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FOR THE FIRST CIRCUIT

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NOTICE OF PROPOSED RULES

The United States Court of Appeals for the First Circuit hereby provides notice that it proposes the attached amendments to the Local Rules, including a new Local Rule 32.3 and amendments to existing Local Rules 32.2 and 36.

The proposed amendments relocate the rule on the use of unpublished opinions from Local Rule 36 to a new Local Rule 32.3 and make some changes in this rule. Under the current rule, unpublished opinions of this court may be cited in this court only in "related" cases. Proposed Local Rule 32.3 clarifies the meaning of "related" by substituting more precise language. In addition, the proposed new rule liberalizes this court's current policy to permit unpublished opinions of this court to be cited for their persuasive value under limited circumstances. The proposed rule leaves intact this court's policy that unpublished opinions are not binding precedent.

The proposed amendments to existing Local Rules 32.2 and 36 are necessitated by the proposed addition of Local Rule 32.3.

The proposed changes to existing Local Rules 32.2 and 36 are highlighted in gray. Additions to these rules are noted in **bold** print; deletions are shown in ~~strikeout~~ print. Since proposed Local Rule 32.3 is entirely new, no highlighting or other demarcation is used to indicate change.

The Court of Appeals invites public comment on these proposed amendments. Comments should be received by November 29, 2002 and addressed to:

Office of the Clerk
U.S. Court of Appeals for the First Circuit
John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

September 27, 2002

Richard Cushing Donovan

Local Rule 32.3 Citation of Unpublished Opinions of this Court.

An unpublished opinion of this court may be cited in this court only in the following circumstances:

- (a) When the earlier opinion is relevant to establish a fact about the case.** *An unpublished opinion of this court may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.*
- (b) Other circumstances.** *Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.*
- (c) Procedure.** *A party must note in its brief or other pleading that the opinion is unpublished, and a copy of the opinion or disposition must be included in an accompanying addendum or appendix.*
- (d) Definition.** *A published opinion is one that appears in the ordinary West Federal Reporter series (not including West's Federal Appendix) or as a recent opinion intended to be so published. All slip opinions released by the clerk's office are intended to be so published unless they bear the legend "Not For Publication" or some comparable phraseology.*

Local Rule 32.2 Citations Citation of State Decisions and Law Review Articles.

All citations to State or Commonwealth Courts must include both the official state court citation and the National Reporter System citation when such decisions have been published in both reports; e.g., Coney v. Commonwealth, 364 Mass. 137, 301 N.E.2d 450 (1973). Law review or other articles unpublished at the time a brief or memorandum is filed may not be cited therein, except with permission of the court.

Local Rule 36. Opinions

- (a) **Opinions Generally.** *The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order, memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in the official West reporter, and may not be cited in ~~unrelated cases~~ **except as provided in Local Rule 32.3.** As indicated in Local Rule 36 (b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36 (b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form.*
- (b) **Publication of Opinions.** *The United States Court of Appeals for the First Circuit has adopted ~~Judicial Council of the First Circuit, pursuant to resolution of the Judicial Conference of the United States,~~ hereby adopts the following plan for the publication of **its** opinions ~~of the United States Court of Appeal for the First Circuit.~~*
- (1) **Statement of Policy.** *In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.)*
- (2) **Manner of Implementation.**
- (A) *As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in the light of further research and reflection.*

- (B) *With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in the cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.*
- (C) *When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.*
- (D) *Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.*
- (E) *If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion.*
- ~~(F) *Unpublished opinions of this court may be cited in filings with or arguments to this court only in related cases. Otherwise only published opinions may be cited. A published opinion is one that appears in the ordinary West Federal Reporter series (not including West's Federal Appendix) or as a recent opinion intended to be so published. All slip opinions released by the clerk's office are intended to be so published unless they bear the legend "Not for Publication" or some comparable phraseology.*~~
- ~~(G)~~
- (F) *Periodically the court shall conduct a review*

in an effort to improve its publication policy and implementation.

- (c) ***Precedential Value of Unpublished opinions.*** *While unpublished opinions of this court may be cited to this court in accordance with Local Rule 32.3, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion.*

~~(c)~~

- (d) ***Copies of Opinions.*** *Unless subject to a standing order which might apply to classes of subscribers, such as law schools, the charge for a copy of each opinion, after one free copy to counsel for each party is \$5.00.*