03-AP-328

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Rule of Federal Procedure 32.1

To the Committee on Rules of Practice and Procedure:

I am writing to express my opposition to proposed Rule 32.1. Upon graduating from law school, I spent a year clerking for a Ninth Circuit judge. I followed that career choice with a ten-year stint at Horvitz and Levy, LLP, drafting civil appeals and writs. As of the end of 2002, I have been clerking for a United States Magistrate Judge in the District Court. As you can see, I have had extensive experience in researching and writing court dispositions (both published and unpublished) and appellate briefs. This experience in research and writing makes me well-suited to comment on the proposed rule from the vantage point of a litigator and law clerk.

The proposed rule would jeopardize the stability and quality of our court system. From my experience, there are many routine opinions that do not add any substance to the existing body of law, and polishing those up so they are meaningful to litigants other than the parties to the action would consume much of the law clerks' time and chambers' judicial resources that are already scarce. Moreover, having to research unpublished opinions cited in the parties' briefs would also add an enormous layer of work with no discernible benefit to the goal of arriving at a correct and just disposition.

Since any further comments I could make on the harm Proposed FRAP 32.1 would bring to the federal judiciary and bar would simply echo the comments of many others, I refer the Committee members to Judge Kozinsky's June 27, 2002 comments to the Subcommittee on Courts, the Internet, and Intellectual Property, which provide an excellent and detailed glimpse into the workings of a judicial chambers and how Rule 32.1 would severely limit the credibility and efficiency of the Circuit courts. (See attached.) I am in complete agreement with Judge Kozinski's comments to the Subcommittee.

Very truly yours,

Holly R. Paul

Holly R. Paul, Esq.
Judicial Law Clerk,
United States District Court

Enclosure

Testimony of Hon. Alex Kozinski
Before the Subcommittee on Courts, the Internet, and Intellectual Property

Washington, D.C.
June 27, 2002

Mr. Chairman and Members of the Subcommittee. My name is Alex Kozinski and I am a judge of the Court of Appeals for the Ninth Circuit, where I have served since 1985. Prior to that time I served for three years as Chief Judge of the United States Claims Court, now called the United States Court of Federal Claims. Immediately after law school, I clerked for then-Judge (now Justice) Anthony M. Kennedy on the Ninth Circuit. I have thus spent over two decades working for courts that issue both published and unpublished rulings, which are the subject of these oversight hearings.

I thank the subcommittee for giving me the opportunity to state my views. I was invited to speak as an individual and not on behalf of my court or the federal judiciary. The views I express are therefore my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues and many other federal appellate judges as well.

What Are Unpublished Dispositions?

As Judge Alito points out in his testimony, the term "unpublished" is an anachronism, dating back to the days when failing to designate a disposition for inclusion in a national reporter meant that it would not be published at all, and therefore unavailable to most members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West's Federal Appendix.

Unpublished dispositions differ from published ones in only one respect – albeit an important one: They may not be cited by or to the courts of our circuit. Ninth Circuit R. 36-3. (As Judge Alito explains, the rule operates somewhat differently in other circuits.) With minor exceptions dealing with subjects like res judicata and double jeopardy, none of the judges of our circuit – district judges, magistrate judges, bankruptcy judges, even circuit judges – may rely on these unpublished dispositions in making their decisions. And, in order to help them avoid the temptation to do so, we prohibit the lawyers from citing them in their briefs. The rule only applies to practice in the courts of our circuit; lawyers are free to cite our unpublished dispositions to other courts, who may give them whatever weight they deem appropriate; they may write about them in law review articles or post them on websites. There is no general prohibition against citing, discussing, criticizing or deconstructing unpublished dispositions. The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context,

and that context alone, the unpublished disposition may not be considered.

Why the Prohibition Against Citation?

The answer to this question is fairly straightforward: Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit – the law applied by lower-court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of action. Maintaining a consistent, internally coherent and predictable body of circuit law is a significant challenge for a collegial court consisting of a dozen or more judges (more than two dozen in our case) who sit in ever-changing panels of three. Appellate courts nevertheless have to speak with a consistent voice. If they fail to do so – if they leave the law uncertain or in disarray – they will make it very difficult for lawyers to advise their clients and for lower-court judges to decide cases correctly. The ripple effect of uncertain or unclear caselaw is felt acutely by those caught up in legal disputes, who must litigate their case all the way to the court of appeals if they want to know how the dispute would be decided.

In order to maintain a clear and consistent body of caselaw, appellate judges spend much of their time working on published opinions – those that announce and calibrate the circuit's decisional law. To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled How To Write It Right by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70-80 drafts of an opinion over a span of several months.)

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges

frequently exchange lengthy inter-chambers memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished disposition is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about half the published cases. Off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999, there were 44 en banc calls in our court, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing and the response. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than for a panel of three, hammering out an en banc

opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4500 cases on the merits, approximately 700 by opinion and 3800 by unpublished disposition. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions – 20 opinions and 130 unpublished dispositions – per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom we sat.

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster – about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future

cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels – at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent through the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have other circuits. None of these is a palatable alternative, yet something would have to give.

Do We Give Short Shrift to Cases Decided by Unpublished Dispositions?

The answer to this question is no. Much of the time spent in deciding a case is not reflected in the length or complexity of the disposition: we read briefs, review the record, read the applicable authorities. All this behind-the-scenes work goes into every case and

necessarily takes a substantial amount of time. How much? There is no set amount. Some cases have a large record, yet have a dispositive issue – such as a jurisdictional defect – right near the surface. Others require a deeper examination before a dispositive issue is identified, although in the end, the resolution may be quite straightforward. The written dispositions in both cases may be short, they may look quite similar in structure and detail, yet they reflect very different time commitments.

Writing up an unpublished disposition is infinitely easier than writing a published opinion. To begin with, the facts need not be recited in detail because the parties to the dispute – the only ones for whom the disposition is intended – already know them. Nor is it important to be terribly precise in phrasing the legal standard announced, or providing the rationale for the decision. Most importantly, the judge drafting the disposition need not ponder how the disposition will be applied and interpreted in future cases presenting slightly different facts and considerations. The time – often a huge amount of time – that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone. Is this time taken away from the case? Is this an illegitimate shortcut? Not at all, because when judges do write opinions, much of the time they spend in the drafting process doesn't go toward actually deciding the case, but rather to making the reasoning consistent with the existing body of circuit caselaw and useful for other decisions in the future.

Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions – that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the

judges. We have discussed this among the judges of my court and are, frankly, baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it.

Nevertheless, we have worried about claims like these, and so in recent years we have taken two initiatives to help discover whether unpublished dispositions are, in fact, in wholesale, lawless conflict with published precedents. First, in February and March 2000 we distributed a memorandum to all district judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished dispositions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website. Responses were collected by e-mail, fax, and a response form at the website. Only six responses were received. Of these, we found two to be meritorious and, despite our instructions, both responses identified conflicts between two publishedNinth Circuit decisions – conflicts of which we were already aware. No one identified an unpublished disposition that conflicted with a published opinion or with another unpublished disposition.

Second, for a 30-month period beginning July 2000, we relaxed the court's rules

barring citation of unpublished dispositions to allow their citation in requests for publication and in petitions for rehearing. For the first nine months, court staff examined all requests for publication filed. Only fifteen requests for publication were received, and none of these identified a legitimate conflict among unpublished dispositions or published opinions.

We are certainly not infallible, and I will not try to persuade this subcommittee that we never make a mistake when we decide 4500 cases a year. But I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence. I feel so confident of this point, having participated in rendering thousands of these dispositions myself, that I would welcome an audit or evaluation by an independent source.

How About That Claim of Unconstitutionality?

Two years ago, in Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000), Judge Richard Arnold of the Eighth Circuit set this area of law ablaze by holding that stare decisis in the strict form – an obligation to follow earlier opinions of the court, published or not – was part and parcel of the Article III judge's obligation to apply the law. If Judge Arnold were correct, this would mean that every one of our 3800 yearly unpublished dispositions is binding on every federal judge in our circuit. Lawyers would have a field day digging for superficial inconsistencies or imprecisions in wording, and we'd do little but hear cases en banc to settle claimed conflicts of authority.

dispositions addresses a specific kind of fraud on the deciding court – the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance. As the Massachusetts Appeals Court noted in Lyons v. Labor Relations Commission, 476 N.E.2d 243 (Mass. App. 1985), unpublished dispositions can be quite misleading to those other than the parties to the case: "[T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decisions. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." Id. at 246 n.7.

Are Federal Courts Unique in Prohibiting Citation to Unpublished Decisions?

The answer is emphatically no. The vast majority of state court systems restrict citation to unpublished decisions. Last year, an article in the Journal of Appellate Practice and Process provided a thorough catalogue of these rules at both the federal and state levels. Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions 3 J. App. Prac. & Process 251 (2001). (A copy of this article is attached as an exhibit, and a summary of its findings appears at the end of my statement.)

Their findings are very revealing. Thirty-eight states (plus the District of Columbia) restrict citation to unpublished opinions to some degree; by far the largest number (35) have a mandatory prohibition that is phrased much like the Ninth Circuit's rule. (Like the Ninth Circuit, some of these states permit citation for purposes of establishing res judicata

or law of the case.) A typical rule, that of Alaska, reads as follows: "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state." Alaska R. App. P. 214(d). Only nine states have rules explicitly authorizing citation of unpublished cases as precedent, and only five have no rules at all on the matter. (The total comes out to fifty-two, plus the District of Columbia, because two states explicitly authorize citation of unpublished opinions as to some courts and explicitly deny it as to unpublished opinions of others.) Two states, California and Tennessee, have provisions that authorize the state's highest court to "de-publish" opinions of the lower courts, thereby depriving them of precedential authority and making them non-citeable.

The state courts, of course, hear vastly more cases in the aggregate than do the federal courts. That the overwhelming majority of states have adopted a prohibition against citation of, or reliance on, a large number of appellate decisions is significant in two respects. First, it shows that this is a legitimate and widely accepted practice in the legal community nationwide. Second, it discloses that many court systems in addition to the federal courts have found the non-publication/non-citation practice to be an important tool in managing the development of a coherent body of caselaw.

Are There Separation of Powers Concerns?

While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of

congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, overseeing the development of the law within their jurisdiction. The fact that so many state and federal courts have nonpublication rules and related prohibitions against citation suggests that this is an area of uniquely judicial concern.

There is not much recent authority on point, but almost 140 years ago the new state of California tried to impose, by statute, a requirement that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court." California Supreme Court Justice Stephen Field – the very same Justice Field who later sat on the United States Supreme Court and wrote that case we all remember so well from law school, Pennoyerv. Neff, 95 U.S. 714 (1877) – would have none of it. Speaking for a unanimous court, he held the law unconstitutional:

> [The statute] is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?
>
> The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot

be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations. The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.

In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate."

The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases – when the pressure of other business will permit – will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.

Houston v. Williams, 13 Cal. 24, 25-26 (1859) (citations omitted). Does this state the law

today? I can offer no advisory opinion, but I do believe that Justice Field's observations are worthy of careful consideration. Perhaps the best approach is not to test the issue by staying far clear of a confrontation between the judicial and legislative branches.

What About The Law Of Unintended Consequences?

It is the sad experience of mankind that often, in trying to make things better, we do something that has exactly the opposite effect. Unpublished, unciteable appellate decisions play an important role in the management of our dual responsibilities of deciding a multitude of cases, while keeping the law clear and consistent. Would it make things better if this tool were removed from the judicial arsenal?

To answer this question, I ask you to imagine a different kind of rule Congress might pass. Let's say Congress decided that we simply didn't have enough uniformity in the application of the law, and the reason was that the United States Supreme Court wasn' t issuing enough opinions. So, in order to improve things, Congress passed a law that required the Supreme Court to grant review to, and decide, 1600 cases a year, rather than the 80 or so it decided this past Term. This would be only 178 case dispositions per Justice per year, less than half the number of the average Court of Appeals judge.

Assuming the Justices disagreed with Justice Field and did not see the law as an unconstitutional encroachment on their authority, what would be the consequences? It's unlikely that this enactment would cause the Justices to work twenty times harder to come up with twenty times the number of published opinions equal in caliber to their current

opinions. My guess is that they'd write something in 1600 cases, but in the vast majority, it would not be something that was very good or very useful. In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write "published" opinions that have very little useful content – akin to very abbreviated dispositions or judgment orders – that contain little more than the word "Affirmed."

Something like this will, I suspect, happen if courts of appeals are forced to accord precedential value to their unpublished dispositions: We would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinions.

And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less, in order to protect the integrity and stability of our circuit law from those who would misconstrue or twist it.

Conclusion

The topic the subcommittee has chosen for its oversight hearings is certainly a timely one. As Judge Alito has suggested, we in the judiciary are in the process of reevaluating our rules. I hope, in the end, we will leave well enough alone, and allow each

court to decide this issue according to its own customs and needs. However, whatever happens will be the action of the judiciary, taken after careful reflection and with full knowledge of the institutional constraints under which we operate. I hope that whatever rule we adopt – whether to stay with the current local option or to adopt a national rule – the political branches of government will accept and respect it.

Citation Rules in State Courts

	Unpublished Opinions *Shall Not* Be Cited		Unpublished Opinions *Should Not* Be Cited		Unpublished Opinions *May* Be Cited	
	Supreme Court*	Intermediate App. Court**	Supreme Court	Intermediate App. Court	Supreme Court	Intermediate App. Court
Alabama	X+	X+				
Alaska	X	X				
Arizona	X+%	X+%				
Arkansas		X+				
California		X+				
Colorado	X					
Connecticut						X$
Delaware					X	
District of Columbia	X+					
Florida				X		
Georgia	X					
Hawaii		X+				
Idaho	X					
Illinois	X+					
Indiana		X+				
Iowa	X	X				

Kansas	X+	X+				
Kentucky		X				
Louisiana		X+				
Maine	X					
Maryland	X+	X+				
Massachusetts		X+				
Michigan						X
Minnesota						X
Mississippi	X+	X+				
Missouri	X					
Montana	X					
Nebraska	X	X+				
Nevada	X+					
New Hampshire	X					
New Jersey	X+	X+				
New Mexico	X	X				
New York						
North Carolina				X+		
North Dakota					X	
Ohio						X
Oklahoma	X+	X+#				X#
Oregon				X	X	
Pennsylvania						
Rhode Island	X					
South Carolina			X+	X+		
South Dakota	X+					
Tennessee	X+					

Texas			X							
Utah	X+		X+							
Vermont								X		
Virginia										
Washington			X							
West Virginia										
Wisconsin	X+		X+							
Wyoming										
TOTAL	26		22		1		4		4	5
TOTAL (EITHER)		35				4			9	
TOTAL (EITHER)				39					9	

Source: Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions, 3 J. App. Prac. & Process 251 (2001).
Notes:

* No entry may indicate that state requires its Supreme Court to publish all opinions and/or orders
** No entry may indicate that state has no intermediate appellate court
\+ Exceptions for res judicata, collateral estoppel, law of the case, etc.
% Exceptions for publication requests and petitions for rehearing.
$ All appellate opinions are published. Citation of unpublished out-of-state opinions is allowed.
# Court of Criminal Appeals is citeable; Court of Civil Appeals is not.

Sample Language:

Shall Not Be Cited:

> "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."
> Alaska R. App. P. 214(d).

Should Not Be Cited:

> "Cases affirmed without opinion by the Court of Appeals should not be cited as authority."
> Or. R. App. P. 5.20(5).

May Be Cited:

"Unreported opinions or orders may be cited, but a copy must be provided."
Del. Sup. Ct. R. 14(b)(vi)(4).