the non-cite rule simply allows us to produce a better quality of justice, with very little downside.

Thank you.

PROFESSOR CAPRA: Judge Boudin.

JUDGE BOUDIN: You might think, with a position for eloquently stated, and a position against dramatically stated, there would be no third position that would be possible. But my own, in a nutshell, is that it does not matter very much.

[Laughter.]

But the topic is one of some interest, not for its own sake, but because there is a set of adjacent problems that it suggests that are extremely interesting and have practical consequences that are considerable. A word on each of these points.

The reason why it does not, to my mind, make much difference whether you have the Proposed Rule or whether you follow the First, Second, or Third Circuit approach to unpublished opinions, is that in practice the results are pretty much the same. The unpublished opinions would not, in my view, change very much if they were to be cited. These cases which are published do not change very much whether the lawyers are allowed to cite unpublished opinions. This is not speculation; it is the experience of almost everyone who has seen the circuits operating differently, or who, like my own, have switched more or less from a rule strongly discouraging or limiting citation of unpublished opinions to a rule which, although somewhat disguised in practice, lets them in whenever a lawyer feels like citing them. There has been almost no difference in the number of cases in which unpublished opinions are cited.

There has been virtually no difference in the outcome, either with respect to the unpublished opinions, which can now be cited, or to the published opinions, in which the unpublished opinions now can be cited. That is the practical reality.

If it doesn't matter very much in real life, this is necessarily a debate that is of some abstract interest but probably is not going to change the world very significantly however it comes out. The adjacent issues, however, are very interesting. Let me give you just three, which can be pursued later if you would like.

The first is that while the opportunity of the lawyer to cite unpublished opinions may not have any effect, the question whether those opinions have to be given precedential weight is a matter of extreme importance, and it is implicated because if one were to take seriously the view that all opinions ought to be available and to be taken seriously in the courts of appeals, whether they were published or unpublished, you are moving in the direction of encouraging, and perhaps ultimately requiring, courts to give the unpublished opinions precedential weight, or at least that is a possible line of extension.

If you think for a moment about what a rule would look like, you will see its implications. Suppose the rule were “all unpublished opinions have to be allowed to be cited and they have to be given equal precedential weight.” That would indeed affect how courts spent their time, probably in the direction suggested by Judge Leval, requiring much more work on unpublished opinions, or in writing very, very brief unpublished opinions so that they could not be misused at all.

Precedential weight, of course, is not an “on” or “off” switch. The reality is that opinions get very different weight depending on all kinds of circumstances: who wrote them, how recently, how persuasive they are. It is not just published or unpublished. But denominating an opinion as binding the panel does have considerable significance, and indeed, that would raise a constitutional problem that would be of great interest if the Congress or the Rules Committee ever sought to prescribe weight.

The second adjacent problem that I find very interesting is that what are either perceptions, or to some extent misperceptions, about unpublished opinions have a reality of their own simply because they become widely held. That reality is an argument for or against the adoption of a rule of this kind.

If no one cared about this rule, there seem to be pretty good arguments offered by Judge Leval why one might want to leave the status quo pretty much intact. You can get through unpublished opinions more quickly. They are not sausage—that is an overstatement—they are generally reasonably detailed, reasonably reliable, but some of the time they do not have the complete balance and polish of the published opinions.

There is some argument, particularly because those cases are chosen because they do not seem to be making new law, for putting them aside and not fussing as much about them. But if the public develops the perception that there is something sinister or improper or dangerous about this practice, that is a reality which you have to take into account.

The vocal law professors, the lawyers, whom Pierre has described as being very upset at not being able to cite the opinions, and others have, to my mind, made a public case that really cannot be undone at this stage. So taking that into account, it seems to me there is pretty good argument for giving way, recognizing that the whole controversy didn’t matter very much to begin with, and taking the softer course of saying, “Cite them if you want, we will do what we want with them,” which is more or less what the First Circuit has now done.

This problem of perception becoming reality, of course, is not limited to this case. That is why it is an interesting problem. For example, the entire cumbersome, expensive, overwrought set of rules that govern judicial ethics, misconduct, and disclosure reports is a product of this perception becoming reality. About seventy-five percent of it could be junked, at great benefit to everyone (Kozinski has actually written quite interestingly on this subject), if everyone were not afraid, and with reason, that any alteration in the direction of reduction, any lessening of overrigid rules, would be

regarded as a confession that misconduct was occurring that we are no longer willing to police.

So this is an ongoing problem in life. It probably affects foreign policy and economic policy and everything else. It plays a major role with respect to this set of rules.

The final point, it seems to me perhaps the most important adjacent issue, is that this controversy, to the extent that it has substance, really presents a different question that is worth considering, which is essentially how much you are willing to pay for the extra polish and perfection.

Though the unpublished opinions do not seem to me that much weaker, they are considerably more concise. They typically leave out facts. They leave out a lot of balancing information and discussion that you would put in if you were trying to write a complete explanation that you expected to guide future panels and all the district courts in your circuit. I do not think it is a drastic difference, but it is a difference.

Now, think about it this way. A typical judge in my circuit works on about 400 merits cases a year, which means the judge is responsible for writing about a third of them. As a practical matter, I am more or less responsible for 130 opinions. About sixty percent will probably be unpublished.

If someone said to me that my load would be cut in half, which might take you back to where Judge Friendly was when Pierre and I were law clerks, it would be possible to devote to all of those cases, including the unpublished ones, the kind of care and polish and completeness that is available for the published decisions.

The cost of cutting my workload in half would be about one million dollars, because that is, very crudely I think, the cost of an Article III judge after salary, three or four law clerks, a secretary or two, some office space, pension, so forth and so on. The question you have to ask yourself is: is it worth it to get that extra polish?

It would be unfair to restrict the caseload reduction to me. There are about one thousand federal judges. A thousand federal judges times one million dollars is about one billion dollars a year. And so you have to ask yourself, if you would be adding a measure of perfection, possibly a few changed outcomes in close cases, is that the right way to spend the one billion dollars, or would it be better used on health care or cancer research or better education for first graders?

It is a serious question, in a way it is the underlying question, when you talk about the concerns that are posed by the weaker or less-polished unpublished opinions, because, one way or another, when you say you want them to be treated as if they were the polished, published opinions, you are really saying in the end that we ought to be spending more money, more judge time, on cases, and the question is: is it worth it?

PROFESSOR CAPRA: Professor Schiltz.

PROFESSOR SCHILTZ: Let me start the discussion by going back to the Ninth Circuit point. We got letters from virtually every judge in the

Ninth Circuit, and many of them pointed out that it is the first time that all the judges in the Ninth Circuit had ever agreed on anything. We brought them together.

But what the Ninth Circuit told us—and I would be curious to hear the judges' reaction to this—is they described for us their process for issuing unpublished opinions. I obviously have no personal knowledge, but this was pretty consistently described by the Ninth Circuit judges.

The process is this: A panel of three judges will in a space of about three days decide about 150 cases, fifty a day. They will not read the briefs, they will not read the records. They will show up in a room. A staff attorney will briefly describe the case, briefly describe the opinion the staff attorney has drafted to dispose of the case. There might be some discussion, but the judges will say, “okay,” and they will move on to the next case. So in many of the cases the judges will not have read any briefs, nor even read the opinion that is going out under the Ninth Circuit's name.

My questions are: First of all, what do you think of this? What would Judge Friendly think of this? I ask that seriously. If you put Judge Friendly in the Ninth Circuit today, would he resign, having to do that for a living? Secondly, is this the future, if Congress continues to give you fewer resources to deal with more cases? And third, are those opinions that the Ninth Circuit is issuing in that setting really better than simple, one-line orders? In other words, if judges agree on a result but do not agree on an opinion, and maybe do not even read the opinion, would it not be better to simply issue what they do agree on, and that is the result?

JUDGE BECKER: I am not going to speak for Judge Friendly because, unlike Judge Leval and Judge Boudin, I didn't clerk for Judge Friendly, although I will point out that, like Judge Kozinski, Judge Friendly's wife was from Philadelphia.

[Laughter.]

But I will say that what we should do is bottle the remarks that you have just made and bring them before the Senate Judiciary Committee as Exhibit A as to why the Ninth Circuit desperately needs to be split, because that is no way—

PROFESSOR SCHILTZ: Well, if we didn't have enough controversy, that will—

JUDGE BECKER: That's no way to run a railroad. I defer to Judge Leval and Judge Boudin as to what Judge Friendly would think.

JUDGE LEVAL: I would say that Judge Friendly would not be happy with that state of affairs, and I think no judge would be happy with that state of affairs. I am sure that the judges of the Ninth Circuit are not happy with it.

It is easy enough to say that it is a terrible way to adjudicate cases, but what do you do when you have cases of that volume? You have to find some way of dealing with them.

We do not dispose of our summary orders that way in the Second Circuit. It is a very different procedure, with the judges very much more involved. But we do not have the volume that they have, and when you have that kind of volume, it simply does not make sense to turn up your nose and say, "Yuck, that's no way for a judge to be disposing of cases." How should those judges dispose of those cases? And if the way they must dispose of them is one that simply does not allow, because of human inability to deal with overwhelming volume, the kind of judicial attention to them that guarantees a reasonably reliable expression of the result, isn't it better that they not be citable? The process is not beautiful, it is not admirable, nobody likes it, but you've got to deal with reality.

JUDGE BOUDIN: What is actually going on in the Ninth Circuit is unclear from the description, but you want to be very careful about drawing the horror show inference that is implied by the way the description is put.

In my circuit, the unpublished opinions are pretty much like the published ones except that staff attorneys do initial drafts and there isn't oral argument. The judges are responsible in the end for drafting an opinion. They have the briefs, they have the record, and they do what they need to do in producing an opinion, which is the judge's opinion, even though it is usually issued as a *per curiam*.

But let me ask you to think about the comparison of what Pat has said the Ninth Circuit does with what might happen in my office in an argued case. A couple of weeks after the argument, the clerk would come in and say, "I'm about to start doing a draft for you of an opinion that was argued three weeks ago," which at that point I will not remember in any detail. I have 400 cases a year to work on.

JUDGE LEVAL: It only takes me three days to forget them.

JUDGE BOUDIN: I will say to the clerk, "What's it about?" and the clerk will give me a two- or three-minute summary. I can usually say to the clerk—I've been doing this for forty years, I've been dealing with appellate problems, I know how to handle most of them—I will say to the clerk, "I think the short answer to that is such and such. Go write it up."

I will then take the clerk's draft, which will come back a week or two later, and over a weekend I will write my own draft using the clerk's as a bench memo, because I think the problem through by typing. And it is my words in the end. I like my words better than the clerk's. And I can type very fast because I went to a progressive school where they thought typing was what was important. Forty years later, with computers, it turned out to be right.

Now, if you think about my description of what just happened, it is true I read the briefs at quite high speed before the argument, I listened to the argument, which was usually rather brief. A lot of cases, including argued cases, can be handled pretty effectively by having the law clerk say, "Here's what's going on, Judge," and the judge saying in answer to that, "I've seen this problem before and this is the way to handle that problem. Do it that way."

So the notion that there is something really infernal about the judges coming into a room and listening to these oral presentations—you have to reserve judgment about that. If the cases are the right kind and are selected according to criteria that produce really easy cases—and boy, are there a lot of easy cases among these 400 that I have, easy once you have digested them quickly—and if the judge is going to take responsibility for reading the explanation, and the explanation often has a benefit to the lawyer and the client, even if it isn't very polished, in reassuring everybody that the case has been considered and that there is an answer to it beyond “yes” or “no,” you might not take quite so hostile a view of the Ninth Circuit.

Remember that an awful lot of law is made, law in the sense of outcomes, which as all unpublished cases are, when somebody gets up in a courtroom and says to a crucial piece of evidence, “Objection,” and the judge says, “Overruled.” So if it's an appellate court and we are talking about non-precedential opinions, I would wait before expressing too much horror.

PROFESSOR SCHILTZ: Understand that I am not expressing horror at the Ninth Circuit, in the sense they are in an impossible position, and none of us can envy their position. What I am getting at is the strange persistence of the insistence on issuing eight-page, clerk-written drafts. Why not issue a one-line opinion? If you say to judges, “Why not issue one-line opinions?” they say, “Because the parties are entitled to know why we decided the case that way.” If you say, “Why not let them cite those then?” “Well, because that's not why we decided the case. Those aren't really our views.” It is this odd persistence of this.

JUDGE BOUDIN: That is a parody of both sides of the argument. This is why the economics profession has had such an impact on legal teaching. It is the great insight that almost all things are tradeoffs. The five or six paragraphs do not have it perfectly and they may lack the context to make them useful precedents, but if you ask the lawyers and the clients, they would rather have a couple of paragraphs, I think, saying, “We listened to your arguments and here is why we rejected them,” assuming there is anything to them.

And as for clerk-written drafts, I write my own opinions. It is probably a waste of time doing it that way. Great judges have used their law clerks' drafts and marked them up, and I am sure in the Ninth Circuit they take these clerk drafts and it must be that they are approved by the judges before they go out, and I'll bet some of them were altered.

PROFESSOR SCHILTZ: Let me ask about the future. As Judge Becker mentioned, the status right now of this is that the Federal Judicial Center is studying it. What the Standing Committee directed it to do is to go out and see if there is any evidence supporting or refuting the predictions made by opponents of Rule 32.1. There are lots of state and federal courts that had very restrictive rules that liberalized their rules, and we can study to see whether a lot of these predictions have come true. Have the one-line orders

increased? Has the time for judges to put out opinions increased? Have attorneys cited a lot of unpublished opinions?

Do you judges think that empirical evidence can make any difference in this debate? In the Second Circuit, for example, the majority of judges sent a letter opposing it. If the Federal Judicial Center says, "We have studied the courts where they allow citation and we have seen no evidence that the things you fear are true," are they persuadable, or will the view be that the Second Circuit is different enough that you just cannot extrapolate the results to your circuit?

JUDGE LEVAL: I would never want to be in the position of saying that evidence doesn't matter, but how much does it matter? Judge Boudin is completely correct in saying that public perception matters. Driven by the anger of attorneys who have not been allowed to cite something that they wanted to cite, and have resorted to hyperbole to convince the American public that something sinister is going on, there is a public perception that has to be dealt with.

I am not very optimistic about the results. I think probably that requiring citability will be forced on us in time. I do not think it will be a good thing. I do not think it will be a terrible thing. I agree with Judge Boudin that the whole issue is overinflated and isn't as important as people think it is. But citability will not improve the overall quality of justice.

Let me add something: I think that part of the trouble comes from the judges themselves. In my view, the correct way to approach the writing of orders in a case without precedential importance is something between the one word "affirmed," and the very discursive, pontifical manner, heavy-on-citations, heavy-on-propositions-of-law, that is often used.

When law clerks prepare drafts of orders, they often want their product to compare favorably with the opinions of Holmes, Brandeis, Boudin, and Becker. That is where the problem lies. Orders in such cases are not designed for posterity. They are essentially for the parties. The purpose in writing them is to give the parties an idea why we decided the case the way we did. They should be written concisely, not in the manner of a legal treatise. Very, very brief. The parties will understand the order, but it will not be useful as precedent.

If judges and the law clerks were to approach the drafting of orders that way, rather than inflating them unnecessarily with declared propositions of law, I think the problem would almost go away.

JUDGE BECKER: I would just say that nobody is going to bother to cite these cursory opinions, so it is a nonproblem in another sense. If you permit citation of unpublished and non-precedential opinions, lawyers are not going to bother citing these cursory jobs. There's no sense wasting their time.