

## **Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines<sup>1</sup>**

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#### I. INTRODUCTION

The burgeoning caseload of the U.S. courts of appeals, which has risen more rapidly than has the number of appellate judges, 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? To aid in coping with their caseload, for close to thirty years they have issued memorandum dispositions and orders which are not to be cited as precedent, although they could be cited for purposes related to “law of the case.” There is now a movement to allow their citation not as precedent but in efforts to persuade the court.<sup>3</sup> Because initially they were not published in the reporters, they came to be called “unpublished” dispositions; however, for some time, they have been available on Westlaw and on court

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<sup>3</sup> Proposed Rule 32.1 of the Federal Rules of Appellate Procedure would remove any prohibition or restriction on the citation of unpublished opinions. In August 2003, the Advisory Committee on Appellate Rules had published the rule for comment, and had recommended approval and transmission of the proposal to the Judicial Conference. In June 2004, the Committee on Rules of Practice and Procedure postponed action on the new rule so that the Federal Judicial Center could complete research on some matters raised by the proposed Rule’s opponents, who were concentrated in the Ninth Circuit. For an account, see *How Appealing*, [http://www.legalaffairs.org/howappealing/2004\\_06\\_01\\_appellateblog\\_archive.html#108793216008620](http://www.legalaffairs.org/howappealing/2004_06_01_appellateblog_archive.html#108793216008620) (June 22, 2004, 15:22 EST) (Howard Bashman). That study, Tim Reagan et al., *Citations to Unpublished Opinions in the Federal Courts of Appeals* (June 1, 2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/\\$File/Citatio2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citatio2.pdf/$File/Citatio2.pdf), was completed in June 2005, and, after the Committee on Rules of Practice and Procedure approved the new Rule, in September 2005 the Judicial Conference endorsed the rule change and forwarded the new rule to Congress. See Tony Mauro, *Judicial Conference Supports Citing Unpublished Opinions*, LEGAL TIMES, Sept. 21, 2005, available at <http://www.law.com/jsp/article.jsp?id=1127207112718>.

websites and, more recently, have been published in West's *Federal Appendix*.<sup>4</sup>

The frequent use of such dispositions, which now constitute more than three-fourths of all courts of appeals rulings,<sup>5</sup> has led to considerable rhetoric about whether or not they *should* be used; indeed, the level of controversy may be said to exceed the amount of knowledge held even by many of those who use the federal appellate courts. It is now long past time for systematic attention to the actuality of practices in the circuits leading to unpublished dispositions. Whether dispositions become published opinions or unpublished memorandums is a result of actions by the judges, clerks, and parties who prepare them and the process through which they move, including discussion among the judges on a panel as to the type of disposition that should result; attention has been given to that process elsewhere.<sup>6</sup> To assist greater understanding of “unpublished” dispositions, this article offers some empirical groundwork about the *guidelines* that have been created to determine whether judges should produce either a published opinion or an unpublished disposition; that groundwork is necessary if people are to evaluate proposals for changing the rules concerning their use. Included are the circumstances in which unpublished dispositions are used, the guidelines for publication, their enforcement, compliance with those guidelines, and other norms concerning non-publication.

This article provides information about judges' views on an important aspect of the process by which they make decisions, as well as a partial view of interaction among judges as they reach a final product. Receiving principal attention is the process in the U.S. Court of Appeals for the Ninth Circuit, although some examples are drawn from other circuits. What takes place in the Ninth Circuit can be taken as indicative of what happens elsewhere because, despite minor procedural variations from one circuit to the next, basic elements of the process are similar across circuits, as are the formal criteria for publication. One important

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<sup>4</sup> The term “unpublished” dispositions, although now a misnomer, is used here because it has long been standard terminology, although it is now “no more than a shorthand for opinions that are designated by the court as ‘not for publication,’” *Unpublished Judicial Opinions: Oversight Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 3 (2002) (Statement of Arthur Hellman, Professor of Law, University of Pittsburgh School of Law) [hereinafter Hellman statements].

<sup>5</sup> See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRACT. & PROCESS 199, 201 (2001).

<sup>6</sup> See Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRACT. & PROCESS 325 (2001); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004).

difference, however, is that Ninth Circuit memorandum dispositions are written text — not the one-line “Affirmed - see Rule 36-1” dispositions common in, for example, the Third and Eleventh Circuits — and the object of considerable criticism.

The picture presented here is drawn from not-for-publication dispositions from the late 1970s to the present time;<sup>7</sup> discussions with some judges; files in closed cases; and the author’s extended observation of the functioning of the Ninth Circuit. Material from the files is used to provide examples for each of the elements examined. Because those files contain clerks’ work and judges’ communications with each other during consideration of a case, they provide a more complete understanding of why cases are published or not published.<sup>8</sup>

The article begins with discussion of the guidelines themselves and related norms concerning non-publication; approaches to evaluating compliance with the guidelines and norms; and how the guidelines might be enforced. Each of the Ninth Circuit’s guidelines are discussed in turn, followed by treatment of other norms and considerations affecting publication that have been identified. Receiving particular attention are dispositions containing issues of first impression, those with separate opinions, and those reversing the lower court or agency.

#### *A. Guidelines*

Judges’ decisions whether to publish are largely, but not completely, discretionary. The criteria or guidelines in each court of appeals’ Local Rules, which once spoke of when a decision *must* be published but now speak of when they *may* be published, are permissive rather than mandatory although they remain formal. They are also relatively consistent across circuits in their wording although they “differ somewhat in their application.”<sup>9</sup>

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<sup>7</sup> Unpublished dispositions for 1972 through 1977 were examined in the San Francisco library of the U.S. Court of Appeals for the Ninth Circuit; these dispositions predated even the inclusion of *Federal Reporter* lists of such cases, and thus do not bear “F.2d” citations.

<sup>8</sup> Reliance on the papers of a single judge poses the risk of lack of representativeness, and, through quotation, certainly leads to greater prominence to that judge’s views. However, as any one judge sits with many other combinations of judges over time, these multiple interactions should serve to provide a breadth of views and reveal recurring patterns.

<sup>9</sup> JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 18 (Federal Judicial Center, 2000). State courts have also enunciated criteria for publication or non-publication of dispositions. See Arthur G. Scotland, *The Filing and Publication of Appellate Opinions: A Survey of the Council of Chief Judges of Courts of Appeal*, JUDGES’ J. 31 (Winter

The criteria state when cases should be *published*, not when they should *not* be published. The Ninth Circuit's General Orders (G.O. 4.3)<sup>10</sup> say an opinion should be written only if the panel determines that a published opinion is necessary, and 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.<sup>11</sup>

The elements of this Rule have remained quite stable over time; exceptions are the additions of (c) and (f) to what was the Ninth Circuit's Rule 21(b) of twenty years ago.

These guidelines, while providing the context within which judges make decisions whether or not to publish, are not "the whole story." For one thing, "[f]or many courts the written rules do not reflect the actual standards used by the court."<sup>12</sup> Other, unstated norms or desiderata also

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2004), which distinguishes between criteria to publish, *id.* at 31, or to use memorandum dispositions, *id.* at 33.

<sup>10</sup> U.S. CT. OF APP. 9TH CIR. GEN. ORDER 4.3 (2005), *available at* <http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c8825ce50065fcb8/f769f3ad364d1b6d88256864007a1479?OpenDocument>.

<sup>11</sup> 9TH CIR. R. 36-2.

<sup>12</sup> DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 37 (Federal Judicial Center, 1985).

come into play, and there are factors shown to be related to choice of an unpublished disposition.

Among the norms are that rulings on non-final/non-dispositive matters, those based on sufficiency of the evidence, and those based on state law such as cases coming to the federal courts under its diversity of citizenship jurisdiction need not be published. In such situations, one can talk of courts that are “reported to have adopted such a policy *in practice*,” as was the case with the Ninth Circuit and intercircuit conflict cases.<sup>13</sup> Norms are, however, not as closely followed as rules, and the pattern of compliance is even less clear for “constructed” criteria. Some of these norms and factors are easily identifiable, perhaps because, like publication of reversals, they are part of other circuits’ formal rules, while others are categories an observer can construct where use of unpublished dispositions is sufficiently regular to allow an inference of the presence of an implicit norm.

### *B. Evaluating Use*

That the guidelines are not self-executing and that compliance with them is less than complete is evident in claims that there is inconsistency among unpublished dispositions and in research findings that there is considerable slippage in the application of criteria.<sup>14</sup> However, we must go beyond such general statements to a closer examination of unpublished dispositions, in which our concern is with those cases resolved by unpublished memorandum when publication might seem appropriate. We adopt this focus on unpublished dispositions rather than published ones because one does not read criticism of over-publication; instead there is criticism of overuse of unpublished dispositions.<sup>15</sup> This makes a “violation” in the direction of *not* publishing perhaps more serious than publication when the criteria for publication are not met. It may be easier to question the wisdom of the decision to publish than to determine that an unpublished disposition should have been published; a brief memorandum disposition may mask information that would lead to the conclusion that publication was in order. There is little dispute that many individual cases are extremely clear-cut candidates for unpublished

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<sup>13</sup> *Id.* at 36 (emphasis added).

<sup>14</sup> See Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963 (1989); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307 (1990).

<sup>15</sup> 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, 281-86 (1996).

disposition. Beyond them, however, evaluating unpublished rulings is harder, and when judges say virtually nothing, determining whether non-publication is proper is very difficult.

Some people appear to approach evaluation of unpublished dispositions with an apparent presumption that all dispositions should be published and a stance that every decision not to publish is questionable.<sup>16</sup> Some also seem to hold the further belief that judges, acting in malign fashion, use memorandum dispositions to hide intracircuit inconsistency and perhaps as well to avoid hard choices.<sup>17</sup> Those claims of impropriety are usually based on individual instances without an indication of how frequently that type of problem occurs, and claims that dispositions in unpublished rulings are not really reasoned dispositions<sup>18</sup> seem designed to put in question the whole enterprise of using unpublished dispositions. An alternative approach, used in this article, treats judges' decisions to issue not-for-publication dispositions as having been undertaken in good faith, with the judges having made some effort to provide reasons, if not full-blown disquisitions, to litigants. Instead, decisions to publish or not are evaluated in terms of the guidelines the courts themselves create and the norms they have developed, as it is legitimate to ask how those criteria appear to be applied.

### *C. Enforcement*

Before turning to look at particular criteria, we ask how the criteria might be enforced. The court's staff attorneys could play a role in uncovering intracircuit conflicts that exist in unpublished dispositions and could prompt the judges to resolve the conflict. On case inventory sheets, the staff attorneys note prior memorandum dispositions on the question in the present case, and they may further recommend that the panel publish the present case. From time to time, courts have charged 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 they feel are erroneously designated "not for publication."

However, not only do staff attorneys' workloads give them little time for this oversight function, but it is also possible that they are hesitant to call possible errors to the judges' attention or that judges

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<sup>16</sup> See *id.*; see also William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRACT. & PROCESS 37 (1999).

<sup>17</sup> See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157 (1998).

<sup>18</sup> See *id.* at 163 n.24.

ignore their suggestions, reinforcing such hesitancy. Indeed, some judges have suggested that colleagues are unlikely to respond favorably to publication suggestions from (mere) staff attorneys. This view is evident in a memorandum from a judge to colleagues reporting that a disposition had not been filed “because the staff decided that under our rules an opinion is required” and noting that the staff “seem to have overruled the panel majority.”<sup>19</sup> Although this judge had earlier argued unsuccessfully within the panel for publication, he said, “I hope the staff loses . . . because I think that judges’ views should prevail”; he later reported that “the clerk lost in the fight” on that case.<sup>20</sup>

Perhaps the most important way to enforce the criteria in a multi-member court, short of appointing a “Publication Rules Czar,” is for judges to remind each other of their application in particular cases. That the criteria for publication appear to be followed to a large extent even in the absence of an enforcement officer may result from several factors. There is discussion among panel members at post-argument conference as to whether the disposition ought to be published. Panel members examining a proposed disposition are not hesitant to call to the attention of the writing judge that publication is required because, for example, no in-circuit citations have been used. There is also monitoring by off-panel judges who might suggest to the panel that they publish a particular memorandum disposition. However, judges are less likely to monitor other judges’ unpublished dispositions than their published opinions, evident in a judge’s interview comment that there are “unpublished dispositions that fly under the radar of the rest of the court.”<sup>21</sup> In addition, as they join the court,<sup>22</sup> new judges absorb the pattern established with respect to the types of dispositions that are to be published. This socialization process is repeated within the community of clerks, as departing clerks convey to their successors information about the types of information they will prepare and as the new clerks themselves read prior dispositions in their judge’s chambers.

Judges may also raise the non-publication issue to be considered at court meetings, particularly at sessions, like the Ninth Circuit’s Symposium, where the judges meet to discuss more general matters of law and policy. One judge’s concerns about “the fidelity with which we

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<sup>19</sup> Quotes without attribution are to materials to which the author was provided access on the condition that the names of authors would not be revealed.

<sup>20</sup> *Id.*

<sup>21</sup> Quotes from interviews are without attribution when the interviews were conducted on the basis of the interviewee’s anonymity.

<sup>22</sup> See Stephen L. Wasby, “*Into the Soup?*” *The Acclimation of Ninth Circuit Appellate Judges*, 73 JUDICATURE 10 (1989).

honor our nonpublication policy” led him to suggest having a symposium panel, because, as he observed in a memorandum to all the court’s judges, “Quality control involves our custom of publishing only those dispositions that ought to be published.”<sup>23</sup> 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.” 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 resocialize them to the rules. The repeated raising of the “quality control” issue makes clear, however, that socialization, or resocialization, is never complete, and judges’ individual inclinations or values at times cause slippage in compliance with the rules.

## II. SPECIFIC GUIDELINES

### *A. A New Rule of Law: Cases of First Impression*

We now turn to examine each of the criteria. Among them, Rule 36-2 (a) — that publication should occur where a ruling “establishes, alters, modifies, or clarifies a rule of law”<sup>24</sup> — is of particular importance. One of the principal purposes for publishing dispositions is to add to the development of the law, and publication is clearly in order in such cases because of their contribution to that end. This rule specifies that cases of first impression in the circuit must be published to be available as circuit precedent. This means that while judges may use rulings from other circuits to support their positions, if those rulings are sufficiently persuasive that the judges believe they should be followed and there is no Ninth Circuit ruling on point, the disposition should be published to create circuit precedent.

When there is no law of the circuit on point, the court is deciding the question for the first time; by adopting the position of another circuit, even if only by citing a case, new circuit law is created *de facto*. This is true no matter how simple, trivial, and noncontroversial the point. In such situations, the rule means that publication should follow as a matter of course. As one judge observed, “Our conclusion that this decision meets the criteria for publication was prompted by the fact that it

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<sup>23</sup> See *supra* note 19.

<sup>24</sup> 9TH CIR. R. 36-2(a).

establishes a rule of law that we had not previously announced in a published opinion. See 9th Cir. R. 36-2(a).<sup>25</sup>

By adopting the position of another circuit, even if only by citing a case, a court of appeals is creating new circuit law de facto, and this does not depend on existence of a dispute over the point for which the out-of-circuit case is cited. Thus when a Ninth Circuit panel stated, “Withdrawal of a plea of guilty requires that there exist a ‘cognizable defense’ not presented at the time of the arraignment,”<sup>26</sup> and cited only a D.C. Circuit case for that proposition,<sup>27</sup> the disposition should have been published to make that point into circuit precedent. Even more obvious was the case in which a panel, affirming a ruling of the Board of Immigration Appeals, said that a Seventh Circuit case was “close” and added, “We approve that decision . . .”<sup>28</sup>; this was an adoption of an out-of-circuit rule that should have been published to make the rule available as circuit precedent.

Likewise, when a panel chooses between positions staked out by other circuits to adopt a rule for its own circuit, publication is necessary, as can be seen in the observation by one member of a three-judge panel to his panel colleagues: “Because this disposition involves a choice between a Sixth Circuit case and a Seventh Circuit case which cannot be distinguished, I believe the disposition qualifies for publication as an opinion under our practices.”<sup>29</sup> This likewise applies when the law of another circuit is rejected; here, publication is considered even more necessary because an intercircuit conflict is being created. When the Seventh Circuit affirmed a ruling on the basis that a motion to alter a sentence was time-barred, the judges discussed how the circuit’s rule was different from that in other circuits, saying they “decline the invitation” to reconsider the rule despite the intercircuit split.<sup>30</sup>

The guideline itself does not seem to be controversial, and its application should be fairly straightforward. A panel, dealing with a Hawaii statute brought into play in a negligence suit against the United States, found that “we probably had to publish in view of the absence of

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<sup>25</sup> United States v. Rivera-Sanchez, 222 F.3d 1057, 1062 (9th Cir. 2000).

<sup>26</sup> See *supra* note 19.

<sup>27</sup> United States v. Mignot, No. 76-3652, 554 F.2d 1071 (9th Cir. 1977) (unpublished table decision).

<sup>28</sup> Park v. INS, No. 76-1356, 556 F.2d 587 (9th Cir. 1977) (unpublished table decision).

<sup>29</sup> Referencing English v. Burlington N. R.R. Co., 18 F.3d 741 (9th Cir. 1994) (Judge Alfred T. Goodwin to panel). Where a case is not cited directly, but is instead noted because it is the basis for a judge’s comment (e.g., an inter-panel memo, interview, e-mail), the signal “Referencing” will be used hereinafter.

<sup>30</sup> Clay v. United States, 30 F. App’x 607, 609 (7th Cir. 2002). See also Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119 (2002).

any circuit level authority” on that statute.<sup>31</sup> There may, however, be some disagreement as to when the guideline requires publication, but this creates pressure that can override objections to publishing, and it receives special attention from the judges as they communicate with each other. The guideline’s effect can be seen in conference memos, as when a judge was reported to have “felt that publication was appropriate, because we do not yet have authority applying *Davis* [<sup>32</sup>] in the context of a juvenile case,” and, in another case, the presiding judge, while saying the author could prepare either an opinion or unpublished disposition, said, “[P]erhaps it should be an opinion because it is our circuit’s first case on this.”<sup>33</sup> It is also reflected in the statement of a judge circulating a proposed opinion, “Because we will be making new law that the 1991 amendment to the §4A1.2 commentary is not a clarifying amendment, I think we need to publish.”<sup>34</sup> In another case, a judge called to his colleagues’ attention “that there is currently no Ninth Circuit law on the issue whether a court may depart based on uncounted juvenile sentences,”<sup>35</sup> while another writing judge said of his proposed disposition on the applicability of Sentencing Guidelines, “We may want to consider publishing, because there is no dispositive precedent in this circuit, and because the issue (or closely analogous ones) likely will recur.”<sup>36</sup>

When a writing judge raises the possible need to publish, other members of the panel may chime in to say that publication is required because the disposition now makes new circuit precedent. Thus, in one case, where the author said, “As there is no Ninth Circuit precedent on partial filing fees, this may be a decision that should be issued as an opinion,” another panel member wrote to “suggest that it be made an opinion since we have no precedent of our court on the subject.”<sup>37</sup> In another case, after a judge submitting a proposed disposition said, “We may want to consider publishing, because there is no dispositive precedent in this circuit,” a colleague responded, “We need law on the

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<sup>31</sup> Referencing *Howard v. United States*, 181 F.3d 1064 (9th Cir. 1999).

<sup>32</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>33</sup> Referencing *United States v. Doe*, 60 F.3d 544 (9th Cir. 1995); *King v. United States*, 152 F.3d 1200 (9th Cir. 1998).

<sup>34</sup> Referencing *United States v. Bishop*, 1 F.3d 910 (9th Cir. 1993).

<sup>35</sup> Referencing *United States v. Beck*, 992 F.2d 1008 (9th Cir. 1993) (per curiam). This judge originally said that not publishing was justified because of reliance on the Guidelines, but a colleague wrote to “suggest that we publish it as a per curiam” because the government would request publication if it were not initially published.

<sup>36</sup> Referencing *United States v. Schram*, 9 F.3d 741 (9th Cir. 1993).

<sup>37</sup> See *supra* note 19.

subject in our circuit.”<sup>38</sup> The argument for publication on this basis can also come later, even when the panel considers a petition for rehearing or during consideration of a party’s request for redesignation of an unpublished memorandum disposition as a published opinion.

Where the court does not publish in situations where no Ninth Circuit case is cited, a litigant’s request for redesignation as a published opinion will likely be based at least in part on the claim that the case is one of first impression. Examples are claims that “the case is one of first impression on the appellate court level concerning ERISA’s preemption of this particular statute,”<sup>39</sup> or “A number of the issues raised by this appeal have either not been addressed in this circuit or have not received the attention necessary to permit their citation as authority.”<sup>40</sup> And the judges show their sensitivity to the rule in responding to redesignation requests, as when a judge, observing “we are contributing new Ninth Circuit law in this disposition,” wrote to his panel colleagues that “we may be obliged to grant the request for publication of this disposition pursuant to our policy of publication of dispositions which cite and rely on law from sources other than our own prior decisions.”<sup>41</sup> However, another judge objected, pointing to the court’s having changed the rules so that publication was no longer mandated when the court relied on out-of-circuit law. “Mere mention of a case from another circuit, particularly when supporting our own prior rule, would not justify publication in any event,” the judge said, “Nor would an incidental reference to another circuit’s case, if we were not relying on it as the basis for a proposition that we were adopting.”<sup>42</sup> The disposition was not published.

If the writing judge appears not to have followed the rule, and the proposed not-for-publication disposition does not contain any within-circuit citations, another panel member is likely to suggest either that missing in-circuit precedent be found or that the ruling be published, and will use language like, “I don’t find any Ninth Circuit precedents cited. If there aren’t any, we will have to publish.” Thus, in a deportation case, in sending a concurrence to the author, a judge said, “I think it should be published even though it wasn’t argued. The reason for publication includes: . . . citation of a 5th Circuit case, and . . . a 1st Circuit case.”

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<sup>38</sup> The former also said publication was warranted “because the issue (or closely analogous ones) likely will recur.” *See supra* note 19.

<sup>39</sup> *Referencing* *Trs. of Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1993) (request from appellee made on Jan. 13, 1993).

<sup>40</sup> *Referencing* *United States v. Jackson*, 947 F.2d 104 (9th Cir. 1992) (statement made on May 27, 1992, by Charles Turner to the Clerk of the Court).

<sup>41</sup> *Lincoln Technical Inst. of Ariz., Inc. v. Fed. Ins. Co.*, 76 F.3d 387 (9th Cir. 1996) (unpublished table decision).

<sup>42</sup> *Id.*

Such a suggestion might lead the author to revise the disposition to delete the citation.

There are many unpublished memorandum dispositions where publication seemed unnecessary because of the absence of an issue of first impression, as when a judge, although willing to agree to publication of a ruling, felt “that it contains no new law requiring publication” and it was not published.<sup>43</sup> However, there are instances where publication was in order because the case was one of apparent first impression in the circuit. An example was a case on a taxpayer’s claim that the statute providing for penalties for frivolous returns (TEFRA) violated the Origination Clause because the Senate had completely amended the House-originated bill.<sup>44</sup> In saying, “This contention has been rejected by every published decision to consider the question,” the court cited only to the Sixth Circuit and the Districts of Arizona and Southern California, not the Ninth Circuit, so that even if the judges didn’t want to give the tax protestor the limelight, the court’s own rules required publication.

Situations of this sort may arise because of the need to dispose of the increasing number of cases, with less attention being given to quality control. Panels, a judge has suggested, “frequently fail to publish when they should spend a little more time and produce a publishable opinion on a subject that really is one of first impression of the circuit.”<sup>45</sup> The result is that “our unpublished stuff abounds with decisions citing no 9th circuit law and relying on 5th or 8th or some other circuit’s research.”<sup>46</sup> This is said to be a danger because the work from the other circuit “may indeed be flawed, or obsolete” or it might “not commend itself to a panel taking the time to really studying the matter.”<sup>47</sup> Reliance on out-of-circuit rulings may, however, mean that, once the panel decides to use an unpublished memorandum to dispose of a case, the clerks assisting the “writing” judge would look only as far as the first citation to support the court’s ruling on a point, without considering whether it was from outside the circuit or was “home-grown.”

The rule’s corollary is that if the court has recently published a disposition on a particular point of law, a case shortly thereafter on the

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<sup>43</sup> Referencing *Baskin Distribution, Inc. v. Pittway Corp.*, No. 96-35882, 141 F.3d 1173 (9th Cir. 1998) (unpublished table decision) (Judge Alfred T. Goodwin to panel).

<sup>44</sup> *Sherman v. Regan*, No. 84-2049, 760 F.2d 276 (9th Cir. 1985) (unpublished table decision).

<sup>45</sup> E-mail from Judge Alfred T. Goodwin, U.S. Court of Appeals for the Ninth Circuit, to Stephen L. Wasby (Apr. 27, 1999) [hereinafter Goodwin 1999 E-mail] (on file with author).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

same point can be an unpublished memorandum disposition which cites to that precedent,<sup>48</sup> in part because the present case is only an application of the law.<sup>49</sup> For example, in December 1972, early in its use of unpublished dispositions, the Ninth Circuit, rejecting a claim that use of hearsay in an indictment was error, said the claim had been rejected both in 1969 and again just five months earlier.<sup>50</sup> Where the court has decided a case directly on point and cites that case, thus pretty much ending the matter, a published opinion seems unnecessary, as it would merely reiterate the legal point.

At times, when a panel has several cases on the same point, the judges will identify one of the cases as a “lead case” which is to receive a published opinion, while the other cases receive memorandum dispositions filed after the lead case and citing to it. When there are many cases in one area of law,<sup>51</sup> the likelihood is great that many will produce the same issues, so that publication of some does not require publication of other related cases. An example is immigration cases in which the INS refuses to grant asylum and withholding of deportation.<sup>52</sup> Unpublished dispositions were used to deal with border search cases after *Almeida-Sanchez v. United States*,<sup>53</sup> such as several 1977 rulings<sup>54</sup> in which the Ninth Circuit, on the government’s petition, granted rehearing and reversed district judges’ rulings suppressing evidence because the fixed checkpoint searches at issue took place after the date in which the en banc Ninth Circuit had said its ruling on such searches should apply.<sup>55</sup>

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<sup>48</sup> See e.g., *Brevard Eng’g Coll.*, No. 71-2697 (9th Cir. May, 30 1973) (citing *Durst v. Nat’l Cas. Co.*, 452 F.2d 610 (9th Cir. 1971)); *Castillo v. Comm’r*, 71-1922 (9th Cir. Aug. 7, 1973) (citing *Sanders v. Comm’r*, 439 F.2d 296 (9th Cir. 1971)).

<sup>49</sup> See *infra* note 198 and accompanying text for further discussion on application.

<sup>50</sup> *United States v. Sulaica*, No. 72-2144 (9th Cir. Dec. 6, 1974).

<sup>51</sup> The staff attorneys identify cases with the same or similar issues, which are grouped for assignment to one panel rather than distributed to many panels; the goal is to reduce inconsistency in treatment.

<sup>52</sup> An instance is a series of cases on the Board of Immigration Appeals’ denial of asylum to Sikhs. See *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995). The memorandum dispositions included *Sindhu v. INS*, 66 F.3d 336 (9th Cir. 1995) (unpublished table decision), and *Singh v. Ilchert*, 64 F.3d 666 (9th Cir. 1995) (unpublished table decision). Also see *United States v. Lorentsen*, 106 F.3d 278 (9th Cir. 1997), followed by *Nordquest v. United States*, No. 96-80323, 107 F.3d 16 (9th Cir. 1997) (unpublished table decision), in which the two-line Order began: “For the reasons stated in *Lorentsen v. United States* . . .”

<sup>53</sup> 413 U.S. 266 (1973).

<sup>54</sup> See *United States v. Mintz*, No. 74-2505, 562 F.2d 56 (9th Cir. 1977) (unpublished table decision); *United States v. Olmstead*, No. 94-2759, 562 F.2d 56 (9th Cir. 1977) (unpublished table decision); *United States v. Jarvis*, No. 74-2502, 538 F.2d 341 (9th Cir. 1976) (unpublished table decision), *superseded by* 562 F.2d 56 (9th Cir. 1977) (unpublished table decision).

<sup>55</sup> *United States v. Escalante*, 554 F.2d 970 (9th Cir. 1977) (en banc).

Yet where there are previous rulings in the circuit, publication may aid if it is not clear how the cases fit together. A Ninth Circuit case discussing earlier cases arguably should have been published, particularly as it also included a dissent.<sup>56</sup> Where a panel engages in an extended discussion distinguishing among past cases,<sup>57</sup> it seems strange to go to that trouble and then not publish, as another panel would have to go through the same “drill.”

This guideline may also lead to publication of only one element in a case while others are disposed of by memorandum disposition. Thus, in denying a habeas petition challenging a state first-degree murder conviction,<sup>58</sup> the writing judge said, “We may want to publish at least part of this, because we have not previously held that *Carter v. Kentucky*[<sup>59</sup>] is not retroactive on collateral review under *Teague v. Lane*.[<sup>60</sup>]” The other panel members agreed, with one saying that because of publication, “I think a slightly more expansive explanation of our conclusion that *Carter* did not announce a new rule is in order.”<sup>61</sup> Having disposed of that issue in a published opinion, the panel used a memorandum disposition to rule on challenges to evidentiary rulings.<sup>62</sup>

Starting from its earliest use of unpublished dispositions, there are many Ninth Circuit examples where citation to one or more Ninth Circuit cases indicated that there was circuit precedent on the points raised, so that publication was not necessary. In one of the court’s many Selective Service cases, the panel quoted from earlier rulings on the point that a draft board did not have to treat every letter from an individual as an appeal and on implications of an applicant’s failure to provide additional information,<sup>63</sup> and in affirming another Selective Service case, the court cited to two 1971 rulings concerning time periods for local board action.<sup>64</sup>

A later instance where the result was clear on the basis of earlier Ninth Circuit cases and non-publication would seem to follow was a case

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<sup>56</sup> See *Singh v. INS*, 35 F. App’x 469 (9th Cir. 2002).

<sup>57</sup> See, for example, *United States v. Williams*, 29 F. App’x 198 (6th Cir. 2001), involving *Apprendi v. New Jersey*, 530 U.S. 466 (2000). For studies of *Apprendi* in the Sixth Circuit, see Emery G. Lee III, *Policy Windows on the Courts of Appeals*, 24 JUST. SYS. J. 301 (2003), and Emery G. Lee III, *Court of Appeals Decision-Making in the Wake of Apprendi v. New Jersey*, paper presented to Midwest Political Science Association, April 2004 (on file with author).

<sup>58</sup> *Referencing Shults v. Whitley*, 982 F.2d 361 (9th Cir. 1992).

<sup>59</sup> 450 U.S. 288 (1981).

<sup>60</sup> 489 U.S. 288 (1989).

<sup>61</sup> *Referencing Shults*, 982 F.2d 361.

<sup>62</sup> See *Shults v. Whitley*, 981 F.2d 1259 (9th Cir. 1992) (unpublished table decision).

<sup>63</sup> See *United States v. Poplawski*, No. 72-1959 (9th Cir. Dec. 6, 1972).

<sup>64</sup> See *United States v. Brown*, No. 72-2114 (9th Cir. Nov. 28, 1972).

challenging land use restrictions on several grounds.<sup>65</sup> Affirming the district court's antitrust dismissal, the appeals court reversed as to the lower court's dismissals based on *Railroad Commission of Texas v. Pullman* and *Younger v. Harris*<sup>66</sup> and ordered the district court to stay proceedings until state condemnation litigation was completed. Explaining why *Younger* abstention was not appropriate, the judges then noted, "Virtually every court abstaining in a land use case has ordered *Pullman* abstention, not *Younger* abstention, and has required the district court to retain jurisdiction," and cited not only two Supreme Court cases but five Ninth Circuit cases and four from other circuits.<sup>67</sup>

Where the court has made a point numerous times, publishing a disposition reiterating it briefly and citing circuit precedents hardly seems necessary. Thus when someone convicted for being a felon with a firearm claimed the statute, 18 U.S.C. § 922(g)(1), was unconstitutional under the Supreme Court's recent federalism cases,<sup>68</sup> the court of appeals took only one paragraph of discussion to say "We have repeatedly rejected this contention" and to cite four Ninth Circuit cases in all of which the Supreme Court had denied certiorari.<sup>69</sup>

Some examples suggest that compliance with this guideline is not complete. As one judge has suggested, "Although an unpublished disposition citing nothing but out-of-circuit cases is a 'No-No,'" the standard is "violated from time to time."<sup>70</sup> An early example of not publishing a disposition in which only out-of-circuit cases were cited for the major point in a case was one in which the Ninth Circuit said there was no constitutional right to bail pending appeal; state judges' discretion was upheld and cases from the Fifth and Sixth Circuits were cited.<sup>71</sup> If there was no Ninth Circuit case to cite, publication seemed called for although this was a preliminary point in the case.

Another possible "rule-violation" is an early unpublished disposition containing an extended discussion of seizure of films where liquor is sold.<sup>72</sup> The court said the case was no different from an earlier Ninth Circuit case, but no Ninth Circuit citation appears; moreover, the

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<sup>65</sup> See *Campbell v. City of Phoenix*, No. 83-2714, 755 F.2d 932 (9th Cir. 1985) (unpublished table decision).

<sup>66</sup> *R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941); *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>67</sup> See *Campbell*, 755 F.2d 932.

<sup>68</sup> See, e.g., *United States v. Lopez*, 524 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>69</sup> See *United States v. Rowland*, 37 F. App'x 304 (9th Cir. 2002).

<sup>70</sup> Goodwin 1999 E-mail, *supra* note 45.

<sup>71</sup> See *Byers v. Wood*, No. 73-1552 (9th Cir. Nov. 7, 1973).

<sup>72</sup> See *Kuzinich v. Kirby*, No. 26602 (9th Cir. July 26, 1973).

memorandum disposition contained thorough substantive discussion and the judgment was a reversal of the lower court, giving added weight to publication, but the panel contained only two judges, who disagreed over the rationale for their result, one concurring only in the result. However, publication here would have revealed that the issue and its resolution were still open matters, and the disagreement between the two judges might call into play the statement that “if courts are using unpublished opinions to announce new rules of decision, while self-consciously rejecting others that might plausibly be followed, they are violating their own standards for deciding cases without published opinions.”<sup>73</sup>

Another situation that would seem to call for publication is the circuit’s first application of a new ruling from the Supreme Court; even if the application seems obvious, publication should follow if the court of appeals has not already incorporated the Supreme Court’s decision into its own precedent. In a suit against a deputy sheriff and a county for failure to provide prompt medical assistance, an appellate ruling on the district judge’s summary judgment for defendants on state law claims based on a jury answer that was limited to federal law would not have required publication.<sup>74</sup> However, in reversing and remanding because retrial was necessary, the court decided a number of matters against plaintiff/cross-appellant on the basis of the intervening ruling in *Daniels v. Williams*,<sup>75</sup> which barred recovery under § 1983 for negligence. The statement that “negligence is not actionable under section 1983. *Daniels*, 106 S.Ct. at 665,” despite its obviousness, was new law in the circuit, as was a statement that, “In the absence of a showing deliberate indifference, a claim of negligence not actionable as a violation of due process. *Daniels*, 106 S.Ct. at 665.”<sup>76</sup> Both statements should have led to publication.

The question of publication may have been closer in another instance in which an unpublished disposition was used to begin the process of applying a new Supreme Court ruling.<sup>77</sup> Here the court of appeals found that the district court had erred in holding that *Miranda* did not apply to statements, made during a defendant’s post-conviction talk with a psychiatrist, that were used only at sentencing, because in *Estelle v. Smith*,<sup>78</sup> the Supreme Court had “indicated circumstances in

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<sup>73</sup> Hellman statement, *supra* note 4.

<sup>74</sup> See *Condon v. County of Ventura*, No. 84-5753, 792 F.2d 144 (9th Cir. 1986) (unpublished table decision).

<sup>75</sup> 474 U.S. 327 (1986).

<sup>76</sup> See *Condon*, 792 F.2d 144.

<sup>77</sup> *Malone v. Avenenti*, No. 85-2192, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

<sup>78</sup> 451 U.S. 454 (1981).

which failure to give a *Miranda* warning may require exclusion of a defendant's statements at a sentencing proceeding that does not affect the determination of guilt or innocence." Because the court of appeals found that the Supreme Court's decision came only twelve days before the recommendations by the magistrate in the present case, the court thought this should not prevent the defendant from presenting his claim on the matter even in a successive habeas petition, so an unpublished memorandum may have been thought to be a sufficient means of asking the district judge to make the initial application of the Supreme Court's new decision, as the court of appeals could always publish further explication when the case returned. And perhaps a published opinion was not necessary to establish that *Estelle v. Smith* could be applied in a habeas proceeding, as the Ninth Circuit had already so held.

If, however, in a case not yet taken to the Supreme Court, the court of appeals issues only a simple remand to the district court to reconsider its ruling in light of the justices' recently-decided *X v. Y*, there would be no need to publish that order, as the matter is likely to return to the court of appeals after the district court's action on remand, providing at that time a sufficient opportunity to issue a published opinion. Indeed, unpublished dispositions are often used to remand cases for further consideration in light of a recent Supreme Court decision in a different, but clearly related, case.<sup>79</sup> Thus a panel vacated and remanded a district court judgment dismissing an action because that decision had been made "prior to the decision of the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976)" on prosecutorial immunity, as the court of appeals wanted the district court "to consider whether any of the allegations in the complaint might support a finding that the district attorney acted outside his authority or in a rule other than in his quasi-judicial capacity"<sup>80</sup> – the situation in which the justices had said a suit could proceed.

### *B. Clarifying the Law*

Even when a ruling is not totally one of first impression, its content might contribute to the law's development, thus suggesting the need for publication, and Ninth Circuit Rule 36-2(a) suggests publication when a ruling "clarifies a point of law." Thus a writing judge told his colleagues

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<sup>79</sup> See, e.g., *Port of St. Helens v. State of Oregon*, No. 75-3525, 551 F.2d 313 (9th Cir. 1977) (unpublished table decision) (remanding to the district court "for further proceedings in light of the decision of the United States Supreme Court" in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)).

<sup>80</sup> *United Farm Workers of Am. v. Leddy*, No. 75-1691, 568 F.2d 778 (9th Cir. 1977) (unpublished table decision).

it might be better to publish a ruling because the legal issue — denial of an insurance claim for failure to submit an authorization to view medical records — was “rather murky.”<sup>81</sup> Thus, a case may be published to make matters clear to district judges. As one judge observed in a Sentencing Guidelines case,<sup>82</sup> “We owe it to the trial judges to give them some guidance in this difficult area,” and in a case on possessing counterfeit access devices and equipment, a member of the panel said he thought “it would be helpful to the district courts and to the bar, if we publish.”<sup>83</sup>

When lawyers complain about the need for clear law, the judges may respond with a published opinion intended to reduce some of the confusion. Thus in one appeal centering on a sentencing guideline issue — “what method . . . [a] district court [may] use to approximate the quantity of drugs involved in an offense” — the writing judge, who wrote that the issue “has not been clearly addressed by any published opinion in this circuit,” called attention to the defense counsel’s having “expressed frustration with the current state of law,” which the attorney said involved cases ““confined to their own particular facts, none of which are cited in the opinion.””<sup>84</sup> As a result, the writing judge stated, “A published order would provide direction to both parties and district courts,” and a published ruling did result.

An instance in which publication would have been in order to clarify the law involved a journalist’s civil contempt for refusal to answer deposition questions about events she had seen, a topic on which there were few cases so a ruling could have fleshed out when the privilege applies.<sup>85</sup> Although the court, discussing *Branzburg v. Hayes*<sup>86</sup> and the balance to be struck, concluded that the need for disclosure outweighed minimal First Amendment interests and said that journalists could be protected without sustaining the privilege in this case, it did not publish the ruling.<sup>87</sup> Likewise, when the court said that a mental illness instruction was invited error because the defense had requested it and thus could be reversed only in an “exceptional situation,” publication could have elucidated what was an “exceptional situation” as the judges

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<sup>81</sup> Referencing *Newcomb v. Standard Ins. Co.*, 187 F.3d 1004 (9th Cir. 1999).

<sup>82</sup> See *United States v. Anders*, 956 F.2d 907 (9th Cir. 1992).

<sup>83</sup> Referencing *United States v. Watson*, 118 F.3d 1315 (9th Cir. 1997).

<sup>84</sup> Referencing *United States v. August*, 86 F.3d 151 (9th Cir. 1996).

<sup>85</sup> See *In re Kioshi-Nelson v. Camarcho*, No. 95-1632, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>86</sup> 408 U.S. 665 (1972).

<sup>87</sup> See *In re Kioshi-Nelson*, 758 F.2d 656.

said the error, although more serious than those in earlier Ninth Circuit cases cited, was not exceptional.<sup>88</sup>

However, in other situations when the distinction between precedential cases is at issue, judges may think publication is warranted to help clarify matters for lower court judges and for lawyers. We can see this when a judge told his colleagues, “As to publishing the opinion, I felt that the distinction between [two cases] by the policy language alone would help to guide lawyers in future cases.” In another case, the writing judge said, “The disposition is written for publication because if left unpublished, the distinction between this case and *Norgaard* will be likely to escape notice,” adding that “other ingenious counsel will keep trying to invest in a ‘*Norgaard* extension’ of the silence-at-sentencing argument”<sup>89</sup>; here we can see use of publication to clarify in an attempt to limit future caseload. This could also be seen when a different judge wished to publish a portion of a disposition on the issue of whether a prisoner could obtain interest on his prison bank account: “My preference is to publish the portion of the disposition dealing with the interest question, so as to obviate the need for further prisoner suits on this issue.”<sup>90</sup>

### C. Calling Attention

Calling the attention of district judges and lawyers to matters they may have overlooked (see Ninth Circuit Rule 36-2(b)) is closely related to clarifying the law. Thus a judge preparing a memorandum disposition said “it may be advisable to have it printed because of our analysis on the consecutive sentence and the application of” an earlier Ninth Circuit case; calling it “an important rule,” he felt that all district judges should be advised on the continued viability of that case.<sup>91</sup> When a panel

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<sup>88</sup> Referencing *People of Territory of Guam v. Alvarez*, 763 F.2d 1036 (9th Cir. 1985) (unpublished table decision).

<sup>89</sup> Referencing *United States v. Gerace*, No. 92-10388, 997 F.2d 1293, 1295 (9th Cir. 1993) (citing *United States v. Norgaard*, 959 F.2d 136 (9th Cir. 1992)).

<sup>90</sup> Referencing *Tellis v. Godinez*, 5 F.3d 1314 (9th Cir. 1993); 8 F.3d 30 (unpublished table decision) (memorandum to panel). Part of the disposition was placed in the unpublished memorandum disposition, because, even though one of the judges was going to dissent, he stated, “our diverse collection of views does not merit publication because they will provide no guidance to prison administrators or district judges.” Referencing *Tellis*, 8 F.3d 30 (9th Cir. 1993) (unpublished table decision).

<sup>91</sup> See *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997), referencing *United States v. Doering*, 909 F.2d 392 (9th Cir. 1990), which held that the need for psychiatric help was not the type of extraordinary instance where a defendant’s mental/emotional condition was relevant to the sentence. *Doering* involved an upward departure from the Sentencing Guidelines; in the present case, the court held the condition relevant to consecutive sentences.

considered a case on armed bank robbery, in the aftermath of a Supreme Court ruling defining “use” of a gun,<sup>92</sup> the writing judge had initially circulated a brief memorandum disposition, but another panel member had written, “I suggest that this is the kind of post-*Bailey* case that should be published to assist the trial judges (and our forgetful panels).”<sup>93</sup>

A judge’s direct experience with lawyers’ lack of knowledge of what the judge thought an important point led him to propose a published opinion. After oral argument in a case involving a challenge to a restitution order, the judge had sat as part of a different panel in another case “in which the U.S. Attorney had no idea that for restitution purposes the conduct had to be an element of the offense.”<sup>94</sup> Because this lawyer “appeared to be a senior attorney but was genuinely surprised when we explained the law to him . . . I decided that an opinion explaining *Hughey*[<sup>95</sup>] and the effect of the statutory amendment might be useful.”<sup>96</sup>

A disposition may also be published to remind lawyers practicing in the court of certain procedural or substantive matters. Where the disposition in a quiet title action involving an easement referred to the Declaration of Taking as determinative, one judge agreed with the writer’s proposed very brief memorandum and did not “insist” on publication but did say, “This appears to be sufficiently important to the bar to call attention once again to the effect of the declaration of taking.”<sup>97</sup>

#### *D. Criticizing Existing Law*

One guideline not often at play is Ninth Circuit Rule 36-2(c), calling for publication if the disposition criticizes existing law. Although judges do criticize existing law when communicating among themselves and off-panel judges may do so when arguing for holding an en banc rehearing, one seldom sees such criticism in the court’s formal dispositions. Nonetheless, when such criticism does find its way into dispositions, publication should result to reveal the uncertainty in the law thus suggested. One such candidate for publication was a case involving the power of a district court to give consecutive sentences for a single act

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<sup>92</sup> See *Bailey v. United States*, 516 U.S. 137 (1995).

<sup>93</sup> *Referencing* *United States v. Washington*, 106 F.3d 1488 (9th Cir. 1997) (per curiam) (Judge Alfred T. Goodwin to panel).

<sup>94</sup> See *supra* note 19.

<sup>95</sup> *Hughey v. United States*, 495 U.S. 411 (1990).

<sup>96</sup> *Referencing* *United States v. Reed*, 80 F.3d 1419 (9th Cir. 1996).

<sup>97</sup> *Referencing* *Hermans v. United States*, 86 F.3d 1162 (9th Cir. 1996) (unpublished table decision). However, the author preferred not to publish and the disposition was filed as a memorandum.

violating more than one subparagraph of a single statutory provision.<sup>98</sup> Two panel members thought those sentences were invalid on the basis of a 1972 Ninth Circuit case, which they questioned for having “incorrectly applied the rule of lenity in looking to legislative history.” They noted the earlier ruling’s possible inconsistency with an intervening Supreme Court decision and had even deferred submission of the case while they decided whether to ask for the en banc hearing that would have been necessary if circuit precedent were to be overturned. Saying “we are bound by our recent reaffirmation of the law of the circuit,” they nonetheless kept the earlier ruling as circuit precedent, although they also included a “cP” cite indicating that “if circuit precedent is undermined by a Supreme Court ruling, a panel may reexamine earlier cases to determine their continuing validity.”<sup>99</sup>

The need to publish this ruling, already evident from the Supreme Court-Ninth Circuit tension the other panel members saw, is given weight by the fact that Judge Reinhardt, even though not pressing for publication on the basis of his separate writing, felt impelled to write, particularly when his concurrence revealed differences in opinion as to the interpretation of double jeopardy in this situation.<sup>100</sup> If the case had been published, other judges would have paid closer attention to it, and would have been aware of the issue when it subsequently arose. When uncertainty in the law leads the court to change its disposition upon petition for rehearing, this also raises the question as to whether law and its application is sufficiently clear that it can be relegated to an unpublished disposition.<sup>101</sup>

#### *E. Unique Interest and Substantial Importance*

Judges may simply be struck by the specifics of an individual case, making it worthy of publication. For example, in a sentencing case involving a downward departure from the Sentencing Guidelines, another judge argued for publication because “it is a rare case when we affirm a *Koon* discretionary departure on ‘heartland’ reasoning.”<sup>102</sup> At

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<sup>98</sup> See *United States v. Yarbrough*, No. 85-3041, 797 F.2d 979 (9th Cir. 1986) (unpublished table decision).

<sup>99</sup> Referencing *id.* The third panel member, Judge Stephen Reinhardt, concurred in the judgment.

<sup>100</sup> See *id.*

<sup>101</sup> See, e.g., *Kime v. County of Riverside*, 872 F.2d 428 (9th Cir. 1989) (unpublished table decision), *superseded by* 889 F.2d 1095 (9th Cir. 1989).

<sup>102</sup> Referencing *United States v. Lopez*, 106 F.3d 309 (9th Cir. 1997) (Judge Alfred T. Goodwin’s note on the face of a proposed memorandum disposition). The reference is to *Koon v. United States*, 581 U.S. 81 (1996) where the Court approved a downward departure in the case of the police officers involved in the Rodney King beating.

times publication is suggested simply because the facts are interesting, as a judge noted of a case that involved mail fraud related to inflating the value of a horse so as to receive a large insurance payment, but the case was disposed of by memorandum disposition.<sup>103</sup> In a later case on deportation of a person found not to be a citizen, this judge suggested that “in view of the unusual facts, I suspect it should be published, and so suggest.”<sup>104</sup>

Although not necessarily equivalent to “importance,” the relative complexity of the law plays an important part in the decision to publish. Some subjects like antitrust frequently produce complex cases, which are often published, while other topics are more likely to result in “simple” cases disposed of with memorandum dispositions. Direct criminal appeals are among the latter, partly the result of the high proportion of criminal convictions and Guideline sentences appealed by federal public defenders. However, the hypothesis that, other things being equal, cases containing more complex issues are more likely to be published than those with simple straight-forward issues is called into question by a judge’s observation that “complexity is not as important in the decision to publish as is the novelty of the questions posed or the current clarity of the law of the circuits.”<sup>105</sup> Moreover, the higher proportion of cases now resulting in unpublished dispositions means that the proportion of “heavy” cases being so decided will have increased.

#### *F. Published Below*

The rationale for Ninth Circuit Rule 36-2(e) is that if the district court disposition was published, the court of appeals ruling should also be. As some judges put it, where the ruling below has been published, publication by the court of appeals “rounds out the history” of the case.<sup>106</sup> Subpart (e) of Rule 36-2 formerly read: “Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency.” The “relies in whole or in part” has been deleted, and “unless the panel determines that publication is necessary for clarifying the panel’s disposition of the case” has been added.<sup>107</sup> The

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<sup>103</sup> Referencing *United States v. Mosesian*, 972 F.2d 1346 (9th Cir. 1992) (unpublished table decision).

<sup>104</sup> Referencing *Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996).

<sup>105</sup> E-mail from Judge Alfred T. Goodwin, U.S. Court of Appeals for the Ninth Circuit, to Stephen L. Wasby (Oct. 16, 2000) [hereinafter Goodwin 2000 E-mail] (on file with author).

<sup>106</sup> Judge Alfred T. Goodwin, note on face of memo transmitting proposed unpublished disposition, Jan. 27 1997, *United States v. Lopez*, 95-10366; the disposition was published, 106 F.3d 309 (9th Cir. 1997).

<sup>107</sup> 9TH CIR. R. 36-2(e).

converse of the rule is that nonpublication below carries no burden to publish the appeal, although other reasons related to the appeals court's ruling might lead to publication. For example, in a suit for negligent supervision of a daycare center in which summary judgment had been given to the government, the panel affirmed in part, reversed in part and remanded.<sup>108</sup> The lead judge, noting that the law clerk's bench memo recommended publication because the district court had published, noted that publication was also called for "since the district court opinion conflicts with a state court opinion, and that conflict should be clarified."<sup>109</sup>

The listings of over 9,800 Ninth Circuit unpublished dispositions from October 1985 through early January 1992, contained in volumes 776 - 909 of the Federal Reporter, Second Series, show only 152 as having been published below – less than two percent (1.6%) of the total.<sup>110</sup> While very few unpublished dispositions come in cases that were published below, the number of published opinions in which the lower court ruling was published is also small. This suggests that publication below is not a particularly important factor in the decisions to publish or not.<sup>111</sup> In 2003, the proportion of unpublished dispositions with rulings published below is only a trace – only 5 of almost 2,200 cases in fourteen volumes of *Federal Appendix* (31 - 44 *Federal Appendix*). In cases with published rulings, the proportion in which the lower court disposition was published was 7.5 percent for 1973 (471 - 494 F.2d),<sup>112</sup> but recently, in 2002-2003 (305 - 346 F.3d), the proportion was ten percent.<sup>113</sup>

Cases reviewed on appeal lack a consistent publication pattern in the lower court because district judges control the decision to publish, although West does ask for some other dispositions. As a result, the court of appeals may see no need to publish just because the district judge

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<sup>108</sup> Referencing *Martin ex rel. Martin v. United States*, 984 F.2d 1033 (9th Cir. 1993).

<sup>109</sup> *Id.*

<sup>110</sup> Data collected by author. In calculating such a proportion, one should recognize that agency decisions are handled differently from district court opinions. "Published below" tends to mean district court – publication in *Federal Supplement* or perhaps *Federal Rules Decisions* – not agency, although there are reporters for, say, NLRB cases. In addition, that a district court opinion is available on Westlaw cite (WL cite) does not mean to the court of appeals that it is "published below" for these purposes.

<sup>111</sup> Many shorter Ninth Circuit dispositions, first on Westlaw and then in *Federal Appendix*, lack even a West headnote and thus any indication of lower court publication, although it might be assumed that if the case had been published below, West would give it a headnote. Use of *Federal Appendix* without checking each case on Westlaw may thus lead to an undercount of "published below" cases.

<sup>112</sup> For that time, when use of unpublished dispositions was just beginning, determining whether unpublished dispositions were published below is very difficult, as the slipsheets do not so indicate.

<sup>113</sup> If cases with WL cites are included, the figure is almost 15 percent.

submitted a case for publication. While some district judges may send rulings that are path-breaking disquisitions on the law, to which one might expect the court of appeals to respond with a well-developed published opinion, other district court rulings sent for publication may be of middling importance or even relatively inconsequential, or primarily “of interest to the local bench and bar in a particular district.”<sup>114</sup> In addition, the court of appeals may agree with the lower court’s judgment but not with its opinion and may not wish to take the time to develop its different view of the law, and the published district court ruling makes publicly accessible at least one statement of the rationale supporting the judgment.

As this suggests, appellate court publication of its disposition when the district court has published is not the same as adopting the district court ruling as its own. Nonetheless, the appeals court may do that, as when a law clerk recommended “adopting the order of the district court and/or the opinion of the administrative law judge,” because “[b]oth opinions provide a more than adequate, and accurate, review of the facts and record in this case.”<sup>115</sup> For the court to say more, even in an unpublished memorandum, would only “reiterate what has been said below.” Where the court of appeals does agree with the district court’s opinion and relies upon it in affirming, to say, “We affirm for reasons stated in the opinion of the district court,” would take up little space in the official reports. And if the district court has published an opinion which the court of appeals adopts as its own, the rule would suggest that even if the result is such a one-line ruling, it should be published.

Where the district court did not publish, agreement with the district court does not, however, require publication on appeal, although the court of appeals could append the unpublished district court ruling to its own published disposition. However, in one instance when a panel contemplated attaching the district court’s decision to an unpublished judgment order, the judges decided that it was too long for that purpose. Coupled with their view that publication was necessary because of the

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<sup>114</sup> WEST PUBLISHING COMPANY, PUBLICATION GUIDE FOR JUDGES OF THE UNITED STATES DISTRICT COURTS (1994). See also Karen Swenson, *Federal District Court Decisions and the Decision to Publish*, paper presented to Midwest Political Science Association, Chicago, Ill., Apr. 2003 (on file with author); Karen Swenson, *Federal District Court Decisions and the Decision to Publish*, 25 JUST. SYS. J. 121 (2004). See also Susan W. Johnson & Ronald Stidham, *Federal District Judges and the Decision to Publish*, paper presented to Southern Political Science Association, Savannah, Ga., Nov. 2002 (on file with author).

<sup>115</sup> *Referencing* Gibson v. Chater, 87 F.3d 1318 (9th Cir. 1996) (unpublished table decision) (memorandum from law clerk to Judge Alfred T. Goodwin). The ultimate memorandum disposition was more than the one-line “We adopt . . .” language but was only two paragraphs long, affirming for substantial evidence. *Id.*

absence of circuit precedent on a key point at issue, they decided that their disposition would have to become a published opinion.<sup>116</sup>

In most instances in which an unpublished disposition is used even though the case was published below, the court of appeals affirms the lower court. For example, we find an unpublished disposition when the denial of a preliminary injunction was affirmed for the district court's reasons, although a reinforcing reason was that the appeals court would get another crack at the case after further proceedings below.<sup>117</sup> However, unpublished memoranda are also used when the court of appeals reverses a published lower court ruling, a situation presenting a strong case for appellate court publication, so that the reviewing court can make widely known that it has overturned the lower court's considered judgment with one of its own.

### *G. Supreme Court Remands*

When the Supreme Court remands a case for further action, Ninth Circuit Rule 36-2(f) leads the court of appeals to publish its orders on remand. These invariably short orders were not previously published, and a 1985 Federal Judicial Center study indicated that Ninth Circuit judges "do not necessarily publish a decision on a remand from the Supreme Court."<sup>118</sup> After some judges complained, the rule was changed, and the Ninth Circuit now publishes most rulings on remand, even simple one-paragraph orders solely remanding to the district court "for further proceedings consistent with" the Supreme Court's opinion.<sup>119</sup>

Although the new rule is seemingly quite clear, a dispute may occur over its implementation. For example, a Ninth Circuit judge sought the help of the chief judge on "a matter about which the members of the court need guidance" — whether publication should occur in a specified situation.<sup>120</sup> As the judge recounted it, the Supreme Court had reversed and remanded a Ninth Circuit ruling that had reversed an administrative law judge's final determination. Receiving the case on remand, the panel "in a fourteen-page memorandum disposition again reversed the administrative law judge on an issue not discussed in the two published opinions." When a panel member suggested that publication was

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<sup>116</sup> Referencing *Howard v. United States*, 181 F.3d 1064 (9th Cir. 1999).

<sup>117</sup> Referencing *Johnson v. Orr*, No. 85-2017, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

<sup>118</sup> Stienstra, *supra* note 12, at 35.

<sup>119</sup> See, e.g., *Catholic Soc. Servs. v. Reno*, 996 F.2d 221 (9th Cir. 1993). For a marginally longer instance, see *Ortega v. Roe*, 209 F.3d 1122 (9th Cir. 2000), *on remand from* 528 U.S. 470 (2000).

<sup>120</sup> Judge Warren Ferguson to Chief Judge James Browning, Sept. 1 1987. The case is not named nor is the ultimate outcome available in the file.

customary after a Supreme Court's reversal and remand, "[t]he others decided that the case was not worthy of publication under ordinary publication guidelines and does not meet the criteria set forth" in the court of appeals rules.<sup>121</sup>

Publication of a ruling on remand disposing of a case on the merits by affirming or reversing the district court would not be surprising, even when the Ninth Circuit's original ruling was unpublished. For example, the Supreme Court's per curiam reversal, in *United States v. Nachtigal*,<sup>122</sup> of a Ninth Circuit memorandum disposition led on remand to a published ruling on the merits,<sup>123</sup> and when the Supreme Court reversed another Ninth Circuit unpublished memorandum on whether a single act could constitute sexual harassment,<sup>124</sup> the remand affirming the district court was also published.<sup>125</sup> Likewise, when the Supreme Court, in its major ruling on statutory reinstatement of securities cases, reversed three unpublished Ninth Circuit dispositions,<sup>126</sup> the Ninth Circuit published the order remanding to the district court.<sup>127</sup> Of particular interest is the instance in which, after the Supreme Court ruled on a Ninth Circuit unpublished ruling, the court of appeals attached its prior disposition to its published order of remand to the district court, "after removing the restrictions against citation."<sup>128</sup>

Publication of remand orders would certainly follow when the prior Ninth Circuit ruling has been published, by analogy with the guideline that when the lower court ruling has been published, the court of appeals' disposition should also be published. For example, when a Ninth Circuit order was reversed by the Supreme Court in the 1975 Term,<sup>129</sup> the order

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<sup>121</sup> *Id.*

<sup>122</sup> 507 U.S. 1 (1993).

<sup>123</sup> 37 F.3d 1421 (9th Cir. 1994).

<sup>124</sup> *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), *rev'g* 232 F.3d 893 (9th Cir. 2000) (unpublished table decision).

<sup>125</sup> *Breeden v. Clark County Sch. Dist.*, 258 F.3d 958 (9th Cir. 2001).

<sup>126</sup> *Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson*, 501 U.S. 350 (1991).

<sup>127</sup> *See Reitz v. Leasing Consultants*, 961 F.2d 1441 (9th Cir. 1992). *See also* *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992) (the unpublished remand of the Supreme Court's decision in *Lozada v. Deeds*, 498 U.S. 430 (1991), reversing and remanding the Ninth Circuit's unpublished order); *Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989) (the unpublished remand of *Rushen v. Spain*, 464 U.S. 114 (1983), which vacated and remanded the Ninth Circuit's unpublished ruling, 701 F.2d 186 (9th Cir. 1993) (unpublished table decision)).

<sup>128</sup> *United States v. Old Chief*, 121 F.3d 448 n.1 (9th Cir. 1997). Also unusual is the situation in which the Ninth Circuit initially issued a memorandum disposition but, after Supreme Court oral argument, redesignated the disposition as a published opinion. *See Gisbrecht v. Barnhart*, 238 F.3d 1196, 1197 (9th Cir. 2002).

<sup>129</sup> *Henry v. Warner*, 493 F.2d 1231 (9th Cir. 1974), *rev'd*, *Middendorf v. Henry*, 425 U.S. 25 (1976).

on remand, further remanding to the district court, was published.<sup>130</sup> What is interesting is the almost invariant application of the rule to orders remanding to the district court for application of the justices' ruling. There are times when the post-remand disposition is *per curiam* rather than signed, but for a short disposition, this is of no matter; under the court's rules, it is *publication*, not *authorship*, that matters. In other instances, the disposition is labeled an "Order," also unsigned,<sup>131</sup> and the court even uses the "Order" format when one of the panel members dissents.<sup>132</sup>

When the Supreme Court grants certiorari, vacates the lower court ruling, and remands (GVR) for reconsideration in light of an intervening case, we would expect publication of the court of appeals' subsequent disposition because the GVR requires consideration of the Supreme Court's intervening ruling. Even when a GVR leads the court of appeals to remand to the district court, the remand order will be published. And publication is likely even when the prior Ninth Circuit ruling was unpublished, as in the aftermath of the major Indian fishing rights case,<sup>133</sup> when the Supreme Court GVR'd three Ninth Circuit cases — all unpublished — for reconsideration in light of that case.<sup>134</sup> This shows the strength of the rule on publication of remands from the Supreme Court.<sup>135</sup> However, if the GVR were for mootness, a published ruling would hardly be necessary, unless the court of appeals had to parse the law of mootness or it was religiously adhering to the guidelines.<sup>136</sup>

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<sup>130</sup> *Henry v. Warner*, 536 F.2d 303 (9th Cir. 1976).

<sup>131</sup> *See, e.g., Navarette v. Enomoto*, 581 F.2d 202 (9th Cir. 1978).

<sup>132</sup> *See, e.g., United States v. Culbert*, 581 F.2d 799 (9th Cir. 1978) (Ely, J., dissenting).

<sup>133</sup> *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

<sup>134</sup> *See Harrington v. United States, Dolman v. United States, and Minnick v. United States*, 604 F.2d 41 (9th Cir. 1979).

<sup>135</sup> Also see *United States v. Carlisle*, 967 F.2d 592 (9th Cir. 1992) (unpublished table decision), in which the Ninth Circuit had originally issued a memorandum disposition, but, after the Supreme Court GVR'd, 510 U.S. 1068 (1994), in light of *Ratzlaf v. United States*, 510 U.S. 135 (1994), the subsequent Ninth Circuit order was published, 18 F.3d 752 (9th Cir. 1994). See also *United States v. Tomlin*, 28 F.3d 110 (9th Cir. 1994), GVR, 513 U.S. 1107, in light of *Tome v. United States*, 513 U.S. 150 (1995); on remand, 62 F.3d 320 (9th Cir. 1995). Interestingly, in publishing an order on remand from a Supreme Court GVR, the Fifth Circuit attached its earlier unpublished *per curiam* as an Appendix. See *United States v. Peebles*, 296 F.3d 325 (5th Cir. 2002), on remand from *Peebles v. United States*, 535 U.S. 1014 (2002), in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); and *United States v. Tampico*, 297 F.3d 396 (5th Cir. 2002), on remand from *Tampico v. United States*, 535 U.S. 1014 (2002), in light of same case.

<sup>136</sup> When the Supreme Court GVR'd a Ninth Circuit en banc disposition with instructions to have the district court dismiss the case as moot, *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (en banc), GVR, *Russoniello v. Olagues*, 484 U.S. 806

### H. Separate Opinions

Some circuits' guidelines require publication of cases with a dissent or concurrence, and the Ninth Circuit did so earlier. The Ninth Circuit's present Rule 36-2(g) makes publication of these cases discretionary with the writer.<sup>137</sup> This makes the dissenter the de facto decision-maker as to publication. Indeed, the extent to which the dissenter controls publication can be seen in a Tenth Circuit case, where, attached to the designation "Publish," is the terse footnote: "The majority opinion is published only because the dissent is published."<sup>138</sup> There has even been a situation, which occurred relatively early in the use of unpublished dispositions, in which a dissenter from a memorandum ruling set out the text of that unpublished ruling in a footnote to his published dissent.<sup>139</sup>

The presence of dissents in unpublished dispositions indicates that some dissenters do not opt for publication. A disposition with a dissent is, however, more likely to be published than is a unanimous disposition, so published opinions over-represent non-unanimous dispositions.<sup>140</sup> In 1998, when the Ninth Circuit had an 18 percent overall publication rate, two-thirds of its cases with a dissent and almost 90 percent with a concurrence had a published opinion.<sup>141</sup> More recently, in cases reported in *27 Federal Appendix*, dissents or concurrences were found in 1.8 percent of cases in circuits which permitted citation of unpublished dispositions and in 2.7 percent of circuits banning such citation.<sup>142</sup> For the Ninth Circuit, dissents or concurrences appeared in 4.9 percent of these "unpublished" cases.<sup>143</sup>

Separate opinions have generally been infrequent in the Ninth Circuit's unpublished dispositions. For example, in 31 *Federal Appendix*, which contained 269 memorandums and orders from that court, there were no concurring opinions and only two dissents.<sup>144</sup> In one immigration case, the dissent was a simple notation that in the judge's

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(1987), the disposition on remand was also en banc and was published. *Olagues v. Russoniello*, 832 F.2d 131 (9th Cir. 1987) (en banc).

<sup>137</sup> Stienstra, *supra* note 12, at 34-35.

<sup>138</sup> *United States v. Gonzales*, 344 F.3d 1036, 1037 (10th Cir. 2003).

<sup>139</sup> *United States v. Hunt*, 548 F.2d 268, 268 n.1 (9th Cir. 1973) (Sneed, J., dissenting).

<sup>140</sup> The *Federal Reporter* lists of "tabled cases" do not reveal dissents, but the dissents are clear from the dispositions themselves and they are on Westlaw. They are now quite apparent in *Federal Appendix*.

<sup>141</sup> McKenna, *supra* note 9, at 19 (Table 11).

<sup>142</sup> Stephen L. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRACT. & PROCESS 1, 19 n.83.

<sup>143</sup> *Id.*

<sup>144</sup> Data collected by author.

opinion, “exceptional circumstances exist here.”<sup>145</sup> The following volume, with over three hundred cases, saw only three dissents and two other partial dissents, and in 33 *Federal Appendix*, there were only two dissents in 122 cases. The 110 Ninth Circuit dispositions in 34 *Federal Appendix* prompted only five separate writings — two concurrences and three dissents, with one concurrence and one dissent written in two closely related habeas corpus cases by a district judge sitting by designation.<sup>146</sup> Thus for these four volumes, the proportion of unpublished dispositions accompanied by separate writings was less than one percent. By comparison, in the early years of the Ninth Circuit’s use of unpublished dispositions, the proportion of those dispositions carrying a separate writing started off at just under five percent (4.9%) for 1973, the first full year in which unpublished rulings were used, before dropping to only 2.0 percent for 1974. For 1972-1977, the overall proportion was 3.2 percent, a proportion well above that in the most recent period.<sup>147</sup>

To determine whether the case is more likely to result in a published than an unpublished disposition when a judge writes a separate opinion, published opinions in *Federal Reporter* for volumes covering cases in 2002 were compared with unpublished dispositions in *Federal Appendix* from roughly the same period. Comparing cases from 300-304 F.3d with those from 29-44 *Federal Appendix*, we find that of 2,162 unpublished rulings, 53 (only 2.5 percent) contained 56 separate writings, compared with 13.8 percent of the 654 published rulings (90, with 96 separate opinions).<sup>148</sup> Here, too, there was intercircuit variation.<sup>149</sup> Only one of the Tenth Circuit’s 37 published opinions (2.7%) contained a separate writing, like the overall proportion of unpublished dispositions with separate opinions. There were similar low

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<sup>145</sup> *Ahir v. INS*, 31 F. App’x 588, 589 (9th Cir. 2002) (Reinhardt, J., dissenting).

<sup>146</sup> *See Scherbovitch v. Mayle*, 34 F. App’x 353 (9th Cir. 2002) (Shea, D.J., dissenting); *Greenberger v. Farmon*, 34 F. App’x 355 (9th Cir. 2002) (Shea, D.J., concurring). These two cases also illustrate that, when a court of appeals does not identify the author of a memorandum disposition, identification of authorship is facilitated when one of the three judges (all of whose names are identified) writes separately. In both these cases, the majority opinion carried the footnote: “Of course, we express no opinion about what the course of events might be if [the petitioner] tries to return to district court with some newly exhausted claims at some later time. We sit to decide concrete cases, not to engage in vaticination.” Use of words like “vaticination” is a trademark of Judge Ferdinand Fernandez, a member of the panel.

<sup>147</sup> Data collected by author.

<sup>148</sup> *Id.*

<sup>149</sup> The number of cases per circuit is sufficiently small that we must be careful not to place too much weight on these figures. Because the published opinions are often much longer than unpublished memorandums, there are far fewer per F.3d volume than per F. App’x volume. Some published opinions are short, but most are longer.

percentages in the First Circuit (5.1%) and Seventh Circuit (6.7%). Although the Fourth Circuit had a distinctly high percentage of separate opinions in these cases (12 of 27, 44.4%), the proportion of separate writings in many of the circuits was between 10 and 20 percent, with the Ninth Circuit just above 20 percent (21 cases of 97, 21.6%). For five later volumes (320-324 F.3d) covering part of 2003, the proportion of dispositions with separate writings was only slightly less (19.2%). For the Ninth Circuit, the proportion of published opinions with separate writings in 305-346 F.3d remains above one-fifth (23.8%). Because the rate at which judges dissent or write concurring opinions may change over time, greater frequency of separate writings in later years may reflect a change in norms about the filing of such opinions more than an increase in disagreement among the judges.)

One cannot read judges' minds as to why, after preparing a concurrence or dissent, they accede to non-publication, but one can evaluate whether the separate writing is such that publication would have been preferred. Publishing seems unnecessary when a judge notes a concurrence or dissent without opinion. Although a dissent without opinion may indicate to the losing party that someone on the court takes that side, little would be gained from requiring publication for that reason beyond letting the public know that the panel was not unanimous. However, non-publication occurs even when the dissent is not simply perfunctory. For example, in a Selective Service case, the panel initially filed a three-page unpublished memorandum, including discussion of the law, that dismissed an indictment.<sup>150</sup> This drew a two-page dissent arguing that the Selective Service System could not undo the defendant's violation of the law. While the initial disposition was withdrawn in favor of a new, short unpublished memorandum in which the court remanded to the district court for reconsideration of the effect of the District Director's reopening the file, the dissent was now one without opinion. As the revised judgment only remanded for further action, publication did not seem necessary. However, publishing the initial disposition seemed appropriate, particularly as the dissent dealt directly with a point of law.<sup>151</sup>

As in that case, there are instances when dissenters forego publication even when the dissent is far longer than the majority memorandum<sup>152</sup> or almost as long.<sup>153</sup> However, that a separate opinion is

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<sup>150</sup> *Referencing* United States v. Malone, No. 72-1847, 496 F.2d 462 (9th Cir. 1974).

<sup>151</sup> *See id.*

<sup>152</sup> *See* United States v. Nelson, No. 72-2350 (9th Cir. May 4, 1973), where the majority reversed denial of a § 2255 petition and affirmed in one sentence each of two

lengthy does not necessarily mean the ruling should be published, as it may result only from a serious effort to show that the losing party's argument has "legs" and was heard. If the judge did not feel strongly enough to explain the separate position or wish to take the time to write the (more) extended analysis which publication would require, such a dissent might provide little help in developing the law, although the converse is that, if the panel majority decides to use an unpublished disposition, the dissenter may decide not to expend the time to write.<sup>154</sup> However, an unpublished dissent may communicate to judicial colleagues who monitor such dispositions views on which the writing judge wishes to obtain their reaction so that they will keep those views in mind for later cases.

A dissenter may "waive" publication after having made the same point, perhaps frequently, in published dissents, and thus does not see the need to repeat it in print.<sup>155</sup> Likewise, a judge might not insist on publication when the judge's concurrence in the result is based on his statements in a prior published opinion, which is cited, and where the judge says no more.<sup>156</sup> Or the judge may forego publication of a separate concurrence when the only point is to note disagreement with a ruling which, along with "other controlling precedents," provides a "compulsion . . . to yield."<sup>157</sup> However, when there was non-publication when the dissenter disagreed with the majority over its reason and, further, said the majority had misstated what the lower court did,<sup>158</sup> it might appear that the panel was burying quick, careless work, with the dissenter going along.

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other issues remanding for an evidentiary hearing, but Judge Kilkenny filed a five-page dissent.

<sup>153</sup> For an instance of an unpublished concurrence used to send a message about the government's handling of a case, see the discussion *infra* of *United States v. Archer*, 92 F.3d 1194 (9th Cir. 1996) (unpublished table decision).

<sup>154</sup> See *In re Kioshi-Nelson/Chargualaf v. Camacho*, No. 95-1632, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>155</sup> See, e.g., *United States v. Parker*, No. 73-2072 (9th Cir. Nov. 6, 1973); *United States v. Graham*, No. 73-2073 (9th Cir. Nov. 6, 1973); *United States v. Shorty*, No. 72-2636 (9th Cir. Nov. 6, 1973). Judge Ely, dissenting in each case, referenced his own dissent in *United States v. Holz*, 479 F.2d 89 (9th Cir. 1973).

<sup>156</sup> See, e.g., *Manzo-Rodriguez v. INS*, No. 84-7287, 755 F.2d 936 (9th Cir. 1985) (unpublished table decision) (Reinhardt, J., concurring in judgment, citing to *Ramirez-Juarez v. INS*, 633 F.2d 174, 175-76 (9th Cir. 1980)).

<sup>157</sup> *Williams v. Multnomah County*, No. 75-2241, 554 F.2d 1072 (9th Cir. 1977) (unpublished table decision) (Ely, J., concurring). See also *Martinez-Galvan v. INS*, No. 76-1660, 556 F.2d 587 (9th Cir. 1977) (unpublished table decision) (Ely, J., concurring) ("My concurrence is compelled by controlling precedent.")

<sup>158</sup> See *Littlejohn v. Jones*, No. 72-2266 (9th Cir. Sept. 13, 1973).

Those writing separately may also choose not to demand publication when the case is a fact-intensive one that does not produce new circuit precedent or has an unusual procedural posture that would limit the ruling's later effect, as the judge may feel that publishing differing views would not be useful. An example would be a dissent embodying a disagreement over sufficiency of the evidence.<sup>159</sup> A dissent containing little law, which was not only heavily fact-based but also spoke primarily of "justice," is likewise also not a strong candidate for publication because it speaks more to the parties than to the legal community that has to deal with similar future cases. An example is a case on the severability of an (illegal) agreement to sell securities from an agreement to provide legal services, where the majority held the agreements not severable, but Judge Wiggins felt his colleagues in the majority had "unnecessarily reach[ed] a result that does not comport with simple justice" because they allowed someone to get the benefit of services without paying for them.<sup>160</sup> In addition, when the point of the separate opinion is to argue for remand to reconsider a portion of a sentence and to criticize the majority for failing to provide supporting citation or for using dicta, publication may not seem necessary to the writer.<sup>161</sup>

A judge writing might also decline to publish a separate opinion when the circumstances were unusual and the opinion did not particularly speak to the development of the law, as when a concurrence was written to explain to the parties the judge's responsibility for extended delay in disposing of a petition for rehearing.<sup>162</sup>

There are dissents with fact-based conclusions which would help develop the law, leading one to question the failure to publish. In one such case, the majority affirmed dismissal of a habeas petition which challenged the exclusion of testimony as a sanction for violation of a

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<sup>159</sup> See *United States v. Cloughessy*, No. 77-1015, 572 F.2d 190, 191-92 (9th Cir. 1977) (Wallace, J., dissenting).

<sup>160</sup> *Hecht, Diamond & Greenfield v. Rosen*, No. 84-6270, 790 F.2d 85 (9th Cir. 1986) (unpublished table decision) (Wiggins, J., dissenting).

<sup>161</sup> See *United States v. Alvarez-Rubalcava*, No. 74-3353, 556 F.2d 589 (9th Cir. 1977) (unpublished table decision) (Hufstedler, J., concurring and dissenting).

<sup>162</sup> See *United States v. Boni*, No. 74-2174, 566 F.2d 1184 (9th Cir. 1977) (unpublished table decision) (Ely, J., concurring). Judges Ely and (then District Judge) Pregerson had initially dismissed a case as non-appealable but had stated that the district judge had been correct in invalidating a statute concerning federal courts' jurisdiction over Native Americans. The Supreme Court's decision in *United States v. Wilson*, 420 U.S. 332 (1975), concerning the government's ability to appeal in certain cases, "indicate[d] that the majority was mistaken in its original disposition," so the previous appellate ruling had to be vacated, but Judge Ely hoped the district judge would take the delay into account with respect to petitioner's speedy trial rights. *Id.*

discovery order, but Judge Poole was not convinced that the jury would have convicted if it had heard the excluded evidence and supported his position with Fifth and First Circuit cases holding the exclusion of such mistaken identity evidence not harmless, as well as a Ninth Circuit case which found such exclusion an abuse of discretion requiring reversal.<sup>163</sup> Publication would also have been appropriate where the dissenter saw the majority opinion as “patently inconsistent” with a recent Ninth Circuit en banc, and the majority responded in a dozen-line footnote.<sup>164</sup> This is the sort of case that is grist for the mill for those who say that unpublished memorandums are used to “bury” an appellate court’s inconsistent rulings; in any event, the exchange among the judges as to the meaning of the recent en banc opinion would likely have aided others attempting to apply that ruling.

The “subtle interactive process among three repeat players” that characterizes within-panel interaction in the courts of appeals means that “appellate judges may occasionally agree that if an opinion remains unpublished they will forgo their inclination to dissent,”<sup>165</sup> and former D.C. Circuit Chief Judge Wald has said that “wily would-be dissenters go along with a result they do not like as long as it is not elevated to a precedent.”<sup>166</sup> This suggests a possible strategic relationship between dissent and publication, seen in a judge’s observation that “if there is a published opinion on the request for counsel issue, I will have to dissent.”<sup>167</sup>

The relationship is revealed even more clearly in debate over a case on denial of asylum and withholding of deportation for a Nicaraguan mother and minor child.<sup>168</sup> A proposed memorandum disposition overturning the denial was circulated initially, with another judge telling the author, “I don’t see any reason to publish and strongly prefer that the disposition remain a memodispo.” However, at conference, the author changed his mind about publication and indicated that he would recirculate it, with publication appropriate “because there are no cases that deal with the INS’s burden of proof after a petitioner established past persecution.” The colleague, who would not grant asylum to opponents

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<sup>163</sup> Frederick v. Warwieszack, No. 85-1792, 792 F.2d 144 (9th Cir. 1986) (unpublished table decision) (Poole, J., dissenting).

<sup>164</sup> United States v. Sibley, No. 72-3178, 73-1496 (9th Cir. Jan. 7, 1977) (Chambers, J., dissenting).

<sup>165</sup> James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC’Y REV. 565, 582 (2001).

<sup>166</sup> *Id.* at 582 n.36.

<sup>167</sup> See *supra* note 19.

<sup>168</sup> *Referencing Gutierrez v. INS*, No. 95-70053, 95 F.3d 1157 (9th Cir. 1996) (unpublished table decision).

of a now overthrown regime without proof that they still were persecuted, now conditioned his vote on nonpublication. He was “willing to let the petitioner stay and perhaps to withhold dissent if the disposition were not published, but “a vigorous dissent” would accompany publication; nonetheless he noted that the author had the “prerogative” to publish. The third panel member first joined the author on the merits and suggested “that we dispose of the matter with an unpublished disposition,” but later indicated a willingness to “go along with publication because I would like to read [the] dissent.” When, before drafting a dissent, the putative dissenter tried to confirm that the author still held to publishing, the latter finally withdrew, saying the disposition would be filed as a memorandum.<sup>169</sup>

An exchange in the Eleventh Circuit also illustrates how the publication of a ruling can become a matter of court politics. After a disposition with a separate opinion, an off-panel judge wrote to the panel: “I cannot understand why [this case] was not published.

I cannot recall an occasion when an opinion from a divided court went unpublished, except in one or two rare instances when the judges differed on a finding of fact and the opinion contained nothing of substance regarding the law. Here, much is said regarding points of law that are of importance to the court.<sup>170</sup>

Responding, a judge asked whether the circuit had “some written rule or perhaps unwritten ‘tribal law’ that mandates that our opinion be published when a judge dissents” and said he knew “of no such rule or policy.” Not satisfied, the off-panel judge indicated an intention to seek en banc rehearing, and tried to force publication, saying, “If the panel’s decision is not published, I shall attach it to my dissenting opinion as an appendix.” A member of the panel, in addition to asking why someone would want a thoroughly disliked opinion published, emphasized that publishing a previously unpublished disposition as an appendix to a dissent to a denial of rehearing en banc posed a serious institutional issue. However, the threat was carried out. The court denied en banc rehearing, and the off-panel judge dissented at length to the denial, adding the (previously) unpublished ruling as an appendix to his dissent.<sup>171</sup>

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<sup>169</sup> *Referencing id.*

<sup>170</sup> *See* Riley v. Camp, No. 94-9118, 84 F.3d 437 (11th Cir. 1996) (unpublished table decision) (Kravitch, J., concurring and dissenting).

<sup>171</sup> *See* Riley v. Camp, 130 F.3d 958 (11th Cir. 1997) (Tjoflat, J., dissenting from denial of rehearing en banc).

## III. OTHER ELEMENTS AND NORMS

In addition to formal guidelines for publication and the criteria embedded in them, other norms or desiderata also come into play. Some are easily identifiable, perhaps because, like publication of reversals, they are part of other circuits' formal rules. In such situations, one can talk of courts that are "reported to have adopted such a policy *in practice*," as was the case with the Ninth Circuit and intercircuit conflict cases.<sup>172</sup> In addition, an observer can construct categories of cases in which use of unpublished dispositions is sufficiently regular to infer the presence of an implicit norm, such as instances in which jurisdiction or aspects of justiciability such as mootness keep the court from reaching the merits, or where the court deals with non-final/non-dispositive matters so that the case is therefore not appealable.

*A. Jurisdiction*

Relatively obvious candidates for unpublished dispositions are instances in which jurisdiction or aspects of justiciability keeps the court from reaching the merits. A ruling spelling out why the court lacks appellate jurisdiction might be a candidate for publication to assist prospective parties as to the rules for bringing an appeal, and fleshing out conclusory statements about the absence of jurisdiction might help explain the law on the subject. However, if the court of appeals cannot reach the merits for obvious jurisdictional reasons, an unpublished disposition may be sufficient to dispose of the case, as when there had been judgment below on only one of several claims and no district court certification for a non-delayed appeal; there the judges, while mentioning the issue of whether never-served "parties" are in a case for Rule 54(b)<sup>173</sup> purposes and cited Second and Third Circuit cases to the effect they are not, but they said, "We need not address this issue" because of the claims not yet adjudicated.<sup>174</sup> This avoided the problem of having to publish because that issue was one of first impression in the circuit.

Another instance of use of an unpublished disposition on jurisdictional matters came when the court of appeals considered the dismissal of a suit over recoupment of overpaid disability benefits.<sup>175</sup> The judges found mootness as to two of the three claims because the

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<sup>172</sup> Stienstra, *supra* note 12 (emphasis added).

<sup>173</sup> FED. R. CIV. PRO. 54(b).

<sup>174</sup> *Great W. Sav. v. United States*, No. 83-6183, 755 F.2d 935 (9th Cir. 1985) (unpublished table decision). "Tempted as we might be to rule on the merits of the bank's argument, we must restrain ourselves." *Id.*

<sup>175</sup> *See Easley v. Heckler*, 84-2825, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

Secretary of Health and Human Services had paid the contested amount and waived the right to recoup overpayment, and found a lack of jurisdiction as to the other because of sovereign immunity, a proposition for which two Supreme Court cases were cited.<sup>176</sup> Also related to jurisdiction was a ruling holding that a plaintiff trying to challenge a welfare regulation that a terminated general assistance beneficiary, to retain benefits pending appeal, must file a notice of appeal within ten days of the termination notice, lacked standing for having filed within the proper time, so the district court judgment invalidating the regulation thus had to be vacated.<sup>177</sup>

Unpublished dispositions also were frequently used when the judges lacked appellate jurisdiction, for example, because the judgment below was non-final and thus not appealable, as when a district court had found 42 U.S.C. § 1983 defendants immune but had dismissed without prejudice, a non-final order.<sup>178</sup> In such cases, an appeal would be available after a new judgment and new notice of appeal.<sup>179</sup>

#### *B. “Not the Right Vehicle”*

There are instances when publication might be appropriate under the circuit’s guidelines but other concerns stand in the way. The judges may feel that the issues have not been satisfactorily briefed, perhaps because appellant is pro se, or that there are some other complications. Thus in a complex immigration case, although one panel member preferred publication because he did not like to have complicated issues appear in unpublished memoranda, another judge wanted the disposition to remain unpublished because the petitioner had been uncounseled and the issues had not been briefed.<sup>180</sup> Some Ninth Circuit judges preferred not to deal with issues of first impression in cases that had been disposed of by screening panels,<sup>181</sup> perhaps because the matters had not been

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<sup>176</sup> See *id.* On mootness, see also *Bast v. Gov’t of Guam*, No. 72-1135 (9th Cir. May 14, 1973).

<sup>177</sup> See *Bustamante v. Jamieson*, No. 84-1776, 758 F.2d 655 (9th Cir. 1985) (unpublished table decision).

<sup>178</sup> See *Renaud v. Phelan*, No. 84-1926, 760 F.2d 276 (9th Cir. 1985) (unpublished table decision).

<sup>179</sup> See *e.g.*, *Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Co.*, 72-1323 (9th Cir. Nov. 12, 1973).

<sup>180</sup> *Referencing Gutierrez-Tavares v. INS*, 92 F.3d 1192 (9th Cir. 1996).

<sup>181</sup> Cases given the lowest (lightest) “case-weights” by staff attorneys are sent to three-panel screening panels, which dispose of cases with aid of staff attorneys, who have prepared proposed memorandum dispositions in lieu of bench memoranda. If the judges are on a screening panel because a case is more complex than is appropriate for disposition before them, they can “reject” a case, that is, send it to a regular argument panel.

argued, and did not think such cases to be good vehicles for publishing. However, as one judge who told his colleagues that he had “always been reluctant to publish screening decisions on first impression issues for the circuit” nonetheless agreed to publish one ruling because “we have clear guidance from other circuits” on the Sentencing Guidelines issue in the case, and another because “the issue is fairly straightforward, and oral arguments are precluded because the pro se plaintiff is a prisoner.”<sup>182</sup>

When the court of appeals’ ruling will apply to only a limited number of people, it may not be thought to warrant publication, just as the Supreme Court generally does not grant certiorari when a case applies to only a few individuals. Thus when a case is really more about individuals’ benefits and less about a broader legal issue, a memorandum disposition will suffice. We see this when, after termination of pilots when they reached the maximum age for pilots and most had been rehired in the different position of flight engineer, two remaining plaintiffs had likewise been rehired after filing suit and their pension was the only remaining issue.<sup>183</sup> With an issue of limited long-term effect that was also not likely to recur and that involved only two people, publication seemed unnecessary.

Issuing a ruling in an unpublished disposition because of its limited effect also took place when the court dealt with transitional circumstances, for example, correction of sentence where a new statute carried less stringent penalties (and the possibility of probation) than did the one used to sentence the defendant.<sup>184</sup> A published disposition would have added to circuit law on the conditions under which district judges could grant motions to correct sentences and could also have cast light on the interplay of the new statutes, but the judges might have believed that an unpublished disposition was sufficient, as fewer such cases would occur as sentencing took place under the new statutes, and the fact situation was complex, making it unlikely to recur. Another situation that was highly unusual — not likely to recur, highly fact-bound, and for which an unpublished disposition was used was a dispute over a protective order and discovery orders — arose in a suit by Varig Airlines against Boeing, in which the panel issued mandamus to the district court to sort out “the misunderstanding and confusion” caused by the latter’s “own regrettable and informal method of operation” in handling matters

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<sup>182</sup> See *supra* note 19.

<sup>183</sup> Referencing *Penton v. Flying Tiger Line*, No. 85-5945, 788 F.2d 1566 (9th Cir. 1986) (unpublished table decision).

<sup>184</sup> Referencing *United States v. Gaglie*, No. 72-2632 (9th Cir. Jan. 12, 1973).

before it.<sup>185</sup> As the panel observed, “The unfortunate chain of events leading to this Petition are so singularly unique that we cannot conceive that the situation will ever again be duplicated.”<sup>186</sup>

Another aspect of the “proper vehicle” question is that some courts of appeals apparently have an inclination to wait for other cases raising the issue, much as the Supreme Court denies certiorari in order to allow an issue to “percolate.” Thus at least one court, faced with a case containing a new point of law in the circuit — something that would require the Ninth Circuit and most other appellate courts to publish — nonetheless is said to follow the practice of not publishing on the point at issue until it sees what other circuits are doing.<sup>187</sup> And percolation may be involved in the alleged practice in which the Third Circuit used judgment orders to deal with complex cases.<sup>188</sup>

### C. Diversity Jurisdiction/State Law

One aspect of jurisdiction related to non-publication is the federal court’s diversity of citizenship jurisdiction. Cases that come to the federal courts in this way are among those *most* likely not to be published because the judges, who seek to be less intrusive in interpreting state law, realize their rulings on state law are “good law” only until state appellate courts decide the point at issue. An authoritative decision on the subject by the state’s highest court then immediately displaces federal court interpretation, so that the federal court, as one judge put it, “has written in disappearing ink.”<sup>189</sup> The same may be true with respect to other types of cases based on state law, such as federal tort actions brought under the Federal Tort Claims Act (FTCA). Thus, as one judge observed in recommending against publication, “We should leave such questions in the state courts where possible” and should not publish if the case “simply involves interpreting state insurance law”; were the case to involve “novel questions of federal law,” however, publication might be in order.<sup>190</sup>

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<sup>185</sup> Referencing *S.A. Empresa De Viacao Area Rio Granense (Varig Airlines) v. U.S. Dist. Ct. for the W. Dist. of Wash. (Boeing Co. and Weber Aircraft Corp., real parties in interest)*, No. 77-1677, 568 F.2d 778 (9th Cir. 1977) (unpublished table decision).

<sup>186</sup> *Id.*

<sup>187</sup> I am indebted to Wayne Logan for this information.

<sup>188</sup> See generally Gulati & McCauliff, *On Not Making Law*, *supra* note 17.

<sup>189</sup> Commenting on a Ninth Circuit colleague, Judge David Thompson said, “Judge Goodwin feels that if it’s an issue of state law, it should never be published.” Open Forum on Court of Appeals, Ninth Circuit Judicial Conference, Aug. 17, 1997, Portland, Oregon (notes on file with author).

<sup>190</sup> Referencing *Lunsford v. Am. Guar. & Liab. Ins. Co.*, No. 91-16536 (9th Cir. Oct. 10, 1994) (Judge Alfred T. Goodwin to panel). After a request for redesignation, the memorandum disposition was published as an opinion, 18 F.3d 653 (9th Cir. 1994).

An example of non-publication when the decision rested fundamentally on the judges' reading of state law is the disposition in a suit to divide gambling proceeds, which the district court had dismissed as a suit to enforce an illegal agreement.<sup>191</sup> Identifying the issue as which state's law is to be applied as to the enforceability of agreements, the court of appeals parsed Nevada law and found that a betting pool was illegal everywhere, including Nevada, but said that Nevada enforced betting pool agreements to place wagers at licensed casinos and share the proceeds.<sup>192</sup> Even when state law is explored in some detail, as was done in *Kent*, with copious citation to cases and analysis of what those cases require, the disposition is likely to remain unpublished because the federal court is not the final authority on state law. Alternatively, the ruling may be seen as an application of law as the federal court finds it and not appropriate for publication for that reason. If the question in the unpublished memorandum were one of federal rather than state law, the dispositions would likely look more like a published opinion than if only state law is involved.<sup>193</sup>

Another instance of a memorandum disposition that was an exposition and application of state law was a ruling, on a forfeiture action against a plane, that drew heavily on state law.<sup>194</sup> Reversing the district court for a clearly erroneous finding because "uncontroverted evidence establishes Bowman's liability for intentional interference with contractual relations" and basing its discussion on California law, the court of appeals looked at each of five bases of liability, devoting a short paragraph to one and as much as two-and-one-half pages to the most central element on which liability was found, and also devoted a paragraph to affirmative defenses. The result was a nine-page memorandum disposition, the civil equivalent of a multi-issue criminal case that has a long memorandum because at least some time is devoted to each of a number of issues. There was also a concurrence, by (then) Judge Kennedy, but, like the majority opinion, it was based on California law.<sup>195</sup>

Another such unpublished disposition came in an appeal from a \$65,000 judgment for a distributor who had sued Frito-Lay for breach of contract, where the court of appeals said that the district judge had made

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<sup>191</sup> *Kent v. Mindlin*, No. 93-17286, 106 F.3d 407 (9th Cir. 1995) (unpublished table decision).

<sup>192</sup> *Id.*

<sup>193</sup> *See, e.g., Nationwide Mortgage Servs. v. Inv. Mortgage Int'l*, No. 84-1691, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>194</sup> *See United States v. Bowman*, No. 83-6476, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>195</sup> *See id.*

a clearly erroneous finding that Frito-Lay had waived its right to terminate the relationship without cause on notice.<sup>196</sup> The court devoted more than four pages to the state law issues at the heart of the case, whether “election of remedies” applied; while much of this discussion was fact-based, also included was a page-long discussion of election of remedies doctrine and of criticism made of it, along with citation to cases showing its use instead of estoppel and *res judicata*.<sup>197</sup>

#### *D. Application of Existing Law*

If it is most important that the judges follow the guideline calling for publication of cases involving matters of law of first impression in the circuit, cases in which the court of appeals, instead of announcing a new rule, is only applying an existing rule are legitimately issued as unpublished dispositions; an extensive opinion is said not to be needed if the law to be applied is straightforward, and the Ninth Circuit has long been among those courts which “do not necessarily publish these decisions.”<sup>198</sup> The general notion is that unpublished dispositions are to be used in cases that break no new ground and thus do not pronounce new circuit precedent, and particularly to dispose of cases applying existing law to uncomplicated fact patterns. We can see this in the judge’s comment that “the disposition of this appeal requires no more than an unpublished memorandum, as the result reached . . . involves a routine application of our asylum law.”<sup>199</sup>

Of course, “application” to one person is interpretation or “rule-development” to another, and some see an application of a rule to new facts as developing precedent, thus requiring publication.<sup>200</sup> Among the latter type of situations are those involving use of Supreme Court decisions. For example, in deciding an appeal by a doctor charged with issuing methadone for non-medical reasons,<sup>201</sup> the judges said that doubts raised by a dissent in an earlier ruling against claims about the statute’s

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<sup>196</sup> See *Balding v. Frito-Lay Inc.*, No. 84-1816, 758 F.2d 655 (9th Cir. 1985) (unpublished table decision).

<sup>197</sup> See *id.*

<sup>198</sup> Stienstra, *supra* note 12, at 36.

<sup>199</sup> *Rivera-Moreno v. INS*, 213 F.3d 481, 487 (9th Cir. 2000) (Hawkins, J., concurring specially).

<sup>200</sup> Referencing *Alarcon-Duarte v. INS*, No. 95-70452, 87 F.3d 1317 (9th Cir. 1996) (unpublished table decision). On June 14, 1996, Judge Alfred T. Goodwin wrote to the panel: “I . . . respectfully suggest that we are not really interpreting the new regulation, we are merely applying it.”

<sup>201</sup> See *United States v. Alexander*, No. 75-1728, 538 F.2d 339 (9th Cir. 1976) (unpublished table decision).

coverage of “registered” physicians<sup>202</sup> had been dispelled by a Supreme Court ruling<sup>203</sup> which had noted the earlier case. Such an observation by the court of appeals judges should have been given greater notice through publication of the disposition. Likewise, publication might have been advisable when recent Supreme Court decisions disposed of a case dealing with a challenge to a transfer between prisons.<sup>204</sup> Although the judges observed, “Recent Supreme Court decisions in *Meachum v. Fano* (1976), and *Montanye v. Haymes* (1976), foreclose Rodriguez’s claim that his due process was violated by being denied counsel at his prison transfer hearing,” apparently a straight-forward matter not demanding publication, the panel found a potential problem with the district court’s dismissal of the prisoner’s claim about confinement in administrative segregation.<sup>205</sup> In reversing and remanding for further proceedings, the judges went on to suggest how the new rulings might apply: “For due process to attach, *Meachum* and *Montanye* teach that an action by prison officials must deprive a prisoner of an interest in liberty rooted either solely in the Constitution or in applicable state law operating in conjunction with the Constitution.”<sup>206</sup> Publication of that application would have aided development of circuit precedent.

Non-publication even of reversals regularly takes place when the result appears quite clear to the court and the ruling is a straightforward application of circuit precedent. From the early years of regular use of unpublished dispositions, one can find instances in which precedent was clear, so that the only question was whether the law had been properly applied. For example, publication was not necessary when the court of appeals, relying on a case from the prior year, reversed a continuing criminal enterprise (CCE) conviction and a firearms count dependent on it because the jury had not been properly instructed as to whether an individual was supervised by the defendant when, as a matter of law, that person was not within the defendant’s supervision.<sup>207</sup> In this reversal, use of a memorandum disposition was acceptable because there was recently-issued circuit precedent and the court had also warned the parties of its applicability. And, in another instance, a panel, citing more

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<sup>202</sup> *Id.* (citing *United States v. Rosenberg*, 515 F.2d 190 (9th Cir. 1975) (MacKinnon J., dissenting)).

<sup>203</sup> *Id.* (citing *United States v. Moore*, 423 U.S. 122 (1975)).

<sup>204</sup> *See Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976).

<sup>205</sup> *Rodriguez v. Cardwell*, No. 75-3338, 549 F.2d 808 (9th Cir. 1977) (unpublished table decision).

<sup>206</sup> *Id.*

<sup>207</sup> *See United States v. Archer*, No. 93-10753, 92 F.3d 1194 (9th Cir. 1996) (unpublished table decision).

than one circuit ruling on several of the points, used an unpublished disposition to reverse and remand when a district judge made a series of errors as to a defendant's mental capacity.<sup>208</sup> That the district judge was one with whom the circuit had had difficulty may also explain the non-publication; the judge had not changed over time, and a published opinion would not likely have had much effect.

Among the situations in which the application of existing law is at issue, so that unpublished dispositions are regularly used, are those in which the district court has wide discretion and the reviewing court finds no abuse of discretion. An early example was an affirmation of the district court's dismissal of a case for plaintiff's inactivity.<sup>209</sup> When the court, finding no serious problem with a jury verdict, reverses the district court's grant of a new trial as abuse of discretion and directs entry of judgment on the jury verdict, publication also is not necessary.<sup>210</sup> While such cases could in some circumstances mark out the boundary of the trial judge's discretion, making them appropriate for publication, in most instances involving district court discretion, there are no "boundary" issues because the resolution is not a close call.

#### *E. Frivolous Cases*

Somewhat related to application of the law are frivolous cases, for which unpublished memoranda are quite likely to be used. They are frivolous in part because the legal answer to the question posed is so obvious that application of the legal rule is virtually automatic. When the court of appeals determines that an appeal is frivolous, there is little reason to publish it unless the judges are identifying a particular element as being frivolous as a matter of law or are stating some new element of the law of sanctions. The same is true when the appeals court affirms a district court ruling dismissing a claim as frivolous.

Unpublished dispositions are used when the court is faced with certain types of frivolous claims to which it would not wish to give publicity, such as baseless claims against the tax system. Apart from the fact that if an argument is frivolous, discussion of it would add nothing to the law, publishing the ruling would provide publicity to the litigant. Faced with a claim that wages were not constitutionally taxable, the court, citing two Ninth Circuit cases, devoted one paragraph each to federal officials' immunity and the Tax Injunction Act, and said, "This

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<sup>208</sup> *United States v. Ayers*, 37 F. App'x 921 (9th Cir. 2002). Two members of the panel had served on the district court with that judge.

<sup>209</sup> *Mimi Motors v. Honda Motor Co.*, No. 72-1468 (9th Cir. June 11, 1973).

<sup>210</sup> *See, e.g., Applied Cos. v. Lockheed Martin Librascope*, 37 F. App'x 865 (9th Cir. 2002).

claim has been repeatedly rejected,” and assessed costs and attorney fees for bringing a frivolous case.<sup>211</sup> Likewise, when the claim was that wages were not income subject to the income tax, the judges found that the required administrative claim had not been made.<sup>212</sup> Complaining about frivolous cases, they said, “Meritless appeals of this nature clog the court and serve no purpose for the parties,” and assessed double costs and \$1,500 for attorney fees.<sup>213</sup>

Particularly where the party making the frivolous argument is a “frequent filer,” the last thing the judges wish to do is give that individual the spotlight; frivolous matters brought by such litigants are slapped down in unpublished memoranda. An example is the person who brought numerous challenges to denial of his bar application, in one of which the court found no district court jurisdiction over the claim because it was a challenge not to general rules but to the state supreme court’s decision on an individual action.<sup>214</sup> Moreover, the court of appeals found no abuse of discretion in the district court’s injunction against filing additional suits and found it acceptable to give the defendants attorney fees for a groundless action, to which they added attorney fees for a frivolous appeal.<sup>215</sup>

The court of appeals also affirmed an injunction against the filing of more suits by another “frequent filer” unless the cases were signed by an attorney. Ruling in nine consolidated cases brought against Supreme Court justices, four district judges, eight state court judges, prosecutors, and others, the Ninth Circuit found the district court’s total ban on all *pro se* claims too broad, and thus required modification of the injunction, but only as to the defendants against whom the plaintiff could not file.<sup>216</sup> There could be no further harassing lawsuits, but the plaintiff could file in “other legitimate unrelated disputes.” Nonetheless, there was no

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<sup>211</sup> Williams v. Pecorella, No. 94-3961, 758 F.2d 657 (9th Cir. 1985) (unpublished table decision).

<sup>212</sup> Passow v. Dist. Dir., IRS, No. 84-1807, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>213</sup> *Id.*

<sup>214</sup> Ronwin v. Holohan, No. 83-2676, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>215</sup> *See id.*

<sup>216</sup> *See* Lussy v. Bennett, No. 85-3902, 788 F.2d 1565 (9th Cir. 1986); Lussy v. Burger, No. 85-3896, 788 F.2d 1565 (9th Cir. 1986); Lussy v. Garrity, No. 85-3897, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Jameson, No. 85-3898, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Greely, No. 85-3599, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Dunbar, No. 85-3900, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Radonich, No. 85-3901, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Murray, No. 85-3903, 788 F.2d 1566 (9th Cir. 1986); Lussy v. Hugo, No. 85-3904, 788 F.2d 1566 (9th Cir. 1986) (unpublished table decisions).

question about the judges' view of the filings: "These lawsuits are a flagrant and repeated attempt to abuse the judicial process by suing judges . . . who have participated in previous civil actions" involving the plaintiff.<sup>217</sup> When the same plaintiff sued Washington's Attorney General for not bringing criminal charges against state judicial officers, the court of appeals likewise affirmed the district court's finding that the suit was frivolous, disposing of the appeal in an unpublished memorandum by saying briefly that the district court was not required to state detailed reasons for granting the defendant's motion to dismiss.<sup>218</sup>

Another candidate for nonpublication is a case with a claim or set of claims that may have no basis, even if the judges don't find them frivolous. Unless the judges create new rules to "put someone out of court," such cases are not likely to require publication. In one such case, a challenge to a district court dismissal of a petition to quash IRS summons, where the claim was that the district court should have held an evidentiary hearing, the appeals court, quoting the statute as to limits on who received notice, said that the individual involved was not entitled to notice of the summons and could not bring an action to quash.<sup>219</sup> Thus the district court's dismissal was affirmed.

#### *F. Fact-Based Rulings*

In many instances of applying law, the facts are dominant. This is one reason dispositions applying the law are not published. More generally, cases requiring review of a district court's or agency's interpretation of facts in relation to some standard often result in fact-based rulings. These are candidates for release as memorandum dispositions because the rulings are of minimal broader applicability. As a judge observed in one case, "This seemed to me to be such a fact-specific case that an opinion was not warranted." In another case, in rejecting a colleague's suggestion of publication, a judge said, "This is a fact specific case that I do not believe would be of precedential value," and, in still another case, the author, who had reported himself as leaning to an unpublished disposition, reported, "The panel was of the opinion that this is such a fact-specific case that we really do not need to publish."<sup>220</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> *See* Lussy v. Eikenberry, No. 85-3707, 790 F.2d 85 (9th Cir. 1986) (unpublished table decision).

<sup>219</sup> *See* Thiede v. Commack, No. 85-2326, 790 F.2d 85 (9th Cir. 1986) (unpublished table decision).

<sup>220</sup> *See supra* note 19.

One reason that heavily fact-specific cases are quite likely to receive an unpublished disposition is that the case could be decided “either way without changing the law of the circuit or creating an intercircuit conflict.”<sup>221</sup> Although alteration of a rule would require publication, these cases may fall well within the zone of an existing rule, so that the decision is not seen as altering it. Where the new facts to which the rule is applied are at the margin so that the rule’s domain is affected, publication would be more likely, but it is less so when a litigant’s claim is not close to the boundary. If one’s view of change in the law is that application of a rule to a new set of facts does not alter the rule itself, publication is not necessary. If, however, one takes the view that application of a legal rule to a new set of facts — its extension to those facts — itself alters the rule, then publication of the resulting disposition would be in order. Thus perhaps the Ninth Circuit should not have used a memorandum disposition to distinguish a defendant’s case from a recent Supreme Court ruling, as that distinction may have made the coverage of the Supreme Court ruling clearer and perhaps prevented similar claims.<sup>222</sup>

The fact-basis of unpublished rulings can be seen in cases involving contract interpretation, which depend on the specific wording of the contract. An example is a reversal, as either a clearly erroneous factual holding or an error of law, of a district court’s finding that an (illegal) agreement to sell securities was severable from an agreement to provide legal services.<sup>223</sup> Use of an unpublished disposition was appropriate on the basis that severability was a state law issue; the issue was also heavily fact-based, and the memorandum contained little discussion of law except at one point, on the primary purpose of the agreement.<sup>224</sup> Likewise, the court’s reading of a trust deed to determine whether it transferred all real property interest in the land, rather than only the legal title to land, was a factual matter not requiring publication of the disposition.<sup>225</sup> Another fact-heavy case typical of those in which unpublished dispositions are used was one in which the judges, affirming the denial of Conscientious Objector status to a serviceman, searched the

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<sup>221</sup> Hellman statements, *supra* note 4, at 12.

<sup>222</sup> See *United States v. Hernandez-Padilla*, No. 73-2225 (9th Cir. Nov. 5, 1973) (distinguishing *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)).

<sup>223</sup> See *Hecht, Diamond & Greenfield v. Rosen*, No. 84-6270, 790 F.2d 85 (9th Cir. 1986) (unpublished table decision). There was also a dissent by Judge Wiggins, but it was a fact-based opinion and spoke of justice rather than law.

<sup>224</sup> See *id.*

<sup>225</sup> See *In re John W. Stoller Inc.*, 95 F.3d 1157 (9th Cir. 1996) (unpublished table decision).

record with respect to the sincerity of his claim.<sup>226</sup> Another fact-based case, a copyright case in which the plaintiff claimed his movie idea was stolen, involved the question of similarity; this resulted in a nine-page disposition, in which the only law discussed was the use of summary judgment in such situations.<sup>227</sup>

Certain types of cases usually are fact-based and thus appear regularly as unpublished dispositions. Among them are immigration cases. Claims of persecution in applications for asylum, for example, are fact-based although the question may be one of applying the standard to be satisfied before asylum is to be granted.<sup>228</sup> Criminal cases involving the question of an adequate basis for probable cause are another type; whether an officer had sufficient basis for probable cause or reasonable suspicion in connection with a search or stop is usually fact-based.<sup>229</sup> Another circuit's chief judge has said that his experience led him to consider that "prime candidates for unpublished opinions are Social Security, Black Lung, and criminal cases as well as prisoner petitioners,"<sup>230</sup> all of which, particularly the first two, share the characteristic of being fact-based.

Also usually fact-based and thus usually not requiring publication are Social Security disability benefits cases. However, there are instances where one might question use of a memorandum disposition in such a case, such as a case in which the majority and the dissenter disagreed over what a Ninth Circuit case required of an administrative law judge in evaluating evidence in certain situations.<sup>231</sup> The majority found a remand was in order for development of a proper record "and to afford the ALJ an opportunity to more thoroughly evaluate the petitioner's disability and to make further findings" because a Ninth Circuit case required a specific finding about the diagnosis, while Judge Wallace, dissenting, said the same Ninth Circuit case did not give presumptive weight to a treating doctor's report; moreover, he would not remand under it because the

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<sup>226</sup> See *Ross v. Marsh*, No. 84-2458, 758 F.2d 656 (9th Cir. 1985) (unpublished table decision).

<sup>227</sup> See *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir. 1985).

<sup>228</sup> See David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 831 (2005) ("The factually driven, legally repetitious nature of asylum appeals would seem to make them poor candidates for publication on the whole . . .").

<sup>229</sup> See, e.g., *United States v. Manning*, No. 84-5138, 758 F.2d 657 (9th Cir. 1985) (unpublished table decision).

<sup>230</sup> Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 183 (1999).

<sup>231</sup> See *Hill v. Heckler*, No. 83-2440, 758 F.2d 655 (9th Cir. 1985) (unpublished table decision).

ALJ's ruling came before the case was decided.<sup>232</sup> To be sure, the dissent, which found that substantial evidence supported the ALJ, was partly fact-based, and the case had not concluded because the majority remanded, but the disagreement over what the disputed case required should have suggested that publication was appropriate. Similarly, when the Third Circuit, finding no substantial evidence to support the Social Security Commissioner's determination concerning an individual's level of education, remanded for reconsideration in a fact-based ruling, its discussion of the presumption that between completion of the sixth grade meant a marginal education might be thought to cast light on the law, which should have led to publication.<sup>233</sup>

### G. Sufficiency of the Evidence

Among fact-specific cases appropriate for unpublished dispositions are those in which the basic question is the sufficiency of the evidence. Use of unpublished dispositions in such situations can be seen regularly when the appellant in a criminal case claims that evidence was not sufficient to sustain a conviction.<sup>234</sup> If an unpublished disposition is acceptable when the court affirms on the basis that the evidence was sufficient, an unpublished disposition may likewise be acceptable even when the court reverses for *insufficiency* of the evidence, as when a panel majority, providing a paragraph of explanation, reversed for *insufficiency* of the evidence, over a dissent in which the dissenting judge spelled out at length why the evidence was sufficient to sustain the conviction.<sup>235</sup> One might question this failure to publish a reversal accompanied by a dissent, but nonpublication might be appropriate where the disagreement was only over the sufficiency of the evidence, not the applicable law.

Use of memorandum dispositions when sufficiency of the evidence is at issue occurs not only in criminal cases but also in civil ones, such as those concerning Social Security disability benefits. Where agency rulings, to which considerable deference is shown, are being reviewed and the only issue is whether there was substantial evidence in the record to support the agency decision, publication is unlikely.<sup>236</sup> However, two

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<sup>232</sup> See *id.*

<sup>233</sup> See *Green v. Barnhart*, 29 F. App'x 73 (3d Cir. 2002).

<sup>234</sup> An early example is *Polk v. United States*, No. 72-3020 (9th Cir. Mar. 28, 1973).

<sup>235</sup> *United States v. Chapman*, No. 72-1451 (9th Cir. Apr. 20, 1973). Another instance of an unpublished disposition reversing for insufficiency of evidence was *United States v. Mora-Romero*, No. 73-1790 (9th Cir. Nov. 28, 1973), where the panel said the outcome was controlled by a line of Ninth Circuit cases, which were cited.

<sup>236</sup> See, e.g., *Ernst v. Richardson*, No. 72-2376 (9th Cir. July 9, 1973); *Gibson v. Chater*, No. 94-36133, 87 F.3d 1318 (9th Cir. 1996) (unpublished table decision).

matters weigh in favor of publishing rulings enforcing or denying enforcement of agency rulings. One is that agency decisions are published in formal agency dockets or in specialized commercial reporters and thus fit the court's criterion of publication when a case is "published below." The other is that, because these rulings are far less visible than the district courts' rulings, when the courts of appeals review of the agency rulings, publication would assist in holding the agency accountable. Cases from the NLRB also are often fact-based, particularly when the issue is whether there was substantial evidence to support the Board's result. Thus, in one case, where there was no challenge to the Board's legal analysis but only to the evidence supporting its conclusions, the court used a memorandum disposition in ruling that there was substantial evidence to support the Board's findings that General Counsel had made out a *prima facie* case, which had not been rebutted by a preponderance of the evidence.<sup>237</sup>

Related to non-publication of such fact-based reversals are those cases which result in unpublished rulings because as one judge stated, "the district court really did have unresolved fact questions which it erroneously disposed of in a summary judgment." In one example, the court of appeals said a union seeking arbitration claimed an oral modification of the bargaining agreement, which was allowed under Ninth Circuit law, and the possible existence of the modification was a material fact about which there was a dispute, requiring reversal of the summary judgment.<sup>238</sup> Other circuits do this as well. Thus the Sixth Circuit did not publish when it vacated and remanded after finding a factual dispute over when an employee told the employer of the need for leave – a question relevant to basing summary judgment on the statute of limitations, and the basis for summary judgment,<sup>239</sup> and the Tenth Circuit used an unpublished disposition to remand because certain fact issues remained in a case.<sup>240</sup>

Using an unpublished disposition to reverse a grant of summary judgment may be sensible because the ruling establishes only that there is a dispute as to material facts, with further action necessary in the case. Not only is the judges' determination itself fact-bound, but it will be soon enough for the court of appeals to publish the case upon dealing with legal issues when the case reappears on appeal after the district

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<sup>237</sup> See *NLRB v. Cine Enters.*, 978 F.2d 715 (9th Cir. 1992) (unpublished table decision).

<sup>238</sup> See *Stove, Furnace & Allied Appliance Workers v. Anaheim Mfg. Co.*, No. 85-5799, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

<sup>239</sup> *Williams v. Schuller Int'l*, 29 F. App'x 306 (6th Cir. 2002).

<sup>240</sup> *Dawson v. Abraham*, 29 F. App'x 561 (10th Cir. 2002).

judge applies the law to disputed facts. Certainly when the appeals court found a factual dispute where the district court, to grant summary judgment, had seen none, reversal by unpublished disposition seems reasonable as the matter will proceed toward trial. Unpublished dispositions also seem appropriate when reversal of summary judgment comes because the plaintiff had not been given a real opportunity to respond to defendant's summary judgment motion. For example, the Ninth Circuit used an unpublished disposition when an incarcerated prisoner who, the court noted, had regularly tried to comply with Court rules, was not given a real opportunity to respond to defendant's motion because of the prisoner's changing address, to which the district court paid insufficient attention.<sup>241</sup> However, if instead of only overturning a summary judgment, where the case then remains to be tried, the court grants a summary judgment to the other side, publication might be thought more appropriate.

#### IV. OTHER ELEMENTS II: REVERSALS

There are several principal reasons supporting publication of reversals. One is that disagreement among judges over an issue, even if "vertical" disagreement between levels of the court system, indicates that the law is uncertain, and uncertainty is said to require debate in public. Another that deference to the trial court or agency requires providing a public explanation for such action, and the legal community, in particular, deserves an explanation of the reversal. The rationale for a published opinion in reversals is, however, undercut, at least in part, by the relative ease with which these dispositions can be retrieved electronically or found in *Federal Appendix*.

Although it has been the case that no circuit "unequivocally requires publication when the decision is a reversal of a lower court or agency decision,"<sup>242</sup> some circuits have an explicit guideline that dispositions ought to be published if the court is reversing a district court's or agency's ruling. On the basis of interviews, the 1985 Federal Judicial Center study indicated, that the Ninth Circuit's "judges do not necessarily designate these decisions for publication."<sup>243</sup> However, this seems to be the most obvious of the court's desiderata for publication not explicit in its Local Rules.

By far the largest proportion of "unpublished" dispositions have been affirmances, so labeled — whether in *Federal Reporter* tables of

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<sup>241</sup> See *Gainer v. Agnos*, 953 F.2d 1386 (9th Cir. 1992) (unpublished table decision).

<sup>242</sup> Stienstra, *supra* note 12, at 34.

<sup>243</sup> *Id.*

unpublished cases or cases printed in *Federal Appendix*. If we add dispositions equivalent to “Affirmed,” such as “Enforcement Granted” (for National Labor Relations Board cases) or “petition denied” (for cases from the INS and some other agencies), as well as mandamus denied and most “dismissals,” many of which go to the merits,<sup>244</sup> there are very few dispositions in which the lower court or agency is not upheld. What then about those cases with unpublished dispositions in which the lower court or agency judgment is disturbed in some way?<sup>245</sup>

Official data indicate that for all dispositions on the merits from statistical year (“SY”) 1998 through SY 2001, whether published or not, all courts of appeals were reversed or vacated at the rate of 10.4 percent for 1997-1998 and at rates ranging from 9.1 percent to 9.5 percent for the next three years.<sup>246</sup> These data show that the Ninth Circuit’s variation for 1998-2001 was greater than for other circuits, ascending from 7.3 percent in 1997-1998 to 9.4 percent in 2000-2001; for the first two years, the

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<sup>244</sup> This is particularly so in those circuits which dismiss after review of the record and denial of a certificate of appealability (COA), or which dismiss after accepting *Anders* briefs and finding no non-frivolous issue. By comparison, dismissals for lack of jurisdiction do not go to the merits.

In 29 *Federal Appendix*, of 17 “dismissed” dispositions, seven were dismissals for lack of appellate jurisdiction, as when the appeal was not timely. See *McSheffry v. Conroy*, 29 F. App’x 141 (4th Cir. 2002). See also *Sadowski v. Falanga*, 29 F. App’x 668 (4th Cir. 2002) (when district court orders were not final); *Harmon v. Davidson*, 29 F. App’x 570 (10th Cir. 2002) (when the court said a petitioner must bring a habeas action before filing a § 1983 suit); *United States v. Allen*, 29 F. App’x 819 (3d Cir. 2002) (when there was no jurisdiction to review a district judge’s discretionary downward departure from a Guidelines sentence).

Nine other dismissals were clearly the equivalent of affirmances. Some were denials of a certificate of appealability: that the dismissal was based on the district court’s reasoning, on a ruling that an entrapment claim was not supported, or that a guilty plea was voluntary, or other findings of no reversible error, which indicates rulings on the merits. See *United States v. Queen*, 29 F. App’x 139 (4th Cir. 2002); *Slusher v. Furlong*, 29 F. App’x 490 (10th Cir. 2002); *Ross v. Lytle*, 29 F. App’x 499 (10th Cir. 2002). So were rulings agreeing with counsel’s assertions that the issues noted in the lawyer’s *Anders* brief would be frivolous on appeal, see, e.g., *United States v. Baker*, 29 F. App’x 375 (7th Cir. 2002).

<sup>245</sup> Notice that it is the *judgment* in which we are interested. Unless the court of appeals affirms “for reasons stated by the district court” or “on the basis of the opinion of the district court,” it is in some sense disturbing the lower court ruling by adopting its own rationale for the judgment.

<sup>246</sup> Used here is a statistical year, beginning October 1 and ending the following September 30, and the data are drawn from the database of the Administrative Office of United States Courts (A.O.) and from Tables B2 and B5 of the A.O.’s annual reports by Professor Stefanie Lindquist, whose assistance is very much appreciated. For annual reports, see <http://www.uscourts.gov/library/statisticsalreports.html>. The A.O. data are reversals, and the rates do not appear to include remands. By contrast, the data gathered by the author, and presented *infra*, take into account any “disturbance” by the court of appeals of the judgment of the district court or agency.

Ninth Circuit's reversal rate was below the overall figure, but it was roughly the same for the two more recent years. If all categories of dispositions not fully sustaining the lower court are included, the rate at which the courts of appeals disturb lower court or agency dispositions is much greater. For part of 2002, for example, for all courts of appeals somewhat more than half (56.4%) of the published rulings in 300 - 304 *Federal Reporter* upheld the lower court or agency.<sup>247</sup> The affirmance rates for most circuits ranged from just below half (the Sixth and Eleventh Circuits, each at 49%) to 60 percent. The Seventh Circuit had the highest proportion of published rulings that do not disturb the lower court (78.7%), with the Tenth Circuit also over 70 percent and the Eighth Circuit at two-thirds; the Ninth Circuit had the lowest proportion (44.3%). In cases from 2003 appearing in 320 - 324 *Federal Reporter*, the proportion of lower court rulings which the Ninth Circuit did not disturb was over half (54.8%), well below the proportion of such outcomes in unpublished dispositions.

The picture for almost 2,200 Ninth Circuit unpublished dispositions in 2002 (29 - 44 *Federal Appendix*) is that the proportion of such dispositions in which lower courts' or agencies' rulings were left undisturbed remained comfortably over 80 percent for all except three volumes and only twice fell below three-quarters.<sup>248</sup> A close-up picture is provided by 29 *Federal Appendix*, where the great majority of the dispositions for all circuits were affirmances, true, for example, of more than four-fifths of 96 Second Circuit cases and an even higher proportion from the Third Circuit.<sup>249</sup> For the Ninth Circuit, a disproportionately high 90 percent were affirmances; so were over 80 percent of the Eleventh Circuit's listed cases. For the Sixth Circuit, three-fourths of the 36 dispositions were affirmances or the equivalent, as were virtually all the Seventh, Eighth, and Tenth Circuit dispositions.<sup>250</sup>

In the next volume (30 *Federal Appendix*), the proportion of "non-affirming" Ninth Circuit dispositions was much higher, exceeding one-third (37%), while only one-eighth of Sixth Circuit dispositions overturned the ruling below, but the picture in other circuits was quite different. All eight D.C. Circuit dispositions were affirmances; in the Seventh Circuit all but one (an attorney discipline proceedings) were

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<sup>247</sup> Data reported here collected by the author.

<sup>248</sup> The exceptions are 72.5% (34 *Federal Appendix*) and 68.1% (41 *Federal Appendix*). Data in this section collected by the author.

<sup>249</sup> "Tabled" Third Circuit cases, which still appeared at that point, contained only affirmances, a small number of dismissed appeals, and a couple of procedural rulings.

<sup>250</sup> The only Federal Circuit cases that were not affirmances were two dismissals for failure to pay a docketing fee and one case dismissed on the withdrawal of a United States appeal.

affirmances or their equivalent, and all but one of 33 Eighth Circuit were affirmances. Although slightly less than one-half (123) of the 266 Fourth Circuit rulings were officially labeled “Affirmed,” an equal number were dismissals, mostly after the court had examined the merits; with other “Affirmed” equivalents added, less than four percent of lower court or agency rulings were disturbed.

The proportion of Ninth Circuit non-affirmances remained over ten percent in subsequent *Federal Appendix* volumes; it was roughly 15 percent in 31 and 32 *Federal Appendix*, before dipping slightly to 13 percent (33 *Federal Appendix*), then rising substantially to 28 percent in 34 *Federal Appendix* before declining to 19 percent (35 *Federal Appendix*), a higher proportion than or any other court of appeals with nontrivial numbers of dispositions. Affirmances and equivalents were 87 percent of dispositions in both the Sixth and Tenth Circuits but a much higher 94.5 percent in the Fourth Circuit.<sup>251</sup> This examination shows that overall the proportion of affirmances in published opinions is considerably lower than the proportion in unpublished memorandums; reversals certainly are more likely than affirmances to be published. The clear import of these data is that dispositions disturbing lower courts rulings are increasingly segregated in the *Federal Reporter*.

The courts of appeals are more likely to affirm with respect to certain types of cases than others, so these cases make up a high proportion of unpublished dispositions. A very high proportion of unpublished dispositions are criminal appeals<sup>252</sup> or habeas corpus petitions from state convictions, and in the dominant proportion of those, the courts of appeals affirm the conviction or the lower court denial of habeas corpus. Also appearing in considerable number are petitions in immigration cases where the INS has refused to grant asylum and ordered deportation.

In 1997-1998, when the reversal rate was 10.4 percent overall (both published and unpublished dispositions), it was 14.4 percent for administrative appeals and 15.2 percent for bankruptcy appeals, but only 8.5 percent for criminal cases.<sup>253</sup> Indeed, the rate of reversals regularly was the lowest for criminal appeals – as low as 5.4 percent in 1998-1999 and 5.7 percent in 2000-2001. On the other hand, the rate of reversals

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<sup>251</sup> For the three circuits with “tabled” lists, the figures were above 90 percent: Third Circuit, 97%; Fifth Circuit, 95.7%; and Eleventh Circuit, 90.3%. This probably resulted from heavy use of AWOP’s (affirmances without opinion.)

<sup>252</sup> This receives strong visual confirmation in *Federal Reporter* tables. The cases captioned “U.S. v.,” most of which are criminal cases, contain an almost unbroken line of affirmances, whereas elsewhere in a several-page list, affirmances are interrupted by reversals, vacatur, and appeals dismissed.

<sup>253</sup> Data in this paragraph are derived from A.O. data. See *supra* note 244.

was regularly well above the average in administrative appeals and bankruptcy appeals (12.2% and 11.7%, respectively, in 2000-2001, and 13.3% and 11.3% in 1998-1999). Prisoner petitions (10.7% in 2000-2001, 11.3% in 1998-1999) and “other U.S. civil cases” (10.8% in 2000-2001, 11.1% in 1999-2000, 11.8% in 1998-1998) also had above-average reversal rates. In the Ninth Circuit, where reversals certainly were more likely than affirmances to be published, the rate of reversals in criminal appeals was regularly well below the overall reversal rate and administrative appeals and other U.S. civil cases well above it; reversals in bankruptcy appeals were also well above the average in two of the four years. The widest swing can be found in prisoner petitions, well below the average in two years of the four (only 3.6% in 2000-2001 and 4.9% in 1998-1999) but above the average in 1999-2000 and 2000-2001 (11.6% and 13.5%, respectively).

Differential application of criteria for publication between criminal cases and civil appeals is suggested by some judges’ belief – stated in comments to each other – that a disproportionate number of criminal appeals reversing the lower court are published, while most affirmances receive unpublished dispositions. Such action might have resulted from a belief that, just as some judges believe that oral argument should be granted in criminal appeals, it was important to show the world that the court was giving appropriate attention to criminal matters and appropriately protecting defendants’ rights. The “P.R.” element in this concern can, however, cut the other way, as when some judges questioned whether the impression from the published criminal cases, said to be unrepresentative, give the court a “bad rep” for being “soft on criminals.” Here there may have been an element of the need to indicate that, indeed, the Ninth Circuit did affirm convictions instead of “freeing criminals,” which would counter the impression created if reversals were more likely to result in published opinions and affirmances in not-for-publication memorandum dispositions. Although some judges had argued “that the ‘public will know from reading the tables in the Federal Reporter that a great many cases are decided without published opinions and that the overwhelming majority are affirmed,’” a colleague responded that, even if “informed lawyers will have this information available . . . most people believe that courts are soft on crime.”<sup>254</sup> It was therefore, he suggested, a “disservice” to the court not to publish “more of the significant cases in which we affirm convictions” in order not to

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<sup>254</sup> Memorandum from Judge Robert Boochever to Chief Judge Alfred T. Goodwin concerning possible action by the court of appeals’ Executive Committee (Sept. 28, 1988).

“further feed . . . a misguided impression that courts are soft on crime.”<sup>255</sup>

*A. Trends?*

What about changes over time in the publication of rulings disturbing lower court and agency rulings? As the proportion of “unpublished” cases has increased, we might find a smaller proportion of reversals among unpublished cases as the court used such dispositions for quick stamps of approval as it attempted to cope with caseload. At one time there may have been an assumption that reversals per se made law and thus should be published, while now it may be understood that a fact-based reversal no more requires publication than do other heavily fact-based dispositions.<sup>256</sup> However, it might be more likely that an *increased* portion of memorandum dispositions would be reversals, as non-precedential dispositions, reversals included, are issued in more cases overall. Judges may feel that publishing explanations for reversals may not be important in all cases, particularly where the dispositions are now available in *Federal Appendix* or on-line, and that they are providing enough material, even if in an unpublished disposition, for use by the lower court or agency on remand so deficiencies in the earlier proceeding can be remedied. Here we might note that if the practice were changed to provide for publication of all dispositions other than full affirmances, the proportion of all cases receiving unpublished dispositions would not substantially increase, but the impression of a higher proportion of reversals would be created by published opinions.

The overall rate of court of appeals rulings disturbing the lower court or agency judgment has declined steadily if somewhat irregularly from the first half of the 1970s, when it was regularly close to one-fifth through the end of the century. For the 1970s, the proportion was 18.6 percent; it was 16.9 percent for the 1980s; and it dropped below ten percent in the 1990s, staying below it as the century ended, with the overall percentage for the 1990-1999 decade less than half that for the 1970s rate.<sup>257</sup>

In Ninth Circuit unpublished “table” dispositions from October 1985 through July 1990 (776 - 909 F.2d), lower court or agency judgments predominantly were left undisturbed, but in a significant proportion of these cases, the court of appeals nonetheless did disturb such judgments. There is variation over time, but the proportion of

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<sup>255</sup> *Id.*

<sup>256</sup> See discussion, *supra* at text accompanying notes 220-33.

<sup>257</sup> Data in this and subsequent paragraphs collected by the author.

“undisturbed” dispositions is close to or exceeds 80 percent but seldom rises about 90 percent.<sup>258</sup> Only seldom are less than 70 percent of the cases undisturbed, although at times it falls to between 75 and 80 percent. For these unpublished dispositions, there is no steady overall trend during this period although the long-term pattern reveals some increase in the frequency with which the court of appeals makes an alteration in the lower court or agency ruling.

Federal Judicial Center data show that in 1998, only 14 percent of the Ninth Circuit’s dispositions affirming were published but 53 percent of cases reversing the lower court or agency were published; for remands, the proportion was one-fifth.<sup>259</sup> If we extend this examination, we find that in only half (50.9%) the cases the courts of appeals disposed of with published opinions in 305 - 346 F.3d were the district court or agency judgments “undisturbed,” distinctly lower than for cases with published opinions from 1973 – where 62.9 percent of the lower court or agency judgments were upheld or otherwise left alone. Yet even in the early years of the use of unpublished dispositions, cases in which they were used were more likely to result in affirmances or related dispositions; we see this in such cases from 1972-1977, when over three-fourths (76.9%) were upheld.

### *B. Reasons for Not Publishing*

A closer look at the reversals which received unpublished dispositions is now in order. If a presumption favors publication of rulings that disturb the lower court’s disposition, what can we make of such rulings issued as unpublished dispositions? Even if there is a lower proportion of reversals among unpublished dispositions than among published opinions, the issue is why there are any at all. We find that good reasons within the spirit of the court’s norms exist for not publishing most reversals which result in memorandum dispositions. Indeed, from the beginning, among the relatively few Ninth Circuit unpublished dispositions in which the court reversed in the early 1970s, there were instances where a not-for-publication disposition seemed appropriate. These included rulings modifying, remanding on

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<sup>258</sup> For “table” listings in *Federal Reporter*, captions (dispositions), not docket numbers, are counted, so consolidated cases — usually criminal cases with more than one defendant — count as one. Usually only two cases are consolidated as one, but in a case from the Tax Court, *Boushey v. C.I.R.*, 932 F.2d 972 (9th Cir. 1991) (unpublished table decision), there are 31 docket numbers (90-79935 et seq.). Thus, if anything there is over-counting: a bankruptcy case usually has two listings, one as “In re Jones,” the other as “Jones v. Smith”; matching of docket numbers to eliminate the duplication was not undertaken.

<sup>259</sup> McKenna, *supra* note 9, at 19 (Table 11).

government concession of error, and reversing where retrial is necessary, which left matters open for later appellate examination.

Some particular types of rulings disturbing the lower court judgment where publication might seem unnecessary are quite evident. For example, a remand in a Rule 11 case, on a government concession at oral argument that an attorney had not reviewed one of the relevant documents before making a declaration, hardly required a published opinion,<sup>260</sup> particularly where the court of appeals' disposition does not further discuss the law.<sup>261</sup> Going beyond such individual instances to look at those in 29 and 35 *Federal Appendix*, we find that among Ninth Circuit rulings in 29 *Federal Appendix* in which the judges vacated or reversed the lower court ruling in whole or in part, there were instances where the appeals court's action was minor, as when an affirmance was accompanied by a sua sponte remand to exclude reference to a statutory provision,<sup>262</sup> or when the court remanded only for deletion of a statutory reference in the judgment.<sup>263</sup>

Only slightly more serious was a case where the court upheld the defendant's conviction but reversed and remanded because the district court had not made factual findings with required specificity as to a sentence enhancement.<sup>264</sup> In two other cases, however, the reversal was more significant. In one, the court held that a prisoner should be able to address directly those making decisions about him and remanded for a determination of the critical decision-makers and whether the prisoner had a meaningful opportunity to present his story to them.<sup>265</sup> In the other, while ruling that not holding a hearing on admissibility and on prosecutorial misconduct was harmless error, the court reversed on the ground the district court's jury instruction did not cover the defendant's theory of the case, so that a retrial was necessary.<sup>266</sup>

Ninth Circuit rulings in 30 *Federal Appendix* that were other than full affirmances included a remand for the relatively minor reasons that the judgment had to reflect conviction under a particular statutory proceeding when the district court accepted a guilty plea under Rule

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<sup>260</sup> See *Clark v. United States*, No. 85-2188, 792 F.2d 144 (9th Cir. 1986) (unpublished table decision).

<sup>261</sup> See *United States v. Jimenez-Gutierrez*, 37 F. App'x 305 (9th Cir. 2002) (reversing on government's concession of error).

<sup>262</sup> See *United States v. Mejia-Plasencia*, 29 F. App'x 444, 446 (9th Cir. 2002).

<sup>263</sup> See *United States v. Bernal-Portillo*, 29 F. App'x 466, 468 (9th Cir. 2002).

<sup>264</sup> See *United States v. Blatt*, 29 F. App'x 477, 480 (9th Cir. 2002).

<sup>265</sup> See *Castro v. Terhune*, 29 F. App'x 463, 465 (9th Cir. 2002); the court disagreed with the prisoner on other claims.

<sup>266</sup> See *United States v. Williams*, 29 F. App'x 486, 487-89 (9th Cir. 2002).

11<sup>267</sup>; there was also a dismissal and remand because of mootness as to one claim and lack of ripeness as to others.<sup>268</sup> One reversal involved only an order taxing costs for the period before a case had been removed, in part because the order was contrary to a state court order.<sup>269</sup> Several other reversals resulted from the appeals court's determination that factual issues remained – as to the conclusion of a subcontractor's obligations; the “reverse confusion” in a trademark case; and retaliation for complaining of discrimination.<sup>270</sup>

Among other instances in which the lower court's ruling was disturbed, one involved a partial reversal on the basis of error as to treble damages under New York law, with a remand to apply that law to punitive damages for a breach of fiduciary duties,<sup>271</sup> and there was another partial reversal as to “unseaworthiness” resulting from a crew member's character although the court found in error as to giving “maintenance and cure.”<sup>272</sup> Among the many criminal cases disposed of by unpublished disposition, there was one in which the court found it was not harmless error to accept a guilty plea without informing the defendant he could not withdraw the plea if the judge rejected the sentencing recommendation,<sup>273</sup> and a vacate-and-remand disposition when the judges found defendant entitled to a *Franks* hearing concerning a search warrant.<sup>274</sup>

Unpublished memorandums are used in a number of situations when the court of appeals overturns the lower court ruling in whole or in part:

- when clear circuit precedent is applied
- when there has been an intervening relevant ruling or action
- when technical matters must be attended to
- when matters of procedure require remanding the case

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<sup>267</sup> See *United States v. Cisneros-Vasquez*, 30 F. App'x 696, 697 (9th Cir. 2002).

<sup>268</sup> See *Eggleston v. Pierce County*, 30 F. App'x 721, 723 (9th Cir. 2002).

<sup>269</sup> See *Gardner v. Nike*, 30 F. App'x 726, 728 (9th Cir. 2002). The Ninth Circuit's affirmance of the summary judgment in the case had been published. See *Gardner v. Nike*, 279 F.3d 774 (9th Cir. 2002).

<sup>270</sup> See *United States ex rel. J & A Landscape Co. v. Reza*, 30 F. App'x 708 (9th Cir. 2002); *M2 Software v. Viacom*, 30 F. App'x 710, 712 (9th Cir. 2002) (with a one-paragraph dissent by Judge Pregerson, who disagreed that trademark law extends to CD-ROM products); *Olson v. Teamsters Local No. 70*, 30 F. App'x 718 (9th Cir. 2002) (a split decision in which the court affirmed on failure to show a breach of duty of fair representation).

<sup>271</sup> See *Bank Saderat Iran v. Telegen Corp.*, 30 F. App'x 741, 744-45 (9th Cir. 2002).

<sup>272</sup> *Torres v. Caribbean Fishing Co., Inc.*, 30 F. App'x 752, 753 (9th Cir. 2002).

<sup>273</sup> *United States v. Benitez*, 30 F. App'x 706, 707-08 (9th Cir. 2002).

<sup>274</sup> *United States v. Flake*, 30 F. App'x 736, 739 (9th Cir. 2002) (drawing a partial dissent by Judge Tallman, *id.* at 740-41, who found the evidence sufficient to support the warrant).

- when the ruling is fact-based, including reversal of summary judgment because of an issue of material fact

Some of these elements have already been treated, but others require attention here.

### *C. Intervening Ruling*

There may be no need to publish when the court of appeals reverses because of some intervening ruling, particularly a Ninth Circuit decision, handed down after the district court's judgment. The district court's ruling is wrong *now* given the changed law, but it was not wrong *then*, and because the intervening decision created circuit precedent, a following case could be unpublished. On the other hand, if application of the intervening ruling clearly makes new law, publication would be in order for that reason. However, when an intervening Supreme Court ruling requires reexamination of a lower court ruling and the distinguished district judge had done a fine job, the court might feel no need to use a published opinion to reverse.<sup>275</sup> In one instance, when, the very day the instant case had been submitted in the court of appeals, the Supreme Court handed down a ruling the judges said controlled the precise issues before them, an unpublished disposition was thought to suffice.<sup>276</sup>

Unpublished dispositions are used to send cases back to the lower courts to consider an intervening Supreme Court ruling. Where the court of appeals ruling requires reversal of the district court's action so new precedent can be considered, matters remain open and publication is not necessary.<sup>277</sup> However, to the extent the appeals court uses a remand to assimilate the new high court case to circuit precedent, publication might be in order. Although preliminary examination of Supreme Court rulings would add to the law and thus should perhaps be published, non-publication of a reversal may be excused on the basis that once the district court had carried out its application of that preliminary discussion, the court of appeals would have another opportunity in a subsequent appeal to state the legal rules more fully.

An early example of such usage is a case dealing with an IRS summons for papers held by a person's attorney. The district court had refused to enforce the summons on the basis that the papers remained in the taxpayer's "constructive possession." Saying that the district court's

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<sup>275</sup> See, e.g., *Baucus v. Kidd*, No. 72-1082 (9th Cir. Dec. 17, 1973).

<sup>276</sup> See *Gianone and Van Epps v. A.B.C. of Cal.*, No. 71-3010 (9th Cir. Dec. 29, 1972), applying *California v. LaRue*, 409 U.S. 109 (1972).

<sup>277</sup> See, e.g., *Herron ex rel. Herron v. United States*, 37 F. App'x 867 (9th Cir. 2002).

action had been correct at the time, the panel majority pointed out that the Supreme Court had then decided *Couch v. United States*,<sup>278</sup> where papers were in an accountant's possession, and had given "constructive possession" a narrower meaning. While the Ninth Circuit judges said necessary reexamination of the district court ruling "can best be done by the District Court itself," the judges' comments left open the possibility of quashing the subpoena on the basis of attorney-client privilege. The majority acknowledged the difference between papers in the hands of an accountant (*Couch*) and an attorney (the present case); Judge Ely, concurring, thought this was enough to sustain the district court "without further ado." That distinction might well have been the basis for publishing, as the ruling was not a clear point-for-point application of *Couch* to the Ninth Circuit's case.<sup>279</sup>

In a number of situations when there has been some development after the district court ruling, the court of appeals, before issuing a ruling, wishes the district court to consider that development. In a challenge to zoning of adult entertainment, when the city council had passed a new resolution, the Second Circuit remanded for the district court to consider the resolution.<sup>280</sup> When a district court, in ruling on *forum non conveniens*, had not had available a recent circuit en banc decision to guide its evaluation, the appeals court remanded for consideration of the factors stated in the en banc ruling and also went on to "highlight some other matters for the District Court's reconsideration on remand."<sup>281</sup> Given the range of factors the appeals court said should be considered, the ruling might have been published as extending the relevant law. The fallout from the Supreme Court's ruling in *Apprendi v. New Jersey*<sup>282</sup> also produced some unpublished remands; in a case on which the appeals court had previously ruled, the judges found an intervening ruling that when a quantity of drugs took a sentence outside the Guidelines range, the jury must decide, and thus remanded for resentencing.<sup>283</sup>

#### *D. Technical and Procedural Matters*

Technical matters help explain not publishing a number of dispositions where the matters were minor and the appeals court could be

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<sup>278</sup> 409 U.S. 322 (1973).

<sup>279</sup> *Baucus v. Kidd*, No. 72-1082 (9th Cir. Dec. 17, 1973).

<sup>280</sup> *Damach v. City of Hartford*, 29 F. App'x 720 (2d Cir. 2002).

<sup>281</sup> *Alnwick v. European Micro Holdings*, 29 F. App'x 781, 783 (2d Cir. 2002).

Included were discovery and the availability of witnesses; language barriers; administrative burdens on the court from parallel Dutch litigation; choice of law; the essence of the case; and plaintiff's fraud claims. *See id.*

<sup>282</sup> 530 U.S. 466 (2000).

<sup>283</sup> *See United States v. Williams*, 29 F. App'x 656 (2d Cir. 2002).

explicit about the necessary correction. A number of these cases involved sentencing matters. Thus the Second Circuit remanded with directions to enter an amended judgment accurately showing the offense of conviction and for the district judge to reconsider how to treat unserved home detention.<sup>284</sup> In the Third Circuit, one remand was to redetermine restitution,<sup>285</sup> and another, in which the court affirmed a conviction for fugitive in possession of a gun, said the sentence could not be enhanced for the individual being a fugitive.<sup>286</sup>

Procedural matters, where the court said nothing on the merits but its action allowed the suit to proceed, accounted for a number of other unpublished remands. Thus, the Sixth Circuit let a case move forward when it used an unpublished disposition to overturn a ruling on standing so that owners of sexually-oriented businesses could challenge zoning and licensing ordinance.<sup>287</sup> In a 28 U.S.C. § 2255 ineffective assistance case, the Fourth Circuit remanded for a hearing statutorily mandated upon a certain showing.<sup>288</sup> The Third Circuit overturned a district court dismissal for discovery violations for having done so without findings, an abuse of discretion.<sup>289</sup> A Second Circuit unpublished reversal order overturned the requirement that a plaintiff obtain the court's permission to file suits about his sister's care, because no notice or opportunity to be heard had been provided.<sup>290</sup> A similar case involved a district court order barring a former wife from future bankruptcy filings without court permission, which the Third Circuit held improper for lack of notice and for being unnecessarily broad.<sup>291</sup>

The Sixth Circuit, vacating and remanding, said the district court should rule on qualified immunity without further discovery.<sup>292</sup> Where the district court had dismissed a Title VII case and had denied counsel to the pro se plaintiff, the Ninth Circuit said that the plaintiff had raised a question as to when he received an EEOC decision, which would start the period for bringing suit, and, because the district court had not indicated why plaintiff had been denied counsel, the appeals court could not determine whether the judge had abused his discretion.<sup>293</sup> And in a

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<sup>284</sup> See *United States v. Anderson*, 29 F. App'x 630 (2d Cir. 2002).

<sup>285</sup> See *United States v. Solano*, 29 F. App'x 831 (3d Cir. 2002).

<sup>286</sup> See *United States v. Pritchett*, 29 F. App'x 865 (3d Cir. 2002).

<sup>287</sup> See *Bronco's Entm't v. Charter Twp. of Van Buren*, 29 F. App'x 310 (6th Cir. 2002).

<sup>288</sup> See *United States v. Hogge*, 29 F. App'x 131 (4th Cir. 2002).

<sup>289</sup> See *Ciaverelli v. Stryker Med.*, 29 F. App'x 832 (3d Cir. 2002).

<sup>290</sup> See *Prince v. Dicker*, 29 F. App'x 52 (2d Cir. 2002).

<sup>291</sup> See *Beeghley v. Beeghley*, 29 F. App'x 907 (3d Cir. 2002).

<sup>292</sup> See *Collins v. Vill. of New Vienna*, 29 F. App'x 359 (6th Cir. 2002).

<sup>293</sup> *Tannous v. Sec'y of Army/Tannous v. Commandant, Def. Language Inst.*, No. 83-2635/83-2636, 760 F.2d 277 (9th Cir. 1985) (unpublished table decision). The appeals

case on final orders of deportation in which the ruling did not conclude the case, the appellate judges found substantial evidence to support deportation of the individuals as overstays, but, saying that they had no jurisdiction to review the INS district director's discretionary action because the district court was the proper place, they gave petitioner 45 days to seek relief there.<sup>294</sup>

Unpublished dispositions also seem appropriate when the ruling brought to the court of appeals is not dispositive or is otherwise defective; included would be court of appeals' dismissals for lack of a final judgment or where a case is moot. Other, less recurring, instances include a remand for a determination as to whether the offense took place in U.S. jurisdiction, and reversals for sentencing not done properly. In these instances, and particularly the latter, the case would return to the court of appeals for further action, and any law the judges wished to lay down could be published then. Still another instance was a sentencing case in which the panel affirmed, saying there was no abuse of discretion by the district judge; however, as the defendant could still file a motion for reconsideration of the sentence, the case was still open.<sup>295</sup>

#### *E. Further Action to Follow*

In considering whether decisions reversing or vacating should be published, judges might not think publication to be necessary when the appellate ruling would not complete the case and further activity could be expected in the district court after remand, with the case then likely to return to the court of appeals. If the decisions embodying such remands contain rulings that develop precedent, then the entire disposition should be published, but many memodispos are essentially only another procedural step in an incomplete case that provides the court with later opportunities to speak to the law. When the court of appeals needs more information, particularly as to facts that might underlie a decision, an unpublished memorandum may well be used to remand. Thus in a § 1983 suit against jailers, in which the district court had given summary judgment to the defendants on some claims, denied it as to others, and dismissed as to still others on believing plaintiff had asked for dismissal, the court of appeals reversed "because the record is inadequate for us to understand the circumstances surrounding the dismissal" and remanded

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court said if on remand the action was found timely filed, the district judge would have to reevaluate the counsel request.

<sup>294</sup> See *Mehrmoosh v. INS/Sohirad*, No. 81-7627/81-7646, 755 F.2d 936 (9th Cir. 1985) (unpublished table decision).

<sup>295</sup> *United States v. Lopez*, No. 73-1099 (9th Cir. June 11, 1973).

so the district judge could “make findings as to what occurred.”<sup>296</sup> If the district court found that the plaintiff had in fact asked for dismissal, said the appeals court, the judge “should make a record adequate for this court’s review.”<sup>297</sup> This ruling indicates how the court of appeals can simultaneously seek more information and, more than obliquely, criticize the district court.

Another type of case in which further district court action would occur was one in which a preliminary injunction had been granted or denied, because the district court’s ruling on a permanent injunction would also likely be appealed. One can see explicit recognition of this possibility of later appeals court work when a panel used an unpublished memorandum to affirm a district court’s denial of a preliminary injunction: “The substantive questions presented can await decision in a final judgment of the district court.”<sup>298</sup> And such a disposition was also used to clarify the status quo ante which a preliminary injunction was intended preserve, when the court of appeals upheld denial of a motion to dissolve or modify a preliminary injunction.<sup>299</sup> However, in affirming denial of a preliminary injunction, the judges came close to a definitive ruling when they said that plaintiffs had not shown they would probably prevail on the merits in their challenge to double-celling in state prison, but they still used only an unpublished memorandum even though change would be unlikely on appeal from the merits, particularly as the judges said they ‘were impressed by [then District] Judge Rymer’s careful review of the conditions at CMC and her surprise inspection of the facility.’<sup>300</sup>

Additional instances in which further action would take place in the lower courts are remands for an evidentiary hearing,<sup>301</sup> to clear up matters,<sup>302</sup> or to determine attorney fees, for example, when the court affirmed on the principal legal question but reversed or vacated attorney

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<sup>296</sup> See *Anderson v. Carey*, No. 84-4243, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

<sup>297</sup> *Id.*

<sup>298</sup> *Johnson v. Orr*, No. 85-2017, 787 F.2d 597 (9th Cir. 1986) (unpublished table decision).

<sup>299</sup> See *F.T.C. v. Paradise Palms Vacation Club and Weiswasser*, No. 84-3933, 760 F.2d 274 (9th Cir. 1985) (unpublished table decision).

<sup>300</sup> *Dohner v. McCarthy*, 84-6048, 760 F.2d 274 (9th Cir. 1985) (unpublished table decision).

<sup>301</sup> See, e.g., *Torres v. United States*, No. 72-2465 (9th Cir. Apr. 11, 1973); *United States v. Nelson*, No. 72-2350 (9th Cir. May 4, 1973). The latter case has a five-page dissent by Judge Kilkenny; given the length of the dissent, one wonders whether it was prepared as a proposed disposition.

<sup>302</sup> See, e.g., *Kuchuris v. Harper*, No. 72-2184 (9th Cir. Nov. 28, 1973).

fee awards.<sup>303</sup> Other examples are remands to deal with improper sentencing. When a conviction is affirmed but there a problem with the sentence, perhaps because of a misapplication of an element of the Sentencing Guidelines, judges tend to remand and to use an unpublished ruling to do so. Thus when a judge believed he lacked authority to depart downward, and the court of appeals, distinguishing on the basis of an earlier case between the lack of authority and not using discretion to depart, said that the judge's belief was erroneous, the panel vacated and remanded "to give the sentencing court an opportunity to exercise its discretion."<sup>304</sup> Another reason for using an unpublished ruling is that the case before the appellate court would also not be complete.

The court of appeals also used unpublished dispositions when further work was required on an aspect of an immigration case.<sup>305</sup> Thus the judges denied a petition for review of denial of withholding of deportation but remanded concerning the denial of voluntary departure, because the only reason the Board of Immigration Appeals had given in support of the denial was inadequate. The BIA had not mentioned that the alien had the means to depart, and "[This court] cannot affirm the BIA's decision on a basis other than actually relied upon [below]."<sup>306</sup> Where the court of appeals remands for an evidentiary hearing of some sort, an unpublished ruling should suffice; an example would be a remand for an evidentiary hearing as to the defendant's understanding at the time he waived trial.<sup>307</sup> However, publication might be the better option if the judges develop the law at some length.<sup>308</sup>

In a more complicated case in which a memorandum disposition seemed appropriate because further action was necessary, the court of appeals reversed and remanded for a hearing in which more facts would be obtained.<sup>309</sup> Here the district court had summarily denied a motion to set aside a guilty plea, without saying whether the ruling was on the merits or was based on jurisdictional problems. Nor was it clear whether a government motion to augment the record had been granted and thus

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<sup>303</sup> See, for example, *Alyeska Ski Corp. v. United States*, No. 72-1539 (9th Cir. Sept. 10, 1973), where, after affirming summary judgment for the defendant, the court reversed a \$500 allowance for attorney fees without prejudice to renewal of the request and then remanded the case for transfer to the Court of Claims.

<sup>304</sup> *United States v. Sims*, 927 F.2d 612 (9th Cir. 1991) (unpublished table decision).

<sup>305</sup> *See Boules v. INS*, 45 F.3d 435 (9th Cir. 1994) (unpublished table decision).

<sup>306</sup> *Id.*

<sup>307</sup> *United States v. Foreman*, No. 84-1221, 772 F.2d 914 (9th Cir. 1985) (unpublished table decision).

<sup>308</sup> *See, e.g., United States ex rel. Reed v. Commandant of Marine Corps*, No. 72-1295 (9th Cir. June 11, 1973).

<sup>309</sup> *United States v. Fey*, No. 84-5099, 787 F.2d 598 (9th Cir. 1986) (unpublished table decision).

was part of the pleadings; if it had been included, the defendant had not had an opportunity to rebut new allegations. The court of appeals said defendant had included sufficient facts to require a hearing and then observed:

The present record raises a disputed issue of fact regarding Fey's guilt of a crime and his knowledge of the requirements of the law that must first be resolved by the trial court. An evidentiary hearing on Fey's motion is necessary to establish the facts which caused him to conclude that he was guilty of a violation . . . .<sup>310</sup>

It was important, in "the interests of justice," for the defendant to have an opportunity to have the district court consider his constitutional claim, and if the district judge were to find an inadequate basis for holding an evidentiary hearing, "the district court is requested to set forth the basis for its ruling on this issue." Because the appeals court said that defendant's motion should have been treated as a request for a writ of error *coram nobis*, to the extent that this ruling spoke to situations in which *coram nobis* might be appropriate, publication might have added to circuit precedent.<sup>311</sup>

Why publish a remand, particularly if the lower court's decision might change the complexion of the case, as when the court of appeals ruled that the district judge had not committed an abuse of discretion but the defendant could still move to reconsider his sentence,<sup>312</sup> so the case thus was still open. However, if the appeals court may wish to provide guidance, both to the court that will receive the remand to aid it in resolving matters likely to be raised in the continued proceedings and to other courts *now*, a published ruling would be better. Another ruling not ending a case was a reversal of a district court's dismissal of a § 1983 case by a pro se prisoner against state prison officials for seizure of legal documents for pending cases.<sup>313</sup> After stating that pro se complaints were to be dismissed as frivolous only if they lacked an arguable basis, the court explained how plaintiff's allegations, which did not lack an "arguable basis in fact," might if proved show constitutional violations, and also found another claim to have been stated with sufficient particularity. Although using a memorandum disposition, the court took

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<sup>310</sup> *Id.* As the district judge, Harry Pregerson (C.D. Cal.), later a member of the Ninth Circuit, was experienced and well thought of, there seems no need to have "held his hand" by laying out instructions in this fashion, but doing so may have been intended to send a message.

<sup>311</sup> *Id.*

<sup>312</sup> *United States v. Lopez*, No. 73-1099 (9th Cir. June 11, 1973).

<sup>313</sup> *See Jessen v. Terry/Percharo v. MacLeod*, No. 84-1658, 84-1756, 755 F.2d 936 (9th Cir. 1985) (unpublished table decision).

a paragraph to explain a Ninth Circuit case with circumstances like those in the present one.<sup>314</sup>

#### *F. Return After Remand*

If unpublished dispositions are appropriate where further action is to follow, it is also true that a case returning to the court of appeals after a remand for some further action may not require publication, as the lower court's ruling often involves application of the legal principles set forth in the court of appeals' remand. When the court of appeals has published its ruling remanding, the post-remand appeal is often handled by unpublished memorandum — to deal with follow-up matters.<sup>315</sup> That the appellate court affirms when such cases return on post-remand appeal, as it most frequently does in an yet another unpublished disposition, would seem to show that the instruction was adequate to allow the lower court to “get it right.”

One reason why dispositions in post-remand appeals are not published is that these appeals are often handled by a different panel from the one which handled the earlier appeal, and the later panel's judges may have a different view of what needs to be published. More basic, however, is that if the court has set forth in the published opinion the legal rules the district court is to apply, on post-remand appeal the question is quite likely to be limited to whether the district court has properly applied those rules, and such application is likely to be fact-specific, making the disposition even less a candidate for publication. In criminal cases where the appeals court has already upheld the conviction and the remand was only for resentencing, the post-remand appeal quite likely will be limited to that question. Publication is not seen as necessary in such cases, often involving factual questions of application of the Sentencing guidelines, particularly where the sentence is upheld. Thus unpublished rulings are used when the court deals with elements of a case that “follow on” prior action.

If the initial remand order is unpublished, the ruling in any follow-up appeal will usually also be unpublished. One reason is that affirmances are likely in post-remand appeals, and unpublished dispositions are more likely when the court affirms. Where the initial remand was not published, only infrequently does the post-remand appeal produce a published disposition. Given the upward trend in unpublished dispositions over time, one would not expect many initially

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<sup>314</sup> *Id.*

<sup>315</sup> On occasion, the *Federal Reporter* table indicates that the appeal being decided is on remand from an earlier ruling, for which the citation is provided.

unpublished dispositions to result in published opinions upon appeal from the remand. If a case stood a certain chance of being published when it was first heard, by the time it returned to the court after remand, the likelihood of publication would be less, all things being equal. In memorandum dispositions of appeals from remands, roughly twice as many came from initial remands that had been published. Thus, cases initially published but unpublished on post-remand appeal are more frequent than unpublished initial appeals also unpublished on post-remand appeal.

### *G. Sending a Message*

Use of an unpublished disposition may be a way to soften a reversal. There are instances when, particularly where other criteria do not seem to require publication, the court may intentionally use an unpublished disposition to call some failings to the attention of a judge or prosecutor quietly, particularly if the judge is otherwise well-respected or the prosecutor has not previously caused problems. This may be done when judges have erred but where the problem does not seem systemic, as the latter would make publication more appropriate; lawyers can be chided for misbehavior in the same way. In short, the court can administer some discipline but, by leaving the disposition unpublished, can soften the blow in correcting an errant district judge or out-of-line prosecutor. The judges thus send a “message” without hanging the official “out to dry” by including the criticism in a published opinion. In a recent reversal for prosecutorial misconduct, one of the judges, noting that “publication may be a career damaging event for the prosecutor,” commented to his colleagues that the prosecutor needed to be called on what the judge referred to as “pettifogging” — “but not necessarily in public.”<sup>316</sup>

Although “messages” are more often negative, they can be either negative or positive. An example of the latter is the statement, on the appeal of a complicated patent case that resulted in a ten-page memorandum disposition, “We conclude the trial court tried well a difficult case, carefully analyzed the evidence and reached a result consistent with the law as announced in this circuit.”<sup>317</sup> The court may sometimes convey that the district judge “got it right” even when it is reversing the judge’s decision. Although a reversal is, of course, usually a negative message, it might be accompanied by this positive message if

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<sup>316</sup> *Referencing* United States v. Leon-Gonzalez, No. 00-50698, 24 F. App’x 689 (9th Cir. 2001).

<sup>317</sup> MacDermid Inc. v. S. Cal. Chem. Co., No. 74-2791, 549 F.2d 807 (9th Cir. 1977) (unpublished table decision).

intervening law led to the reversal. Thus when, subsequent to a conviction for an ammunition offense, the Ninth Circuit had said that specific intent had to be shown, thus requiring reversal of the conviction, the panel said, “We note on behalf of the District Court that the first impression decision” in that Ninth Circuit case “was entered subsequent to the trial and entry of the judgment of conviction and sentence herein.”<sup>318</sup> If an intervening Supreme Court ruling means that a lower court ruling must be reexamined and the district judge, a distinguished one, had done a fine job, the court of appeals would not feel the need to reverse in a published opinion.<sup>319</sup> One judge observed in an interview that if the court of appeals was going to reverse a lower court because of an intervening Supreme Court or court of appeals decision and the district judge had “got it right” in deciding the case initially, it was only humane and courteous for the court of appeals to note explicitly that the judge had applied correctly the law in effect at the time of that decision.<sup>320</sup>

If positive views could be conveyed even in reversals, negative comments could be made even when the district judge was being affirmed. At times, this occurred as to sentencing, when the appeals court might suggest that a sentence was too harsh, even though valid. In a particularly obvious example, a panel affirming a sentence upon a conviction for importing aliens because “The sentence imposed is within the statutory limit,” added a comment *after* the ritual “Judgment is affirmed,” in which it said:

We note . . . while recogniz[ing] that sentencing is within the discretion of the trial court, the sentences imposed seem harsh in view of the nature of the offense. The defendant’s offense cannot be condoned; it calls for punishment. We suggest that the District Court seriously consider exercising its power under Federal Rule of Criminal Procedure No. 35 to reduce the sentence imposed.<sup>321</sup>

While appellate judges correcting an errant district judge may soften the blow of a reversal by leaving the disposition unpublished, on the other hand, they may want to send a message about disliked practices which do not necessarily lead to reversals of convictions and hence will publish the opinion in order to “get the word out” about a particular

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<sup>318</sup> United States v. Morales, No. 76-1310, 546 F.2d 427 (9th Cir. 1976) (unpublished table decision).

<sup>319</sup> See, e.g., Baucus v. Kidd, No. 72-1082 (9th Cir. Dec. 17 1973).

<sup>320</sup> See *supra* note 21.

<sup>321</sup> United States v. Ortiz-Martinez, No. 76-2189, 546 F.2d 427 (9th Cir. 1976) (unpublished table decision).

practice. In such situations, an unpublished disposition might not have been efficacious before such dispositions were available on-line or in *Federal Appendix*. However, particularly in the early years of unpublished dispositions, when there were fewer of them, a published opinion might not have been needed to get a point across to others through a reversal or criticism because one could assume that other judges would read them, and, as U.S. Attorneys were thought to collect and reach such dispositions, perhaps they would have “heard” those directed at prosecutors. Heavier caseload may have altered that situation, but in any event, if the unpublished disposition did not bring change, later opinions could be published to convey the appeals court’s view about a particular practice.

In one instance, from another circuit, the court sent a message both to a judge and to a lawyer, when the presiding judge delivered the opinion from the bench, after which it was transcribed and released as an unpublished ruling.<sup>322</sup> Thus the lawyer would have been present to “get the message” with others also hearing it. Chief Judge Becker was quite blunt: “we will surely not pin any medals on plaintiff’s counsel for celerity or diligence in getting the material to the defense. She acted here more like the tortoise than the hare, but ultimately she did get them what they needed.”<sup>323</sup> In the same case, in which the court reversed and remanded a district court’s dismissal as an abuse of discretion for having been taken without findings and without weighing relevant factors, Judge Becker, naming the judge, said: “Judge [J. Curtis] Joyner is a very able member of the District Bench, a man whom we all admire and respect. But just as it was said of the great Homer, that Homer nods, in this case Judge Joyner nodded and acted a little precipitously.”<sup>324</sup>

The entire panel can send the message, but it can also be sent in a judge’s separate writing, for example, a concurrence adding to the majority’s opinion. For example, in a Third Circuit case, Judge Becker, pointing to problems with the trial judge’s post-trial opinion on motions and to his inconsistencies, first complemented the trial judge as “an able, experienced, and conscientious jury,”<sup>325</sup> but then said: “In this high profile case, perhaps in an effort to tie down every loose end, he may have said too much. In another sense, however, in terms of not clearing up the issues that trouble me he may have said too little,”<sup>326</sup> but that might have stemmed from the defendant not raising issues at trial.

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<sup>322</sup> See *Ciaverelle v. Stryker Med.*, 29 F. App’x 832 (3d Cir. 2002).

<sup>323</sup> *Id.* at 834.

<sup>324</sup> *Id.*

<sup>325</sup> *Gov’t of V.I. v. Bryan*, 29 F. App’x 65, 69 (3d Cir. 2002) (Becker, J., concurring).

<sup>326</sup> *Id.* at 69-70.

*H. Judges*

At times the “message” need not be very strong, and it may be less a “message” to “shape up” than a note of mild criticism. Thus, in an employment case involving payment of pension to individuals rehired in different positions after the termination for age, a panel observed, “Our review is somewhat hampered by the district court’s failure to prepare findings of fact and conclusions of law.”<sup>327</sup> As this judge was highly respected and regularly sat with the Ninth Circuit, the judges did not find the need to administer public embarrassment in a published opinion.

Another instance of a slight knuckle-rapping of a judge came when a panel reversed a summary judgment because the plaintiff had not been provided a real opportunity to respond to the defendant’s motion.<sup>328</sup> As the judges observed,

The district court should not have granted summary judgment against an incarcerated prisoner when the record showed that the motion for summary judgment had not been sent to the prisoner. The court could have ascertained the reason for the plaintiff’s failure to respond by examining its own records.

One element of a “message” is criticism. We see this in a bankruptcy case involving the transfer of mining claims.<sup>329</sup> After a bankruptcy court finding of a joint venture was reversed by the Bankruptcy Appellate Panel (BAP), further action in the bankruptcy court and the court of appeals led ultimately to affirmance of the BAP’s ruling. The bankruptcy court then issued supplemental orders, confirming sanctions and the property transfer. In this procedurally complex matter, the court of appeals then used another memorandum disposition to reverse the BAP for misapplying the appeals court’s earlier decision, which it said was the law of the case only on the joint venture issue. While conceding “some logic to the BAP’s conclusion” that the transfer of mining claims should be reversed and the joint venture finding fell together, the Ninth Circuit said, “However, this Court could not have made its finding more plain . . . .” And the judges added, “The BAP is wholly without authority to ‘correct’ what it apparently perceived as our misunderstanding of its prior decisions.” The court of appeals also said that the BAP ruling on the sanctions “exceeded the directives of our judgment” because “sanctionable violations” would stand even if the

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<sup>327</sup> *Penton v. Flying Tiger Line*, No. 85-5945, 788 F.2d 1566 (9th Cir. 1986) (unpublished table decision).

<sup>328</sup> *See Gainer v. Agnos*, 953 F.2d 1386 (9th Cir. 1992) (unpublished table decision).

<sup>329</sup> *See In re Zodiac Inv. v. Cal. Pozzolan*, 45 F.3d 438 (9th Cir. 1994) (unpublished table decision); Judge Kleinfeld dissented.

violated orders were subsequently reversed.<sup>330</sup> Here, we see the court of appeals “woodshedding” the BAP with less publicity than a published opinion would have produced, although the procedural complexity of this case, which made it quite fact-heavy, would have also tilted the court toward non-publication, which had been used when the case had earlier appeared on appeal.

In another case, one of four elements addressed was “Judicial Misconduct” involving the judge’s questioning of witnesses.<sup>331</sup> Saying it had “reviewed each of the judge’s comments set forth in appellant’s briefs,” the Ninth Circuit found some “ill-advised and inappropriate.” However, in part because the judge had told the jury that his comments were not evidence, the court found that no comments “reach the level of bias or prejudice required by this court to support an assertion that the trial judge’s conduct affected the jury’s ability to reach an impartial decision.”<sup>332</sup> As the appeals court did not reverse, this was a case in which the court seemed to send a message through its language. However, as the district judge was one against whom repeated complaints of misconduct had been filed in the judicial discipline system – the judge later was precluded from hearing certain types of cases – one wonders whether anything was served by keeping the criticism unpublished.

The court of appeals did publish its criticism of another judge with whom the circuit had had to deal a number of times. The court ruled that the conduct of the judge – who, the appellant claimed, “took over the examination of witnesses in an excessive and abusive manner, denigrating the efforts of counsel to put on the plaintiff’s case, and excluded proffered testimony, in a rude and domineering manner”<sup>333</sup> – did not deny a fair trial nor make the judge’s factual findings erroneous. However, the court, while saying that the trial “was not a travesty,” the judges said it “would not serve as an example for the training of new judges,” and, criticizing the judge while upholding his rulings, said, “Intemperate bench behavior does not require reversal merely to chastise a judge if the judgment appealed from was one supported by the law and facts.”<sup>334</sup>

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<sup>330</sup> *See id.*

<sup>331</sup> *See* *Fast v. Diplarakos*, No. 83-6505, 755 F.2d 935 (9th Cir. 1985) (unpublished table decision).

<sup>332</sup> *Id.*

<sup>333</sup> *Stuart v. United States*, 23 F.3d 1483, 1485 (9th Cir. 1994).

<sup>334</sup> *Id.* at 1486. In addition to the fact that publication of this criticism meant that more judges and lawyers would read about it, further publicity came from a story in a Los Angeles legal newspaper, which quoted from the ruling. Headlined “Judge Lydick Criticized by Appeals Court,” the article said that the judge, “once called ‘the meanest

Of course, the court of appeals may further indicate its displeasure by reversing a district judge directly by remanding with instructions to enter a specific judgment instead of remanding for further proceedings. Thus in a case involving a breach of contract, where the district judge made a clearly erroneous finding and was wrong on the state law issue involved, the court of appeals, reversing, gave judgment directly to one of the parties, and the court was also critical of the judge.<sup>335</sup> Another such case was a blunt reversal of a summary judgment granted to an insurance company in a third party complaint for indemnity under investment trust insurance policies.<sup>336</sup> Reversing, holding that the notice period should have been tolled, and remanding only so summary judgment could be given to appellant, the court of appeals said the district court's analysis was "without merit" and indicated that the judge's action "imposes fault on the appellant for the precise act against which he insured; appellant could not have given notice of potential claims of which he had no notice."<sup>337</sup> Leading to an unpublished result may have been the fact that this case involved interpretation of state law and the high respect the court otherwise had for the judge, William Gray, of the Central District of California.

In still another case, the appeals court indicated its annoyance at the district court and, reversing for the second time, took action itself rather than leaving it to the trial judge.<sup>338</sup> The court had earlier reversed the district court's conclusion that a joint venture existed as well as a finding as to an individual's degree of negligence, remanding for redetermination of the latter and of economic damages.<sup>339</sup> When the case returned to the court of appeals, the judges said, "On remand . . . the district court apparently misread our instructions and adopted a completely new finding of fact and conclusion of law," and had again found a joint venture, although "Our earlier memorandum . . . foreclosed this

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judge in town' by a magazine has been chastised for his lack of civility by an appeals court," and put the court's publication of the criticism in context by saying, "The appeals court's comments about Lydick are unusual. The court usually refrains from criticizing judges' demeanor – even when it has been controversial." Susan Seager, *Judge Lydick Criticized by Appeals Court*, LOS ANGELES DAILY J. (n.d.) (on file with author).

<sup>335</sup> See *Balding v. Frito-Lay Inc.*, No. 84-1816, 758 F.2d 655 (9th Cir. 1985) (unpublished table decision).

<sup>336</sup> *Pegasus Fund v. Laraneta*, No. 84-5644, 767 F.2d 933 (9th Cir. 1985) (unpublished table decision).

<sup>337</sup> See *id.*

<sup>338</sup> *Steiner v. United States*, No. 80-5177, 685 F.2d 446 (9th Cir. 1982) (unpublished table decision).

<sup>339</sup> See *id.*

possibility.”<sup>340</sup> They went on to say, “By altering its earlier findings and conclusions on this point the district court exceeded our mandate.” Then, pointing out that Ninth Circuit cases set out how to calculate damages in wrongful death Federal Tort Claims Act (FTCA) cases, the judges said, “The district court here did not specify how it applied the *English* factors.” Observing that “[o]rdinarily, we would remand on that ground alone,” the court took matters into its own hands: “There has already been a remand in this case, however, and we conclude that judicial economy and the interests of the parties will be best served if we proceed to the merits of the damages issues.” Thus the court was conveying that it wished the matter done right rather than have the district judge — the strong-willed Manuel Real of the Central District of California, with whom the court of appeals had prior experience — again make a hash of matters. The appeals court did accept some of Judge Real’s findings but found others were incorrect and still others “inadequate and clearly erroneous,” and the panel specified the damages to be awarded.<sup>341</sup>

The court’s exasperation with some judges can increase to the point where it is unwilling to limit itself to an unpublished memorandum, but publishes a ruling to make clear its displeasure with the district judge. A judge’s failure to “get it” upon being reversed is one such situation. In a housing discrimination suit by African-Americans, the district judge had denied compensatory damages for humiliation for emotional distress. Reversing upon finding clear error for the failure to award these damages, the court of appeals said such matters could be the basis for damages and noted that plaintiffs had provided considerable evidence that would support such an award.<sup>342</sup> On remand, the district judge ordered damages of only \$250 and excused the defendants’ behavior. Again reversing and remanding, the Ninth Circuit said,

We are disappointed that this case is again before us. We hoped our previous opinion would lead to an appropriate award of compensatory damages or a settlement by the parties. Unfortunately, in light of the *de minimis* damage award, we must again reverse for clear error and remand for an award consistent with the purpose of § 1982 and the discrimination cited in plaintiffs’ brief.<sup>343</sup>

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<sup>340</sup> *Steiner v. United States*, No. 83-6042, 760 F.2d 277 (9th Cir. 1985) (unpublished table decision).

<sup>341</sup> *Id.*

<sup>342</sup> *See Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (per curiam).

<sup>343</sup> *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994). The author had written to his colleagues, “Because the first opinion was published and because the district judge needs

That, however, was not all, as the opinion ended with the statement, “Although we decline to set a damage award ourselves, the two appeals in this relatively simple case indicate that some direction is necessary,” because “the disregard of recent relevant precedent has caused an unseemly delay of some five years and has wasted judicial resources.”<sup>344</sup> The minimum damages award was then spelled out, although the opinion said the district judge “may, of course, award more after reviewing the authorities cited above,”<sup>345</sup> and the judges also made clear that attorneys fees should be awarded.

### *I. Prosecutors*

Instead of imposing sanctions on prosecutors or referring a matter for discipline, appellate judges, even when not overturning a conviction, may convey unhappiness with the government’s position and also provide a “heads-up” as to proper practice. One instance involved a prosecutor, who had engaged in “hammering down the credibility of the defendant” and, when the defendant had no duty to produce evidence, had raised the question why defendant had not produced a Puerto Rican birth certificate. Calling the comment “a blunder,” the court said, “If the case were at all close, we might have to call it an unconstitutional shifting of the burden of proof,” but instead, given other evidence, the judges were willing to let it go as “practically a textbook example of harmless error.”<sup>346</sup> In that way, they sent a message.

A message was also clearly conveyed in comments on a case challenge to an affidavit used to support a search warrant. Saying “that in this case no reason whatsoever appears why the ‘individual’ referred to in the affidavit should not have been named and identified,” the judges observed, “why law enforcement officers insist on being so obtuse in the preparation of affidavits to support search warrants, in view of the continuing attacks on their sufficiency, is a policy that cannot readily be understood.”<sup>347</sup>

In another case, a judge who was himself a former U.S. Attorney used a concurring opinion to send a stronger message. The court, said the judge, had “alerted” both defendant and government “to be prepared to

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a wake-up call, I think we should publish this.” Judge Alfred T. Goodwin to panel, Dec. 17, 1993.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 1354.

<sup>346</sup> *United States v. Hernandez-Ramon*, 933 F.2d 1016 (9th Cir. 1991) (unpublished table decision).

<sup>347</sup> *United States v. Cameron*, No. 74-1472 (9th Cir. Sept. 3, 1974, amended Jan. 29, 1975).

argue the applicability of [a case] to the facts of the case.” When the government failed to do so, the court was “compelled” to reverse.<sup>348</sup> Said Judge Hawkins, delivering the message, “Perhaps the arguments were not there to be made. . . . If, on the other hand, the arguments were there to be made, it is most unfortunate for this is a very serious crime and it merited the government’s most serious attention.”<sup>349</sup>

In still another unpublished disposition, the court accepted filing of a superceding indictment in the face of “misconduct in the grand jury process,” but criticized the government,<sup>350</sup> saying, “The government’s behavior here falls significantly below the high standards we expect, and with very few exceptions receive, from the United States Attorney’s Office,” and adding, “Had the government acted more diligently and expeditiously, it may not have been necessary to go a different grand jury for the superceding indictment.” The judges then talked about actions that left “something to be desired” or were “equally disquieting,” and ended by saying that the agent’s “misstatement of a damning confession” by one defendant directly “represents behavior at odds with the American system of justice.” The court has also shown that it can criticize not only a prosecutor’s improper action at trial but also the government’s initiating of the case itself: “We fail to understand why prosecutorial discretion was exercised to bring this petty offense [involving a credit card] into the heavily overburdened federal courts” when state law provided a sufficient basis for prosecution.”<sup>351</sup>

While sending strong messages in unpublished dispositions might keep it out of someone’s official file, regularly placing such messages in memodispos may fail to send a broader message to the law enforcement community which might assist in keeping it accountable. Similarly, one might ask if these “messages,” or expressions of exasperation at lawyers in private practice,<sup>352</sup> reach their intended audience, much less have a noticeable effect. One might ask that same question with respect to the court of appeals’ ruling in a complicated suit to collect part of a judgment that also entailed claims of fraud upon the court. Although the judges had discussed among themselves publishing a later ruling should

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<sup>348</sup> *United States v. Archer*, 92 F.3d 1194 (9th Cir. 1996) (unpublished table decision).

<sup>349</sup> *Id.*

<sup>350</sup> *United States v. Tomlin/United States v. Spas/United States v. Manley*, No. 85-5001/85-5002/85-5006, 792 F.2d 145 (9th Cir. 1986) (unpublished table decision).

<sup>351</sup> *Id.*

<sup>352</sup> *See, e.g., Eureka Fed. Sav. & Loan Ass’n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991) (unpublished table decision) (ruling that a Rule 11 sanctions order had to be vacated on the authority of a Ninth Circuit case “which was the law of the circuit at the time the sanctions were ordered” and otherwise raising a question about the basis on which the sanction was sought).

certain negative facts be found on remand, the court used an unpublished disposition for a message to the lawyers. After an initial affirmance by published opinion,<sup>353</sup> a company in the proceedings sought to have the judgment against it set aside because of evidence it claimed revealed fraud on the court. In overturning summary judgment for defendants, the author wrote to his colleagues on the panel, “This draft does not accuse the two allegedly mendacious lawyers by name. That can be saved for publication if necessary after a court having *nisi prius* powers decides that somebody lied to a judge, and that the judge believed the lies, and then was thereby induced to enter a judgment by mistake.”<sup>354</sup> As he observed in the disposition, “If no such evidence [that a lawyer lied to the court] is produced, the suggestion of professional misconduct by one or more lawyers will be put to rest.”<sup>355</sup>

#### V. CONCLUSION

This article presents an examination, primarily descriptive, of appellate court publication practices, with primary attention given to more than thirty years’ use of unpublished dispositions by the U.S. Court of Appeals for the Ninth Circuit, with a focus on the court’s use of its own criteria and other non-formal facts that affect publication.

Certain findings are of particular note. One is that the court of appeals reverses or in some other way disturbs the decision being reviewed far more frequently in cases with published opinions than in those receiving unpublished memorandums; the same is true with respect to those cases in which a judge writes a concurrence or dissent. With the increase in the proportion of cases receiving non-precedential dispositions, those which are published are disproportionately those in which the court of appeals disturbs the lower court’s or agency’s judgment and in which internal disagreement is manifest in concurring and dissenting opinions. Thus published opinions in *Federal Reporter* are an increasingly segregated set of cases with important policy content,<sup>356</sup> through which the court of appeals performs its law-making function while its error-correction work is heavily relegated to unpublished memorandum dispositions. That unpublished rulings contain many judgments disturbing lower court and agency rulings suggests that they all are not simple, routine, “cookie-cutter” cases.

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<sup>353</sup> *United Commercial Ins. Servs. v. Paymaster Corp.* 962 F.2d 853 (9th Cir. 1992).

<sup>354</sup> *Referencing id.* (Judge Alfred T. Goodwin to panel).

<sup>355</sup> *Paymaster Corp. v. Am. Bankers Ins. Co. of Fla.*, 91 F.3d 154 (9th Cir. 1996) (unpublished table decision).

<sup>356</sup> I thank Stefanie Lindquist for raising this point.

Most assuredly there are unpublished dispositions the publication of which seems either necessary or at least strongly suggested. Such cases can provide grist for the mill of those who approach court of appeals' publication practices with a critical eye or opposition to the use of any unpublished rulings and who build their argument from egregious anecdote rather than a broader view. However, when the great bulk of these rulings are examined, on the whole there seem quite few about which non-publication can be questioned.

For many, perhaps most, dispositions, not publishing seems explainable in terms of the courts' formal criteria, which thus can be said to have an effect. However, there are also instances when, viewed in terms of the criteria, failure to publish is problematic. One would perhaps not expect it to be otherwise when application of the rules rests almost solely with the judges. Yet, despite the obvious effect of judges' discretion, the judges are definitely constrained by the criteria and by other norms which have developed over time but which are not incorporated in the formal publication criteria. These elements take their force from interaction among the judges and from parties' occasional requests to redesignate unpublished dispositions as opinions. The presence of rough edges in the system is hardly surprising, given the partial indeterminacy of the process by which it is decided to publish or not and a decentralized process of guideline implementation, where the judges exercise discretion in applying publication guidelines and there is no Publication Czar to make initial determinations or to reverse judges' publication decisions. Within this context, one is indeed struck by the extent to which, overall, the court has followed, or complied with, the criteria rather than departed from the norms.