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I. INTRODUCTION

There has been a substantial increase in the caseloads of the United States Circuit Courts of Appeals, which has outpaced the increase in district court filings and has also risen more rapidly than has the number of appellate judges.[1] This burgeoning caseload has caused a problem for these mandatory jurisdiction courts, as they must rule on all appeals brought to them, even if the issues are elementary and the answers obvious. What should they do? They have thus far rejected formal adoption of discretionary jurisdiction, but they have used a type of triage by sorting out cases for differing types of treatment. For close to thirty years, to aid in coping, they have issued "unpublished" opinions, which are denominated "memorandum dispositions" ("memodispos") to distinguish them from published opinions.

Such unpublished rulings are now used in upwards of three-fourths of all cases. According to a recent Federal Judicial Center study, by 1987 the proportion of all federal courts of appeals' dispositive judgments resulting in published opinions had dropped to 38 percent, and it dropped to just over 25 percent by 1993. It remained at that level in 1998; however, there has

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1. *See* Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* 57 (4th ed. Nelson-Hall 1993); Sue Davis & Donald R. Songer, *The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited*, 13 Justice Sys. J. 323, 328 tbl. 3 (1988-1989).

been considerable variation in their use across circuits, from roughly 10 percent to slightly over 50 percent.[2]

A major change in the availability of unpublished dispositions has resulted from the rise of electronic databases. Although a limited number of unpublished dispositions (e.g., rulings on tax issues) have long been available in specialized reporters, memorandum disposition slip opinions have been released only to the parties and are also available in court libraries and on request, but they are not published in the *Federal Reporter*. They are listed in tabular form with case name, docket number, district court or agency, and disposition indicated. However, the author or writing chambers[3] for such dispositions, which are unsigned orders, is not available. The putative writer can be determined only by the process of elimination in those rare instances when one judge writes a concurrence and another dissents, or when a concurring judge forgets protocol and refers to the author by name. All this remains true with respect to the printed reporters.

Now unpublished rulings can be found on Westlaw and LEXIS for all circuits except the Third, Fifth, and Eleventh. Their presence produces the improbable phenomenon, the "published unpublished ruling." As the real issue is whether they may be cited to the court, that verbal difficulty could be avoided by calling them "non-citable dispositions." I prefer the term "uncertified dispositions," despite the fact that they are official. Their on-line availability means that even if intracircuit conflict could once be "buried" or at least somewhat hidden, that is no longer possible, because uncertainty in the law of the circuit about such matters as the proper standard of review for certain criminal trial court actions (jury instructions and admission of certain evidence) is openly mentioned in these opinions with relative frequency.

The prevalence of unpublished opinions and problems associated with them have given rise to a general clamor critical of them. After outlining two main lines of criticism of unpublished opinions, this essay turns to focus on the process of

2. Judith A. McKenna, Laural L. Hooper, & Mary Clark, *Case Management Procedures in the Federal Courts of Appeals* 21 tbl. 13 (Federal Judicial Center 2000).

3. I use the term "writing chambers" because most often the judge does little writing on such dispositions, certainly less than for a disposition intended to be published.

making the decision to publish, guidelines for publication, and enforcement of those guidelines within courts.

II. CRITICISMS OF UNPUBLISHED, NON-CITABLE OPINIONS

With few exceptions,[4] much of the writing about these rulings has been normative and highly critical.[5] Pointing to the alleged detriments of those dispositions, some decry the absence in many cases of full treatment, including both oral argument—now heard in a reduced proportion of cases—and a published opinion. Critics also decry the non-citable/non-precedential status of these dispositions. There are at least two lines of reasoning criticizing unpublished, non-citable judicial opinions; one looks to impact upon the development of precedent, the other reflects concern that unpublished opinions present the threat of judges pursuing their agendas.

A. Judge Arnold's Critique

The loss of precedential value resulting from non-publication and no-citation rules is the principal focus of Judge Arnold's discussion in his panel decision in *Anastasoff*.[6] Much of Judge Arnold's opinion focuses on what at first seems to be only a limited aspect of not-for-publication dispositions—their lack of precedential value. That aspect is, however, linked to the

4. An exception is the early work of William L. Reynolds and William M. Richman. *See* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978); *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 807. *See also* Robert J. Van Der Velde, *Quiet Justice: Unreported Opinions of the United States Courts of Appeals—A Modest Proposal for Change*, Ct. Rev. 20-27 (Summer 1998).

5. An example is the more recent work of Richman and Reynolds. *See e.g.* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 281-286 (1996). *See also* William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. App. Prac. & Process 37 (1999).

6. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). His earlier comment, in this journal, perhaps telegraphed what he was to say for the *Anastasoff* court. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

process by which the courts of appeals reach their dispositions. In particular, when judges decide to issue a not-for-publication/non-precedential disposition, they give less time to developing its contours than if their writing were to be published. If all courts were to attempt to adhere to the unrealistic idea of giving all cases plenary treatment, resulting in published, precedential dispositions, more attention to each would be required, with obvious negative effects on time to disposition and backlog. Judge Arnold did approach the unrealistic ideal when he stated,

> The remedy . . . is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.[7]

Despite his negative view of judges' choosing "from among all the cases they decide, those that they will follow in the future, and those that they need not,"[8] judges do spend more time on some cases than on others because they feel that it will be in the interests of the legal system as a whole for them to do so. Taking more time on a case also allows them to meet the sometimes conflicting goals of correcting errors in, and disposing of, individual cases and developing the law for application to subsequent cases—the oft-drawn distinction between error-correction and law-making.[9]

B. The "Misdeeds" in the Appellate Courts Critique

Perhaps it is not surprising that complaints about unpublished rulings would focus on what might be called judicial misdeeds; this includes the claim that the practice is used to hide inconsistencies in circuit doctrine or to avoid having to spell out the rationale of rulings. Such claims are not new: Roughly thirty years ago, in an *ABA Journal* article, James Gardner claimed that not-for-publication rulings were being

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7. *Anastasoff*, 223 F.3d at 904.

8. *Id.*

9. For recent use of this distinction in discussing *Anastasoff* and its potential effects, see Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 Judicature 90, 91 (2000).

used to bury intracircuit inconsistencies.[10] Lately, however, the decibel level of the clamor about these rulings has increased.

This clamor, which seems to be based on an implicit assumption of a cabal sitting at post-argument conference, saying "Let's hide this one," requires close examination so that we can move the discussion beyond attributions of nefarious motivation by those who are not present and clearly do not like the practice. It suffices here to say that critics ignore both how difficult it is in the real world to be Machiavellian in the face of a burdensome caseload, as well as the very real possibility that panel members will not be of like minds and thus would blow the whistle on any such concerted effort. "Data" may be the plural of "anecdote," but to have a basis for evaluating these negative normative concerns, we must get beyond unsupported and often apocryphal assertions to more systematic attention to practices in the circuits and the actuality of the process by which those dispositions rather than published opinions are issued.

Lawyers and judges may not have cast much light on the process by which publication decisions are made. Neither, as a general rule, have political scientists. However, some work by Donald Songer provides an exception. In a 1989 article, he and his colleagues examined unpublished Eleventh Circuit rulings.[11] They did not focus directly on the process by which the court decided to publish or not. However, their findings—that a significant portion of non-unanimous rulings were not published, that ideology of judges (as measured by party of the president appointing the judge) played a role in what got published, and that there was a greater frequency of publication when judges sat by designation—led them to the conclusion that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe."[12] Also reinforcing the view that judges' discretion guided the decision whether or not to publish was their finding of a statistically significant higher rate of publication for cases in which "upperdog" parties (government and corporations) had appealed

10. James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 ABA J. 1224 (1975).

11. Donald R. Songer, Danna Smith, & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 Fla. St. U. L. Rev. 963 (1989).

12. *Id.* at 975.

than in appeals by "underdogs" (labor unions, individuals, minorities, aliens, and convicted defendants).[13]

Songer also examined the extent to which formal criteria for publication appeared to be followed in the Fourth, Eleventh, and District of Columbia Circuits. He found that "the assumption that the unpublished decisions are frivolous appeals with no precedential value" [14] lacked support for several reasons. First, a high proportion of unpublished dispositions were, counter to the criteria, reversals of the lower court or administrative agency. Second, judges differed in the extent to which they participated in not-for-publication dispositions. Third, there were intercircuit differences as to the publication of cases in which "underdogs" were appellants. Finally, there was a partisan effect in unpublished dispositions, with Democrat-appointed majority panels more likely to produce a liberal outcome than Republican-appointed majority panels.[15]

Songer's articles notwithstanding, most of the growing number of political scientists' studies of the United States Circuit Courts of Appeals are based only on the sample of *published* opinions available in the new Court of Appeals Database.[16] This resource saves each researcher from having to gather his or her own data. However, it also leads to a "drunkard's search"—the drunk looks for money not where it is dropped, but under the street light. Use of such a limited sample of opinions means that not-for-publication dispositions, while concededly more difficult to access, are put out of sight and

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13. *Id.* at 981-982.

14. Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 Judicature 307, 313 (1990).

15. *Id.* at 311-312.

16. The Court of Appeals Database, developed by Professor Donald Songer of the University of South Carolina, is available through the Program for Law and Judicial Politics, Michigan State University. *The Program for Law and Judicial Politics* <http://www.ssc.msu.edu/~pls/pljp> (accessed Mar. 22, 2001).

The principal published work drawing on the data is Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* (U. Mich. Press 2000), containing material on court of appeals judges, judicial business, parties appearing before those courts, and decisionmaking in the courts. An extremely useful bibliography of articles on the courts of appeals appears in that work at 160-67. For an example of an article which draws, in part, on the database, see Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 Justice Sys. J. 1 (2001).

mind. This difficulty has become more serious as published opinions have come to constitute a smaller portion of all federal court of appeals dispositions. Without a thorough study of both published and unpublished rulings, we cannot even tell whether published cases are representative of all federal court of appeals cases. Selection effects make quite likely the *un*representativeness of published rulings; at the very least, relying on only published cases provides a geographically-skewed sample of all cases filed, as a result of intercircuit variation in the rate of publication.[17]

III. THE PUBLICATION/NONPUBLICATION DECISION

Although available statistics map the substantial increase in the incidence of all court of appeals dispositions issued without published opinion, there is no systematic literature by participants on the *process* by which appellate courts decide to issue unpublished dispositions.[18] This essay, which draws primarily from the author's extended observation of the United States Court of Appeals for the Ninth Circuit, is offered as an attempt to provide some empirical, if qualitative, groundwork about the process.[19] The process in the Ninth Circuit can be taken as indicative of how it works in other courts of appeals because, despite intercircuit variation, basic elements of the process are similar across circuits, as are the formal criteria for publication.[20]

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17. Examining only published cases can lead to distorted findings. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & Socy. Rev. 1133 (1990) (noting this effect in a sophisticated study using federal district court rather than court of appeals rulings).

18. There are some remarks about process in Judge Arnold's recent piece on unpublished opinions. Arnold, *supra* n. 6, at 224 (noting, for example, that "[s]creening-panel opinions are routinely unpublished").

19. Among sources were off-the-record interviews with judges, perusal of not-for-publication dispositions from the late 1970s to the present time, and files in closed cases containing clerks' work and judges' communication with each other.

20. One difference is that the Ninth Circuit memodispos are written text, not the one-line "Affirmed—see Rule 36-1" dispositions common in, for example, the Third and Eleventh Circuits, and which have been the object of considerable criticism. *See* McKenna et al., *supra* n. 2, at 26 tbl. 12 (noting that of those circuits' dispositions, 32 percent and 19 percent, respectively, were "unpublished").

Issuance of not-for-publication dispositions was regularized in the early 1970s. Practices and processes concerning these rulings have remained stable over time even as their proportion has increased dramatically. There are several stages in the process by which not-for-publication dispositions are developed in the federal courts of appeals. Much of what is described here applies across the circuits, although there are some minor procedural variations from one circuit to the next. I rely most heavily on Ninth Circuit practice.

A. An Overview of the Decisionmaking Process

In the first stage, court of appeals central staff attorneys assign weights to cases. Those with the lowest weights—the easiest cases—are sent to a screening panel with either a bench memorandum or, often, a draft memorandum disposition for the judges' consideration. These cases usually result in an unpublished disposition.[21] In such "light-weight" cases, the judges monitor the work of staff attorneys, and they can and do direct screening of cases to regular argument calendars. This is done, according to one judge's estimate, in from two percent to above ten percent of these cases. Even if the screening panel rejects a case from screening, sending it to a regular (merits) panel, the case will likely be submitted on the briefs and disposed of by an unpublished ruling.

Cases assigned directly to regular panels but nonetheless ordered submitted without argument are somewhat more likely than screened cases to be disposed of by published opinion. In general, however, a case in which oral argument is not heard is not likely to receive a published opinion. When argument is heard, the likelihood increases that the case will receive a published opinion. As a recent FJC study states, "Oral argument is strongly associated with opinion publication overall."[22] The presence of counsel in an appeal, even without argument, also increases the likelihood of a published ruling.[23] Data for the Ninth Circuit in 1998 show that publication occurred in forty

21. *See* Arnold, *supra* n. 6, at 224.

22. McKenna et al., *supra* n. 2, at 19.

23. *Id.* at 18.

percent of orally-argued cases but in only three percent of those submitted on the briefs, and in twenty-five percent of counseled cases but only in two percent of pro se matters.[24] Even with oral argument, however, criteria for publication may lead to disposition as a not-for-publication memorandum, and the more so as the overall proportion of published opinions has decreased.

The next stage for cases assigned to merits panels is the judges' post-argument conference to consider both argued and unargued cases. For some of the latter that are obviously going to result in a not-for-publication disposition, clerks, instead of preparing a bench memorandum, may circulate a draft memorandum disposition in advance of calendar week. The judges—more likely, their clerks—often react to those proposed dispositions before the judges meet. At their conference, the judges confirm any of those suggested changes and order the disposition filed.

For the remaining cases, a critical decision the judges make at conference, in addition to determining the result, is whether to publish the disposition. That decision is reflected in the presiding judge's post-conference assignment memo: "Judge Jones will prepare a disposition for publication." At times, the decision on publication is left to the writing judge: "Judge Jones will prepare a disposition and will decide whether or not it will be published." And there are some instances when the panel may resolve a case in two dispositions—a published opinion covering matters of greater importance or of first impression in the circuit, and a memodispo treating the remainder of the issues.

The decision on publication is made early because it affects what is written and the amount of work expended on writing. A principal justification for unpublished rulings is that they take less time to prepare than do published opinions. An extensive opinion is said not to be needed if the law to be applied is straightforward or if a case is heavily fact-specific and thus is of minimal or narrower applicability. Because unpublished opinions are primarily directed to the parties rather than a larger audience, the statement of facts, which are known to the parties, can be truncated. Also, the law need not be elaborated, with only

24. *Id.* at 19 tbl. 11.

enough analysis provided to demonstrate to the parties that consideration has been given to the legal issues.

As a result of these bases for not-for-publication dispositions, giving them precedential value would, said one judge, "require us to spend precious time polishing for publication about 76 percent of our cases on which we spend very little judge time now, but rely on recent graduates of law schools for the writing and most of the editing."[25] If all cases were published and citable, the quality of analysis in published opinions might well suffer by comparison to the present situation where such opinions receive more attention; moreover, lawyers would have to contend with many more precedential cases.[26]

That not-for-publication dispositions are intended to be different can be seen in the availability of a form indicating the matters to be touched on in them. This form carries the urging that "every effort should be made to shorten the length of the disposition." Lengthy writing may, however, be necessary even in an unpublished ruling. For example, a criminal appeal raising multiple issues may result in a long memorandum disposition even if each issue is simple to decide: One paragraph per issue, with perhaps somewhat more space devoted to one or two central issues, adds up. Some judges say they or their clerks may write at greater length in criminal appeals so that defendants, particularly indigents, will understand that their claims, even if rejected, have been heard.

An unpublished disposition may also be long if it is a bench memorandum slightly revised by a clerk. Although the full statement of facts usually provided in a bench memo can later be excised from an unpublished ruling, that does not always happen. Likewise, to assist the judges, the bench memo is likely to contain discussion of multiple issues raised in the briefs, in the event any of those matters is pursued at argument. However, at conference the judges may focus on only one or two issues

25. Quotations without attribution are drawn from the author's interviews, conducted on the basis of the subject's anonymity, and from documents to which access was made available.

26. The Ninth Circuit recently revised its rule, "still not allowing persuasive citation despite the recommendation of the circuit's Judicial Conference and Rules Advisory Committee that it do so." Braun, *supra* n. 9, at 94.

they feel necessary to resolve the case, and while discussion of the others could be excised from the disposition, clerks may fail to remove them.

This initial decision about publication may be altered during subsequent consideration of the case. The writing judge may determine that a published opinion rather than a memodispo is necessary, or in the post-conference give-and-take within the panel, another judge may suggest why a memodispo should become a published opinion. Judges also occasionally comment on the length of a proposed unpublished disposition, out of concern not only for length per se but also for its implications for content and later development of the law. Thus one judge wrote that while he would be inclined to defer to the author's decision to include material (here, the legislative history of certain statutes), he wished to express a caution "that this stuff finds its way into Lexis & Westlaw and may come back to haunt us."

The panel's initial decision as to publication is not always its final one, so the process does not necessarily end with the panel's filing of a not-for-publication disposition. Off-panel judges who monitor their colleagues' work may from time to time question why, based on the court's publication criteria, the ruling is not being issued as a published opinion. Most often, however, the stimulus for redesignation of an unpublished ruling as a published opinion is a request from the parties or others interested in the ruling, usually lawyers specializing in its subject matter.

The language of such requests is at times formulaic: "This case will have great impact within the circuit," "Publication would be of great assistance to our office because of the number of cases of this sort we handle," or "Publication would aid district court judges in disposing of cases with this recurring issue." Yet from time to time, the judges are persuaded to alter the publication status of the disposition. Evidence of such action is found in the *Federal Reporter*, in orders indicating that the previously unpublished memorandum order in such-and-such a case is hereby designated a published opinion authored by Judge X.

The decision to change a memodispo into a published opinion often requires more writing by the author, or at least

given the rationale for less-developed unpublished rulings, it should result in more writing. However, while an unpublished ruling might be edited to beef it up, changes are often minimal. This can create difficulties if the extended language of the clerk's or staff attorney's bench memorandum is left in the ruling or, on the other hand, insufficient reasoning is supplied to support the result. When this occurs, sometimes a redesignation order "leaves a footnote that causes us trouble later," as one judge put it. That is, it calls particular attention to the case, the reasoning in which may be less solid than if the opinion had been written with the judge knowing from the beginning it was to be published.

B. Publication/Nonpublication Guidelines

Judges' decisions to publish are far from completely discretionary, because of the courts' guidelines, or at least criteria, to assist in determining whether to publish a disposition. The criteria, which the FJC notes are relatively consistent across circuits, appear in the courts' local rules. For example, according to Ninth Circuit Rule 36-2, a disposition should be published only if it:

> (a) Establishes, alters, modifies or clarifies a rule of law, or
>
> (b) Calls attention to a rule of law which appears to have been generally overlooked, or
>
> (c) Criticizes existing law, or
>
> (d) Involves a legal or factual issue of unique interest or substantial public importance, or
>
> (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
>
> (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
>
> (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression

requests publication of the disposition of the Court and the separate expression.[27]

These rules have remained quite stable over time. Compared to the Ninth Circuit's Rule 21(b) of twenty years ago, only (f) has been added, leading the court to publish short remand orders when the Supreme Court sends a case back for further action where earlier such orders were not published. The only altered provision is in subsection (e), which formerly read, "Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency." The phrase "relies in whole or in part" has been deleted and the "unless the panel determines that publication is necessary for clarifying the panel's disposition of the case" added. The rationale for publishing in this situation is that if the district court disposition was published, the court of appeals ruling should also be published in order to leave a full published record of the case.

Subsection (a), which provides that cases of first impression in the circuit must be published to be available as circuit precedent, is of particular importance and receives especial attention from the judges as they communicate about dispositions. If the writing judge's chambers appears not to have followed the rule, it is not uncommon for another member of the panel to communicate: "I don't find any Ninth Circuit precedents cited. If there aren't any, we will have to publish." Yet, as one judge suggested, "Although an unpublished disposition citing nothing but out-of-circuit cases is a 'No-No,'" the standard is "violated from time to time." In that judge's view, it would be better were the writing judge or a panel to "spend a little more time and produce a publishable opinion on a subject that really is one of first impression in the circuit."

Criterion (g) means that a case with a dissent is more likely to be published than one that is unanimous, something not evident from the *Federal Reporter*'s lists of "tabled cases" but clear from the dispositions themselves, making opinions likely to over-represent non-unanimous dispositions. Federal Judicial Center figures show that in 1998, in the Ninth Circuit, which had an 18 percent overall publication rate, a published opinion

27. 9th Cir. R. 36-2 (West Group 2000).

resulted in two-thirds of cases with a dissent and almost 90 percent if a concurrence was filed.[28]

In addition to the formal guidelines for publication, norms or desiderata not embodied in the official criteria also come into play. The most obvious is that reversals should be published, and the *Federal Reporter* reveals that reversals are indeed more likely to be published than affirmances. In 1998, the Ninth Circuit published only fourteen percent of dispositions affirming the lower court or agency but in fifty-three percent of cases when reversing; for remands, the proportion was twenty percent.[29] The heavier use of published opinions for reversals indicates that the appeals court is not necessarily trying to spare the district judge embarrassment, although some number of reversals result in unpublished rulings "because the district court really did have unresolved fact questions which it erroneously disposed of in a summary judgment." The result of publishing a disproportionate number of criminal appeals that reverse the lower court while disposing of most affirmances with unpublished dispositions has apparently caused some judges to question whether the impression from the published opinion gives the court a "bad rep" for being "soft on criminals," because the published opinions are unrepresentative.

This aspect of criminal cases is part of the larger point: The relative proportions of published and unpublished dispositions will differ from one subject-matter to the next. This results from a number of factors that affect publication. Perhaps most important are the novelty of the questions posed in the case—related to whether there is circuit precedent on point—and the clarity of the law of the circuit. Also playing a part is the relative complexity of the law. Some subjects like antitrust frequently produce complex cases, while other categories are more likely to contain "simple" cases. One is direct criminal appeals, a result in part of the high proportion of criminal convictions and Federal Sentencing Guideline determinations appealed by federal public defenders. Also illustrating the difference in publication rates among subject-matters are diversity cases. They are among those most likely to be unpublished because the

28. McKenna et al., *supra* n. 2, at 19 tbl. 11.

29. *Id.*

judges realize that their rulings are "good law" only until state courts decide the point at issue and displace the federal court decision.

C. Enforcement of the Publication/Nonpublication Guidelines

That publication/nonpublication guidelines exist is important. But so is whether the guidelines are enforced. Songer questioned the extent to which they were.[30] Given the earlier practice of publishing most dispositions and calls to maintain that practice as much as possible, a "violation" in the direction of not publishing is perhaps more serious than publication of a disposition that seems not to meet the criteria for publication. This is reinforced by the fact that not-for-publication dispositions are less accessible, particularly in circuits which do not allow their posting on Westlaw, keeping such rulings from view. Yet we still know little about the process by which the criteria might be enforced.

From time to time, courts have charged their staff attorneys with examining not-for-publication dispositions before they are filed to see if they fit the criteria and to recommend the publication of dispositions erroneously designated "not for publication." Yet "rule violations" continue nonetheless. Staff attorneys' workload gives them little time for this oversight function. It is also possible that the staff attorneys do not call potential errors to the judges' attention or that the judges ignore suggestions to change the publication status of the disposition, with the latter reinforcing the former. Indeed, some judges have suggested that their colleagues are unlikely to respond favorably to publication suggestions from (mere) staff attorneys.

There are, however, ways in which enforcement can occur short of appointing a "Publication Rules Czar." Perhaps the most important way that this does occur in a multi-member court is for the judges to remind each other of the criteria as applied to particular cases. However, while some such monitoring does take place, and an off-panel judge might suggest to the panel that they publish a particular memodispo, judges are less likely

30. *See* Songer et al., *supra* n. 11, *and* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 Judicature 307 (1990).

to monitor unpublished dispositions by other members of the court than opinions to be published. This is evident from one judge's comment that there are "unpublished dispositions that fly under the radar of the rest of the court."

In addition to comments to colleagues in individual cases, judges may raise the nonpublication issue for consideration at policymaking meetings or at annual symposia, where they meet to discuss general matters of law and policy rather than pending cases. One judge's concerns about "the fidelity with which we honor our nonpublication policy" led him to suggest having a symposium panel because, as he observed in a memorandum to all the judges of the court, "Quality control involves our custom of publishing only those dispositions that ought to be published." One aspect of quality control is a simple failure "to be more alert . . . when we agree with the result . . . but we fail to scrutinize the language of the unpublished decision because it is unpublished, and we don't want to take the time to polish the product." That may leave in the disposition language that may annoy lower court judges, who, when reversed as to the granting of a summary judgment, believe they are being told by the court of appeals how to decide the case on the merits.

Whatever prompts judges' concerns about "quality control" and publication practices, discussion in such settings may serve to raise judges' consciousness about the relevant issues and to re-socialize them to the rules. The repeated raising of the "quality control" issue makes clear, however, that socialization, or re-socialization, is never complete. Judges' individual inclinations or values at times cause slippage in their compliance with the rules.

IV. CONCLUSION

Unpublished dispositions perform an important function, particularly in giving federal courts of appeals judges a running start at keeping abreast of their caseload. These judges do not make decisions not to publish absent-mindedly. They do make conscious decisions about whether to publish, taking into account the criteria established for publication. Whether stated as formal guidelines or found in practice as norms, among the factors affecting publication are the type of issue, the complexity

of the law, the presence of oral argument, the availability of existing circuit precedent, the filing of a dissent, and whether the lower court is being affirmed or reversed. Most important, although judges often defer to each other's choices, they keep each other in line by asking questions, reminding each other of the guidelines, and discussing the issue collectively.

Given the tradition-based expectation that full treatment, including a published opinion, would be given to each case, with the judge in full control of the case, use of unpublished rulings will inevitably draw criticism. As seen in comments quoted here, the judges are aware that some unpublished rulings probably should have been published, and they are critical of themselves; they are concerned that clerks play too large a role and that they themselves are insufficiently watchful.

Others may decide that the picture presented here raises further questions about the practice. Nonetheless, it is my hope that this picture, however rough and preliminary, will provide those interested in the federal courts of appeals' work with a better sense of a practice little known despite the frequency of its use. And perhaps it will serve to allay some concerns and to lower the decibel level of the criticism of the practice.