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Comments:

Proposed Federal Rule of Appellate Procedure 32.1
This rule seems unnecessary and possibly disruptive. While it is true that appellants are generally free to cite any source they wish for whatever persuasive value that source may have (e.g. law review articles, advertising jingles, sonnets), the distinguishing characteristic of unpublished opinions is that their authors wrote them with the understanding that they would not be used in subsequent cases. It seems likely that any author would be affected by the knowledge that his work would or would not be used by others.

As a related matter, it is one thing to say that an unpublished opinion would not be binding (though the proposed rule does not say this), it is another matter altogether to expect that a district court judge would not give special deference to the opinion of a judge of a higher court.

Unpublished opinions are, by definition, not as readily available as published opinions. Perhaps technology will address this question but only at the expense of adding to the volume of opinions that appellants would must consider in framing an appeal. The court that originally decided not to publish an opinion has already made a determination that the opinion was not necessary to advance the state of the law. The proposed rule would compel diligent appellants to ignore this determination. The time and expense necessary to consider the possible use of unpublished opinions would thus add measurable to the cost of pursuing an appeal without a commensurate benefit to the process.

If unpublished opinions are only to be given persuasive authority, there is nothing preventing appellants today from using in their own briefs the same reasoning

and citations of the unpublished opinions. If Judge A cites cases X, Y, and Z for a certain proposition, then the appellant is free to cite the same cases for the same proposition.

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