

## THE ETHICAL CONUNDRUMS OF UNPUBLISHED OPINIONS

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### INTRODUCTION

During the first day of my 1L Summer Clerkship at the Oregon Advocacy Center, an intake specialist handed me a thick file, paper bulging out the sides, noting apologetically, "I'm sorry, but I think the consensus is that you are to deal with this one." The file contained hundreds of letters, emails, and other correspondence from individuals with Multiple Chemical Sensitivity Disorder (MCS), begging the center to help them stop the state and counties from spraying the roads with chemical herbicides. I poured over the pages as I read the horror of these persons' lives, how they were trapped inside their homes, ill for weeks, experiencing extreme pain and suffering from the effects of the chemical sprays.

For the next month, I spent a couple of hours each day on the phone listening to their stories, assuring them I would do all that I could to ascertain whether they had a case under either the Americans with Disabilities Act or Oregon tort law. I found a case directly on point in the Ninth Circuit, *Wroncy v. Oregon Dep't. of Transp.*, 94 F. App'x 559 (9th Cir. 2004), that had occurred only a few years earlier. The Ninth Circuit found expert testimony regarding the diagnosis of MCS insufficiently reliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1,2</sup> However, *Wroncy* was an unpublished

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1. 509 U.S. 579 (1993). In determining whether a scientific theory may be introduced into evidence, *Daubert* requires a court to consider (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the "general acceptance" of the theory. *Id.*

opinion.<sup>3</sup> I consulted the Ninth Circuit's rule on unpublished opinions<sup>4</sup> and discovered that not only were unpublished opinions not precedent, but a no-citation rule was in place—meaning I could be disciplined or sanctioned for bringing the case to the court's attention.<sup>5</sup>

I subsequently looked to other circuits and district courts for persuasive authority and, to my dismay, every court across the nation addressing MCS denied admissibility of any expert testimony regarding the disorder, finding the medical diagnosis to be insufficiently reliable to pass muster under *Daubert*.<sup>6</sup> Not sure what to do without any controlling authority on point, having only a negative unpublished opinion and plenty of negative persuasive authority, I sought the center's legal director's opinion on possible avenues to take for the case. Even though the negative unpublished opinion could not act as authority or precedent, nor even be cited to or referenced to the court by either party, the legal director said we should notify our clients that the case law was not in their favor. She explained to me that even though no one could refer to *Wroncy* in court documents, the judges, judicial clerks, lawyers, and law clerks will all know it is there, that it occurred only two years earlier, and that the facts were absolutely indistinguishable from our case. Further, the attorneys would use the *Wroncy* arguments without citing to the opinion as well as the cases from the other jurisdictions as persuasive authority.

With no controlling case authority in our jurisdiction, and all persuasive authority in other jurisdictions being negative, we did not have much to go on. I lost sleep that night wondering how I would explain to my clients that although they suffered real harm on a regular basis, our hands were tied because the law was not on their

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2. *Wroncy v. Oregon Dep't. of Transp.*, 94 F. App'x 559, 560 (9th Cir. 2004) (unpublished).

3. *Id.*

4. 9TH CIR. R. 36-3.

5. *Id.* See also *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (ordering "counsel to show cause as to why he should not be disciplined for violating Ninth Circuit Rule 36-3").

6. *E.g.*, *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994) (court found evidence of MCS to be subjective and speculative, and determined that plaintiffs failed to establish that the etiology of MCS had been scientifically tested); *Summer v. Mo. Pacific R.R. Sys.*, 132 F.3d 599 (10th Cir. 1997) (court held that MCS was a controversial diagnosis that has been excluded under *Daubert* as unsupported by sound scientific reasoning or methodology); *La-Z-Boy Chair Co. v. Reed*, 936 F.2d 573 (6th Cir. 1991)(court found the testimony to be conflicting and determined the facts in line with opposing counsel's experts' testimonies on the scientific invalidity of MCS).

side, despite the fact that the Ninth Circuit did not think the *Wroncy* case important enough or good enough law to even put it on the books.<sup>7</sup>

The *Wroncy* case raised many questions in my mind as a young law student: What is applicable case law? Does it include every opinion available or only those with precedential or persuasive authority? Why are there unpublished opinions? What is the point of not publishing an opinion if the opinions are widely available and lawyers still use them in assessing their case? What happens when, unlike in my situation, the unpublished opinion is *favorable* to a client? How do lawyers balance the ethical duty of bringing the law to the attention of the court, following the rules of the court, and maintaining a zealous advocacy for their clients?

This article first argues that courts should uniformly treat unpublished opinions with a deference analogous to *Skidmore*<sup>8</sup> deference in administrative law, giving the opinions persuasive value when due.<sup>9</sup> Second, this article contends that without such a uniform rule in place, attorneys face real ethical challenges in giving competent, diligent, and effective assistance of counsel. Part I discusses the background and history of unpublished opinions. Part II compares California's depublication process to unpublished opinions. Part III discusses the recent amendment to Federal Rule of Appellate Procedure 32.1, which forbids any federal court from prohibiting citation to unpublished opinions. Part IV argues that a uniform rule should be in place, requiring courts to give a *Skidmore* type deference to unpublished opinions. Finally, Part V analyzes the ethical responsibilities, duties, and conundrums a lawyer must consider without such a uniform rule.

## I. BACKGROUND AND HISTORY OF UNPUBLISHED OPINIONS

Unpublished opinions were not a part of the American legal system until the early 1970s.<sup>10</sup> If our legal system survived as long as it did without unpublished opinions, what necessitated the change and why is our legal system now dependent on the use of unpublished

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7. See *infra* note 14 and accompanying text.

8. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

9. See *infra* notes 179–181 and accompanying text.

10. Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 546 (1997) (citing the Report of the Proceedings of the Judicial Conference of the United States 11 (1964)).

opinions? Do these original rationales still exist today? This section looks at (A) the emergence of unpublished opinions; (B) the original justifications for rules prohibiting citation to unpublished opinions; (C) electronic availability of unpublished opinions; (D) the debate over no-citation rules; and (E) how state courts and federal circuits treat unpublished opinions.

A. *The Emergence of Unpublished Opinions*

In the early 1960s, the Judicial Conference expressed concern over the cost and difficulty of maintaining the expanding printed opinions<sup>11</sup> and, in the early 1970s, it recommended that courts develop plans “to limit the number of opinions submitted for publication to cope with the exponentially expanding volume of litigation”<sup>12</sup> by publishing “only those opinions which are of general precedential value.”<sup>13</sup> The generalized fear of an exponential growth in printed case law, concerns of judicial efficiency, and the cost of managing print material dominated the rationales behind unpublished opinions.<sup>14</sup> Underlying these factors lays a concern for fairness: expanding libraries will not only impose costs on judges and lawyers, but those costs are in turn imposed on clients, magnifying the inequities in the legal system.<sup>15</sup> Limiting the publication of opinions also frees judges to spend less time laboriously writing opinions, thereby allowing more cases to filter through the system and, in turn, increasing judicial efficiency.<sup>16</sup>

About eighty percent of opinions are designated as unpublished, according to the judicial conference report of September 2005.<sup>17</sup> In general, courts determine whether to publish an opinion based on particular factors. For example, the Ninth Circuit considers whether the opinion (1) establishes, clarifies or changes a rules of law; (2) calls attention to an overlooked rule; (3) criticizes a rule; (4) involves a unique issue or one of substantial importance; (5) disposes of a case

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11. *Id.*

12. COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE 6 (2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter REPORT].

13. Shuldberg, *supra* note 9, at 546 (citing the JUDICIAL CONF. OF THE U.S., REPORT ON PROCEEDINGS 11 (1964)).

14. *Id.* at 547.

15. *Id.* at 548.

16. *Id.*

17. REPORT, *supra* note 11, at 5.

in which the district court opinion was published; (6) follows on the heels of a reversal by the Supreme Court; or (7) was based on a dissenting or concurring judge's request for publication.<sup>18</sup> If the case lacks any of those factors, then the court may decide to issue an unpublished opinion—meaning the opinion will (1) tend to be “far skimpier,” rarely containing either a factual or procedural statement, (2) resolve the appeal in roughly a few pages, and (3) likely cite to few legal cases, if any.<sup>19</sup> Such practices underlied the justifications for prohibiting citation to such opinions.

### *B. The Original Justifications for No-Citation Rules*

Once the practice of selective publication of judicial opinions was underway, justifications for prohibiting citations to those opinions came with it.<sup>20</sup> Such justifications were premised on the belief that citation to unpublished opinions would thwart the purposes of selective publication (judicial efficiency, fairness, and reduced costs).<sup>21</sup> First, judicial efficiency would suffer because judges would feel pressure to carefully write their opinions.<sup>22</sup> Second, citation would be unfair because access to unpublished opinions would be available only to those attorneys with greater resources.<sup>23</sup> Third, costs would not decrease because citation would create a market for unpublished opinions, requiring libraries to purchase and index those opinions.<sup>24</sup>

### *C. The Electronic Availability of Unpublished Opinions*

When unpublished opinions first came into existence in the early 1970s, computer-assisted legal research was only beginning to proliferate. Lexis was the first computer-assisted legal research service, introduced into the commercial market in 1973.<sup>25</sup> By the mid-1970s, Westlaw introduced its computer-assisted legal research

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18. 9TH CIR. R. 36-2.

19. Paul D. Fogel & David J. de Jesus, *Unpublished Opinions*, S. F. DAILY J., Dec. 20, 2006, at 9.

20. Shuldberg, *supra* note 9, at 549.

21. *Id.*

22. *Id.* at 550.

23. *Id.*

24. *Id.* at 549–50.

25. *Id.* at 556.

service.<sup>26</sup> At the time the Judicial Conference recommended limiting publication of opinions, computer research was merely a theory. It therefore follows that the rationales underlying unpublished opinions were premised on the ethos of the printed page and all its limitations.<sup>27</sup>

Legal research and information is no longer limited by the confines of the printed page.<sup>28</sup> Not only are published opinions stored electronically, but Lexis and Westlaw have databases consisting entirely of unpublished opinions issued by the federal circuit courts of appeal.<sup>29</sup> With such widespread national availability of “unpublished” opinions, the term “unpublished” has a new and ironic meaning.<sup>30</sup> “With the advent of computer assisted legal research, the reference to ‘unpublished’ opinions has become a misnomer.”<sup>31</sup> Some argue without such technological progress, “the issue [of no-citation rules] would not have come up, at least not with anything like its present force, in the world of books.”<sup>32</sup> Even though a court may wish to prevent a particular opinion from having precedential effect, the court is at least aware that, whether designated “published” or “unpublished,” its opinion is “going to be read, collected, and analyzed.”<sup>33</sup>

Now that electronic research sources have revolutionized the research world, reevaluation of the premises for unpublished opinions is necessary.<sup>34</sup> First, storage costs are no longer an issue, as libraries no longer require endless space for printed materials.<sup>35</sup> Second, fairness is of less concern, since the availability of unpublished opinions on electronic databases and court websites refute any claim that access to unpublished opinions is unfair or uneven.<sup>36</sup> Third, research costs are mitigated; as computer-assisted legal research has increased, legal research has actually become more efficient.<sup>37</sup>

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26. *Id.*

27. *Id.*

28. *Id.*

29. Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 2 (2002).

30. *Id.* at 3.

31. REPORT, *supra* note 11, at 8.

32. Barnett, *supra* note 29, at 19.

33. *Id.* at 20.

34. Shuldberg, *supra* note 9, at 556.

35. *Id.* at 558.

36. REPORT, *supra* note 11, at 7.

37. Shuldberg, *supra* note 9, at 559–60.

Today, courts must consider that online research systems make unpublished opinions widely available—a new consideration that cannot be ignored when determining whether to proceed with a no-citation rule.<sup>38</sup>

*D. The Debate over No-Citation Rules: The Loud Roar from the Eighth Circuit*

In 2000, Judge Richard S. Arnold of the Eighth Circuit authored an extremely controversial opinion in *Anastasoff v. United States*.<sup>39</sup> *Anastasoff* held that the Eighth Circuit rule declaring unpublished opinions as not precedent<sup>40</sup> was unconstitutional under Article III “because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”<sup>41</sup> Citing *Marbury v. Madison*,<sup>42</sup> the court determined that every judicial decision is, or should be, “a declaration and interpretation of a general principle or rule of law.”<sup>43</sup> According to the *Anastasoff* panel, this “declaration of law” *must* be applied in all subsequent cases to parties who are similarly situated.<sup>44</sup> Those principles of precedent, it continued, were “well established and well regarded at the time this nation was founded.”<sup>45</sup> Determining that our legal system was based on a requirement of precedent, it concluded that “insofar as [the Eighth Circuit’s Rule regarding unpublished opinions] would allow us to avoid the precedential effect of our prior decisions,” it is unconstitutional.<sup>46</sup>

The *Anastasoff* opinion is significant because it vocalized some real and valid concerns about the practice of selective publication.

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38. *Id.* at 566.

39. 223 F.3d 898 (8th Cir. 2000), *vacated by* 235 F.3d 1054 (8th Cir. 2000) (rehearing en banc).

40. The relevant rule reads in part:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .

8TH CIR. R. 28A(i).

41. *Anastasoff*, 223 F.3d at 899.

42. 5 U.S. (1 Cranch) 137 (1803).

43. *Anastasoff*, 223 F.3d at 899–900.

44. *Id.* at 900.

45. *Id.*

46. *Id.*

Particularly, it pointed out that “if judges had the legislative power to ‘depart from’ established legal principles, ‘the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions.’”<sup>47</sup> *Anastasoff* refuted the notion that all opinions must be published.<sup>48</sup> Rather, it acknowledged a history of recognized authority in unpublished decisions, and agreed that courts may decide that a case may not be important enough to be published.<sup>49</sup> However, *Anastasoff* contended that such a pronouncement by the court should “have nothing to do with the authoritative effect of any court decision.”<sup>50</sup>

*Anastasoff* countered the contention that courts do not have enough time to treat every decision as precedent by responding, “[if] this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only.”<sup>51</sup> Most importantly, *Anastasoff* stated that the rule at issue expanded the power beyond what Article III gave to the courts by giving them the power “to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not.”<sup>52</sup> The court felt that “[t]hose courts are saying to the bar: ‘We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.’”<sup>53</sup>

Although the three-panel decision was later reheard and vacated *en banc*,<sup>54</sup> the importance of that opinion reveals itself in the issues it brought to the surface and the way it forced other courts to begin to address their court rules regarding unpublished opinions.

As an immediate and obvious backlash to *Anastasoff*, the Ninth Circuit issued *Hart v. Massanari*, authored by Judge Kozinski.<sup>55</sup> After an attorney violated Ninth Circuit Rule 36-3<sup>56</sup> by citing to an unpublished opinion, the court ordered him to show cause as to why

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47. *Id.* at 901 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*259).

48. *Id.* at 903.

49. *Id.* at 904.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

55. 266 F.3d 1155 (9th Cir. 2001).

56. *Id.* at 1159. “Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . .” *Id.*

he should not be disciplined.<sup>57</sup> Unlike the Eighth Circuit's rule, which allowed citing an unpublished opinion as persuasive authority when no published opinion is on point,<sup>58</sup> the Ninth Circuit's rule forbade any citation to an unpublished opinion, except in very limited circumstances.<sup>59</sup> In a lengthy opinion that primarily criticized *Anastasoff*, the Ninth Circuit recognized no-citation rules as "an effort to deal with precedent in the context of a modern legal system."<sup>60</sup> The Ninth Circuit argued for efficiency, explaining that overruling every unpublished opinion would require a "substantial amount of [the] courts' time and attention—two commodities already in very short supply."<sup>61</sup> Furthermore, "[i]t goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them."<sup>62</sup> With the Ninth Circuit having what many consider an unmanageable caseload,<sup>63</sup> it is no surprise that an efficiency argument emerged there.

The Ninth Circuit further refuted *Anastasoff's* interpretation of precedent at common law, its interpretation of the limits contained in Article III, and its "rigid conception of precedent, namely, that all judicial decisions necessarily served as binding authority on later courts."<sup>64</sup>

Practically, the Ninth Circuit was concerned that unpublished opinions, "not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law . . . not announced in a way that makes it suitable for governing future cases" would be relied upon inappropriately, leading to confusion and unnecessary conflict.<sup>65</sup> Having too many opinions in the same area of law, based on the same facts "will, at best, clutter up the law books and databases with redundant and thus unhelpful authority."<sup>66</sup> The Ninth Circuit wanted to maintain a "coherent, consistent and intelligible body of caselaw,"

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57. *Id.* at 1159.

58. 8TH CIR. R. 28A(i).1.

59. 9TH CIR. R. 36-3.

60. *Hart*, 266 F.3d at 1160.

61. *Id.* at 1172.

62. *Id.* at 1177.

63. Press Release of Senator Ensign, United States Senate, *Ensign Introduces Bill to Split Ninth Circuit Court*, <http://ensign.senate.gov/record.cfm?id=239479&> (last visited May 5, 2008).

64. *Hart*, 266 F.3d at 1161–63.

65. *Id.* at 1177–78.

66. *Id.* at 1179.

which it felt was “served by taking the time to make the precedential opinions [it does] write as lucid and consistent as humanly possible.”<sup>67</sup>

Although the Ninth Circuit vehemently disagreed with *Anastasoff*, neither *Anastasoff* nor *Hart* won out in the end. Each of the arguments presented, however, contributed to the debate on if and how unpublished opinions should be used as authority. As we see next, those opinions represent only two views in a spectrum of views that exist in the courts.

### *E. The Treatment of Unpublished Opinions by State Courts and Federal Circuits*

Understanding the levels of precedent is key to understanding the different ways in which courts allow or place limits on the use of unpublished opinions. There are five inter-connected levels of “precedent.”<sup>68</sup>

At the top of the tier exists *binding precedent*, which means that the court’s holding must be followed “by courts at the same level and lower within a pyramidal judicial hierarchy.”<sup>69</sup> Just below binding precedent exists *overrutable precedent*, which is defined as a holding that is ordinarily followed under the doctrine of *stare decisis*, “but may [be] overrule[d] if sufficient reasons present themselves.”<sup>70</sup> Typically, decisions in this tier originate in the same court.<sup>71</sup>

Third tier cases merely carry *precedential value*.<sup>72</sup> Although a slightly vague concept, some courts allow unpublished opinions to be cited for their “precedential value” or as “precedent.”<sup>73</sup> Depending on the circuit’s local rule, this term contains a spectrum of precedential value from binding precedent to mere citable precedent.<sup>74</sup> The fourth tier contains cases with only *persuasive value*, meaning they have “persuasive force independent of any precedential claim.”<sup>75</sup> Without

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67. *Id.*

68. Barnett, *supra* note 29, at 9.

69. *Id.*

70. *Id.* at 10.

71. *Id.*

72. *Id.*

73. *Id.* at 10–11. The D.C. Circuit permits citation to unpublished opinions “as precedent,” while the Fourth and Sixth Circuits allow citation for “precedential value.” *Id.* at 11.

74. *Id.* at 10–11.

75. *Id.*

any regard to *stare decisis* or the opinion's status as precedent, the decisions must be able to persuade on their own argumentative merits.<sup>76</sup> This level of precedent most often occurs when an attorney cites to an opinion from another circuit or jurisdiction as an example of a line of reasoning, which his or her circuit may or may not be persuaded to adopt.

Finally, a fifth set of cases have *citable precedent*, meaning only that the cases may be cited, but that the weight given to the case is left open to the court.<sup>77</sup> Although not necessarily clear how this fifth tier differentiates from the fourth, there is merit to the differentiation when discussing unpublished opinions, as the ability to cite is at the heart of the issue.<sup>78</sup> Since many argue that unpublished opinions do not carry even persuasive value, there appears to be a need for some tier that allows for a value in existence below "persuasive" where the ability to bring the case to the attention of the court is the only value the opinion is given.

The precedential tiers may reflect not only how courts treat opinions, but also where the issuing court resides, what level of care existed in issuing the opinion, and how receptive the receiving court may be toward non-authoritative precedent. Where an unpublished opinion lies on the precedential spectrum depends on several of these factors: (1) did the opinion originate in the controlling jurisdiction; (2) did the opinion originate in a jurisdiction that the decisionmaking court respects; (3) does the opinion appear to have been written with care; and (4) is the decisionmaking court generally receptive to persuasion from non-binding authority?<sup>79</sup>

There are several ways in which courts allow, or rather place limits on, the use of unpublished opinions in their own courts. At one extreme are no-citation rules. These rules prohibit the use of unpublished opinions even at the bottom tier of the precedential hierarchy. As of 2003, twenty-five states had no-citation rules in place.<sup>80</sup> Prior to the recent Federal Rule of Appellate Procedure

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76. *Id.*

77. *Id.* at 12.

78. *Id.*

79. *See id.* at 9–12.

80. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 484–85 (2003). States that had no-citation rules included: Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska,

(FRAP) 32.1, many federal circuit courts also had similar rules.<sup>81</sup> A slightly less extreme limit on the use of unpublished opinions is a rule allowing citation for its *persuasive value* only. Twelve states allow citation to unpublished opinions for their persuasive value, as of 2003.<sup>82</sup> In the federal circuits, the Eighth Circuit has a rule that advises against citing unpublished opinions, but allows citation “if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”<sup>83</sup> Other courts allow use of unpublished opinions for their *precedential value*.<sup>84</sup> There are five states that allow citation for precedent.<sup>85</sup> Other states have murky rules involving unpublished opinions and are considered to sit “on the fence.”<sup>86</sup> Only four states have no rules prohibiting or restricting citation of unpublished opinions at all, appearing, at least on the surface, to allow equality of use with published opinions.<sup>87</sup>

As seen by the discourse in *Anastasoff* and *Hart*, a major issue in the unpublished opinion debate centers on whether unpublished opinions should be cited at all.<sup>88</sup> Twenty-one states allow citation to unpublished opinions, while twenty-five states forbid citation.<sup>89</sup> The trend has clearly been moving toward banning no-citation rules.<sup>90</sup> With many states moving toward allowing citation to unpublished opinions, the argument is that “[t]he sky does not fall” when citation to unpublished opinions is allowed.<sup>91</sup>

However, there exists little argument over whether unpublished opinions should serve as *binding precedent*.<sup>92</sup> With the exception of

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Nevada, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and Wisconsin. *Id.*

81. *See, e.g.*, 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.3; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3.

82. Barnett, *supra* note 80, at 482. These states include: Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia. *Id.*

83. 8TH CIR. R. 32.1A; *see also* 5TH CIR. R. 47.5.4.

84. *E.g.*, 5TH CIR. R. 47.5.3 (“Unpublished opinions issued before January 1, 1996 are precedent.”)

85. Barnett, *supra* note 80, at 481 (referring to Delaware, Ohio, Texas, Utah, and West Virginia).

86. *Id.* at 483 (referring to Hawaii, Illinois, Maine, Oklahoma, and Oregon).

87. *Id.* at 481 (referring to Connecticut, Mississippi, New York, and North Dakota).

88. Barnett, *supra* note 29, at 12.

89. Barnett, *supra* note 80, at 485.

90. *Id.* at 487.

91. *Id.*

92. Barnett, *supra* note 29, at 12.

Judge Arnold, most commentators, attorneys, and judges accept the proposition that unpublished opinions are not binding to any degree on the courts.<sup>93</sup> The majority bases this view on the belief that (1) unpublished opinions are, in fact, not designed from the outset to serve as binding precedent, (2) efficiency would be lost without the ability of judges to use unpublished opinions, and (3) the general value of unpublished opinions is still less than published opinions.<sup>94</sup> Whether true or not, that ethos still permeates the debate so that the controversy remains at the lower threshold question of whether unpublished opinions should be used at all.

It is important to realize that, although the issuing court is the one determining that the opinion does not merit publishing under the circumstances, it is not necessarily the issuing court that determines how that opinion may be used. Other courts across the country have local rules determining how unpublished opinions may be used in their own jurisdictions.<sup>95</sup> Another interesting practice exists when the issuing court determines an opinion should be published, but a higher court disagrees, and in turn *depublishes* that opinion.

## II. DEPUBLISHED OPINIONS: WHEN DECISIONS MOVE FROM PRECEDENT TO SECRET

*Depublished* opinions, as opposed to *unpublished* opinions, are cases “that have been published in the official advance sheets but were ordered . . . not to be published in the bound reports even though no grant of review or rehearing has been ordered.”<sup>96</sup> *Depublished* opinions “form a small and select subgroup of unpublished opinions,” forming about one percent of all unpublished opinions as of 1994.<sup>97</sup> A few states depublish opinions on a consistent basis.<sup>98</sup> This section looks primarily at California’s system of depublication and compares the rationales and problems of its system to the system of selective publication nationwide. This section discusses (A) the depublication process in the California courts; (B) the changing message behind

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93. *Id.* at 12–14.

94. *See id.* at 12–25.

95. *See supra* notes 82–87 and accompanying text.

96. American Association of Law Libraries (AALL), *Regular Feature: Questions and Answers*, 82 LAW LIBR. J. 627, 641 (1990).

97. Stephen R. Barnett, *Depublication Deflating: The California Supreme Court’s Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 548 (1994).

98. *Id.* at 520.

depublication; (C) the criticisms of depublishing; (D) the counterarguments to those criticisms; (E) the alternatives to depublishing; and (F) the responsibilities of lawyers in light of depublishing.

A. *The Depublishing Process in the California Courts*

The California Supreme Court began depublishing selected opinions of the California Courts of Appeal in 1971.<sup>99</sup> The California Supreme Court, pursuant to constitutional authority under article VI, section 14 of the California Constitution, was “vested with authority to determine which opinions of the Supreme Court and the Courts of Appeal shall be published.”<sup>100</sup> Without hearing, publishing, or recording its reasons, and without affecting the result of the case, the California Supreme Court may order an opinion depublished so that it then becomes an unpublished opinion.<sup>101</sup> The unpublished opinion “shall not be cited or relied on by a court or a party in any other action or proceeding.”<sup>102</sup> However, the actual decision of the courts of appeal stands unchanged.<sup>103</sup>

B. *The Changing the Message Behind Depublishing*

Originally, it was understood by the legal community that depublishing occurred when “a majority of the justices consider[ed] the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent.”<sup>104</sup> In the face of an opinion that did not warrant a grant or retransfer, the court would often resort to depublishing instead of “permitting the appellate opinion to stand as citable precedent [that] may result in building ultimately reversible error into a large number of trials.”<sup>105</sup> Thus, depublishing traditionally gave guidance to lawyers by implying “what the supreme court consider[ed] the law [was] *not*.”<sup>106</sup>

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99. *Id.*

100. California Courts, *Charge of the Advisory Committee on Rules for Publication of Court of Appeal Opinions*, <http://www.courtinfo.ca.gov/courts/supreme/comm/rfpocoaopcharge.htm> (last visited May 5, 2008).

101. Barnett, *supra* note 97, at 521.

102. Cal. Ct. R. 977(a) (renumbered Rule 8.1115, and amended, eff. Jan. 1, 2007).

103. Barnett, *supra* note 97, at 521.

104. Joseph R. Grodin, *The Depublishing Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514–15 (1984).

105. *Id.* at 520.

106. Barnett, *supra* note 98, at 524 (emphasis in original).

In 1990, however, the California Supreme Court changed this implied understanding by adopting California Rule of Court 979(e), which declared that an order to depublish an opinion “shall not be deemed an expression of opinion of the Supreme Court [sic] of the correctness of the result reached by the decision or of any of the law set forth in the opinion.”<sup>107</sup> Orders to depublish no longer carried the label that the opinion was “wrong in some significant way,” but rather they were explicitly meant to imply no message at all.<sup>108</sup> Depublished opinions could no longer provide the same guidance to the legal community as they did before.

Although a literal reading of that rule would leave the California legal community with no understanding as to depublication, many refused to accept the supreme court’s assertion or take the rule seriously, preferring instead to still look to the original rationales behind depublication.<sup>109</sup> Unfortunately, since the supreme court does not accompany its depublications with any statements or explanations whatsoever,<sup>110</sup> all anyone can do is guess.

### C. *The Criticisms of Depublication*

Critics of depublication complain that the California Supreme Court gives no written explanations, standards, procedures, or defined scope for decertifications.<sup>111</sup> Others feel that depublication is “somehow egregious per se—that it smacks of an attempt to rewrite history, to censor the expression of views, and perhaps even to carry out some secret agenda known only to the court.”<sup>112</sup> Furthermore, these opinions act as precedent for a short time and then go underground, creating “uncertainty in the law for brief but discernible periods of time . . . permitting reliance upon the opinion as precedent before it becomes depublished.”<sup>113</sup> Inconsistency also exists in the fact that the supreme court has, at times, later agreed more with an opinion it has depublished, thereby rejecting an entire line of cases it had left standing.<sup>114</sup> When the supreme court suddenly changes its

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107. CAL. CT. R. 979(e) (renumbered Rule 8.1125, and amended, eff. Jan. 1, 2007).

108. Barnett, *supra* note 98, at 525.

109. *Id.* at 536.

110. Grodin, *supra* note 105, at 521.

111. AALL, *supra* note 96, at 643.

112. Grodin, *supra* note 105, at 515.

113. *Id.* at 521.

114. Barnett, *supra* note 97, at 522.

mind, the law changes unforeseeably in ways that trial counsel may not have been able to anticipate.<sup>115</sup>

Depublication also affects the public's view of—and trust in—the legal system, because depublication implies to the parties, especially the losing party, that the judgment they experienced was wrong.<sup>116</sup> Additionally, there persists a general feeling that there is “something inappropriately secretive about the depublication process.”<sup>117</sup>

The criticisms of depublication seem to mirror some of the concerns of unpublished opinions, echoing *Anastasoff*'s concern of an “underground body of law good for one place and time only.”<sup>118</sup> Furthermore, depublication poses even greater concerns than unpublished opinions in that, although most jurisdictions state their reasons for not publishing opinions,<sup>119</sup> no such statement accompanies a depublication order from the California Supreme Court, leaving litigants, attorneys, district court judges, and court of appeals judges to guess at the reasoning of the highest court in their jurisdiction.

#### D. *The Counterarguments*

Those who address the above criticisms argue that it is unclear whether the downfalls of depublication outweigh the dangers of letting a bad published opinion stand.<sup>120</sup> Due to the inability of the courts to grant a hearing in all instances of error, this is a logical alternative to letting bad law exist in the body of law.<sup>121</sup> Also, depublication does not make “secret” opinions that were once precedent, as these opinions often remain preserved in unofficial reporting systems.<sup>122</sup>

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115. *Id.* at 528–29.

116. Grodin, *supra* note 104, at 521.

117. *Id.* at 522.

118. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), *vacated by* 235 F.3d 1054 (2000) (rehearing en banc).

119. See discussion *infra* Part I.A (explaining in general why courts choose not to publish opinions).

120. Grodin, *supra* note 104, at 521.

121. *Id.* at 522.

122. *Id.*

*E. The Alternatives to Depublication*

California's system of depublication could be improved, replaced, or extinguished. Some suggestions for alternatives to the current system include: (1) depublication, with a statement of reasons for depublication made available to the public; (2) denial of hearing only, with a statement of explanation; or (3) grant and/or retransfer.<sup>123</sup> The greatest need in the depublication system is for a form of explanation or an issuance of a statement as to why the supreme court is depublishing an opinion. Without such a statement, attorneys face great difficulties in predicting and following the body of caselaw in their jurisdiction.

*F. The Responsibilities of Lawyers Regarding Depublication and Precedent*

Without an explanation of the rationales behind depublication, lawyers and lower courts are left without any guidance as to the state of the law in their jurisdiction. Lawyers are left at the mercy of the court and their own predictions regarding the cases that the court will depublish and remove from the books. Lawyers must study both depublication orders and depublished opinions in an attempt to anticipate what opinions the court will depublish in the future.<sup>124</sup> However, it may be dangerous for an attorney to conclude what "the law is *not*" based on a depublication order, when the court specifically has said not to do so.<sup>125</sup>

In determining whether a depublished opinion may act as precedent, an attorney faces a quagmire. Although "not 'official' precedent," depublished opinions are no longer discredited, either.<sup>126</sup> A court may find the opinion persuasive, and by following the same reasoning, it may reach the same result, "as long as [it does] so without citing or relying on that opinion."<sup>127</sup> In a sense, then, depublished opinions do act as precedent because "[j]udges trained and functioning in a system of stare decisis have an ingrained inclination to follow precedent. . . . [W]hen there is no published

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123. *Id.* at 524–26.

124. Barnett, *supra* note 97, at 544.

125. *Id.* (emphasis in original).

126. *Id.* at 547.

127. *Id.*

appellate opinion opposing the depublished one, the depublished one is more likely than not to be ‘followed.’”<sup>128</sup>

The dilemma for lawyers includes not only the chance of losing a case, but also “a real threat of sanctions, or the risk of antagonizing a judge, if *they* do something that constitutes ‘citing’ a depublished case.”<sup>129</sup> Unlike unpublished opinions, however, there does not seem to be much of a record of disciplinary proceedings for citing to depublished opinions, and it appears that the prohibitions to citation under Rule 977(a) are a little more lax.<sup>130</sup>

Although there are some similar concerns and criticisms with depublication as with selective publication, California’s secrecy surrounding its depublication process sheds little light on the rationales for selective publication practices among state courts and federal circuits. Depublication also differs slightly from selective publication, since it is not the issuing court devaluing the case, but rather a higher court doing so.<sup>131</sup> However, trial courts and lawyers face similar difficult situations when presented with a depublished or unpublished opinion. In order to assess a case or determine the applicable law, an attorney must anticipate whether courts will follow unpublished/depublished opinions, and how to argue against them in the face of a no-citation rule. These opinions stand in the room like a pink elephant, which no one may discuss, refer to, rely on, or acknowledge, but which no one possibly could ignore.

### III. FEDERAL RULE OF APPELLATE PROCEDURE 32.1: A REAL CHANGE?

The debate regarding no-citation rules and the controversial *Anastasoff* opinion led to consideration of a new rule regarding citation to unpublished opinions. This section discusses (A) the background considerations regarding proposed rule 32.1; (B) the text of recent FRAP 32.1; and (C) whether FRAP 32.1 is a real change for attorneys.

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128. *Id.*

129. *Id.* at 563–564 (emphasis in original).

130. *Id.* See *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (ordering counsel to show cause as to why he should not be disciplined for violating the Ninth Circuit’s no-citation rule); *In re Bagdade*, 334 F.3d 568, 578, 587 (7th Cir. 2003) (attorney sanctioned and disciplined for, inter alia, citing to an opinion which he knew or should have known was unpublished).

131. See discussion *supra* Part II.A.

*A. Background*

The Advisory Committee on Appellate Rules proposed the recent rule 32.1 and published it for comment in August of 2003.<sup>132</sup> The majority of comments opposed the rule, but many comments in support came from the American Bar Association, the American College of Trial Lawyers, the New York Bar, and other public interest organizations, as well as the Department of Justice.<sup>133</sup> The advisory committee recommended that the Committee on Rules of Practice and Procedure (Committee) approve the rule in June 2004.<sup>134</sup> However, out of respect for the judges in circuits opposing the rule, the Committee postponed approving FRAP 32.1 and instead initiated two statistical studies to measure the rule's potential impact on the courts' workload.<sup>135</sup> The studies "failed to support" any contention that the new rule would impose additional work on judges and lawyers.<sup>136</sup> Accordingly, both the advisory committee and the Committee approved proposed rule 32.1.

In its justification for the new rule, The Report of the Judicial Conference stated that "[r]ules prohibiting or restricting the citation of unpublished opinions—rules that forbid a party from calling a court's attention to the court's own official actions—are inconsistent with basic principles underlying the rule of law."<sup>137</sup> In a common law system such as ours, parties should be "free to argue that the court should or should not act consistently with its prior actions."<sup>138</sup> The Committee also was concerned with the First Amendment issue of placing prior restraints on what a lawyer or party may tell a court about the court's own rulings.<sup>139</sup> Although the Committee took no position on whether no-citation rules are constitutional, it determined that "they cannot be justified as a matter of policy."<sup>140</sup> The advisory committee "found the evidence overwhelming that unpublished opinions can be valuable source[s] of 'insight' and 'information.'"<sup>141</sup>

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132. REPORT, *supra* note 11, at 4.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 5.

137. *Id.* at 8.

138. *Id.*

139. *Id.* at 9.

140. *Id.*

141. *Id.*

Unpublished opinions may be helpful to courts, especially in addressing cases which have similar fact patterns.<sup>142</sup>

The fact that the no-citation rules prohibited attorneys from explaining to later courts how valid substantive legal rules had been applied by prior courts in “actual—not hypothetical—circumstances” served as further support against no-citation rules.<sup>143</sup> Despite the rules against citing unpublished opinions, both lawyers and judges regularly read them, and this also signified their value.<sup>144</sup>

Originally, many had voiced concerns over requiring the citation of unpublished opinions because “large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage.”<sup>145</sup> However, as the availability of unpublished opinions has become more widespread and affordable, this justification has eroded and other justifications have attempted to take its place.<sup>146</sup> The three main concerns that exist today are (1) the value of unpublished opinions; (2) the necessity of unpublished opinions for busy courts; and (3) the increase in the costs of legal representation by abolishing no-citation rules.<sup>147</sup>

### *1. The Value of Unpublished Opinions*

Critics of proposed rule 32.1 argued that there is nothing of value in unpublished opinions because these opinions

do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest.<sup>148</sup>

The Report of the Judicial Conference noted that this argument is unpersuasive because no-citation rules would not be necessary if unpublished opinions truly lacked any value.<sup>149</sup> If they were truly “worthless” opinions, unpublished opinions likely would not be cited by attorneys, even in circuits that forbid such citation.<sup>150</sup> The Report

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 10–13.

148. *Id.* at 10.

149. *Id.*

150. *Id.*

further argued that unpublished opinions include lengthy discussion of legal issues, include dissenting opinions, and have been granted review by the U.S. Supreme Court.<sup>151</sup>

## 2. *The Necessity of Unpublished Opinions for Busy Courts*

Another major concern voiced by the opposition was that already overburdened appellate courts need to rely on the efficiency of drafting unpublished opinions without fearing they will become law.<sup>152</sup> When an appellate court drafts an opinion that will become law, “judges draft them with painstaking care.”<sup>153</sup> Unpublished opinions do not reflect this sort of care because they serve only as an explanation for the case at hand, and not as precedent for other courts.<sup>154</sup> The concern is that the judge would either issue a one line unpublished opinion or a much more painstakingly detailed unpublished opinion, either of which would be detrimental to the judiciary system.<sup>155</sup>

The Administrative Office, at the request of the advisory committee, conducted a study of the federal appellate courts and found “little or no evidence that the adoption of a permissive citation policy impacts the median . . . time it takes appellate courts to dispose of cases.”<sup>156</sup> Reports from federal judges in circuits that have abolished no-citation rules state no bad consequences whatsoever.<sup>157</sup>

## 3. *The Increased Costs of Legal Representation*

The citation of unpublished opinions, it is argued, will increase the costs of legal representation because attorneys will have a much greater body of caselaw to research in order to competently advise or represent their clients.<sup>158</sup> Additionally, because unpublished opinions are not written carefully, the body of caselaw will be more difficult to understand and the burden will be felt most heavily by litigants such

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151. *Id.* at 10–11.

152. *See id.* at 12.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (internal quotation omitted).

157. *Id.* at 13.

158. *Id.* at 14.

as prisoners, the poor, the middle class, and parties appearing pro se.<sup>159</sup>

Again, the Report of the Judicial Conference responded that although the disparity between litigants is an unfortunate reality and some litigants may have better access to unpublished opinions, those same litigants probably have better access to published opinions and even to lawyers.<sup>160</sup> However, “[t]he solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles—or from retaining lawyers.”<sup>161</sup>

Therefore, based on the above conclusions, the Committee concurred with the advisory committee’s recommendation that the Judicial Conference approve the proposed appellate rule 32.1.<sup>162</sup>

### *B. The Text of Federal Rule of Appellate Procedure 32.1*

FRAP 32.1, as adopted, reads as follows:

Rule 32.1 Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.<sup>163</sup>

### *C. Is Federal Rule of Appellate Procedure 32.1 a Real Change?*

The Committee Note for the Proposed Amendment stated that “Rule 32.1 is extremely limited.”<sup>164</sup> The rule applies only to the citation of unpublished opinions and says nothing about what effect a court must give to one of its unpublished opinions or to the

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159. *Id.*

160. *Id.* at 15.

161. *Id.* (emphasis in original).

162. *Id.* at 16.

163. FED. R. APP. P. 32.1.

164. REPORT, *supra* note 11, at 5.

unpublished opinions of another court. The Committee and advisory committee desired the rule to be substantively neutral, expressly taking no position on the effect that unpublished opinions should have.<sup>165</sup>

However, FRAP 32.1 does set a baseline at citation, regardless of whether it changes how courts actually treat the opinions or not. Courts can no longer forbid citation for any reason, and may not even “instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.”<sup>166</sup>

There are several other positives to the rule as well. First, FRAP 32.1 is “intended to replace . . . inconsistent standards with one uniform rule.”<sup>167</sup> When the Judicial Conference encouraged courts in the 1970s to develop plans that coped with the volume of litigation, each court created substantially different local rules that dealt with the problems in different ways.<sup>168</sup> The Judicial Conference became concerned about this lack of uniformity and noted that “eventually a somewhat more or less common plan might evolve.”<sup>169</sup> FRAP 32.1 serves just that purpose.

Keep in mind, however, that the rule applies only to unpublished opinions issued on or after January 1, 2007,<sup>170</sup> and then only to *federal* unpublished opinions.<sup>171</sup> Apparently, limiting the rule to opinions issued on or after January 1, 2007 was a last-minute alteration to the text of the proposed rule.<sup>172</sup> Critics of this limitation argue that the limitation is needless because (1) it will only cause confusion and (2) the date serves no logical purpose.<sup>173</sup> Furthermore, the limitation frustrates the purpose of uniformity, because it is likely that all the differentiating local rules will stay in place for unpublished opinions that were drafted prior to January 1, 2007.<sup>174</sup> It is unclear whether FRAP 32.1 preempts local rules regarding

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165. *Id.*

166. *Id.* at 3.

167. *Id.* at 2.

168. *Id.*

169. *Id.*

170. FED. R. APP. P. 32.1(a)(ii).

171. FED. R. APP. P. 32.1.

172. Howard J. Bashman, *To Cite or Not to Cite to Non-Precedential Opinions*, March 6, 2006, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1141380315071>.

173. *Id.*

174. *Id.*

unpublished opinions prior to January 1, 2007, and therefore, “litigants in most circuits lack clear guidance on whether local rules now governing the citation of non-precedential decisions will continue to control the circumstances under which non-precedential rulings issued before Jan. 1, 2007 can be cited.”<sup>175</sup>

The counterargument in response to criticism leveled at the limitation is that the January 1, 2007 date serves the important purpose of letting courts choose to put more time and effort into their unpublished opinions, if they so desire, knowing that the unpublished opinions will now be cited.<sup>176</sup>

Although FRAP 32.1 is extremely limited, it is a good first step. Citation to unpublished opinions is extremely important. However, the rule allows unpublished opinions only to reach the very bottom tier of precedent, and it does not require courts to give the opinion any sort of weight.<sup>177</sup> The next section argues that a better rule would create uniformity by requiring a *Skidmore* type deference to unpublished opinions.

#### IV. COURTS SHOULD BE REQUIRED TO GIVE UNPUBLISHED OPINIONS THE RESPECT THEY ARE OWED

Prior to FRAP 32.1, of the eight circuits that allowed citation to unpublished opinions, none allowed treatment of those opinions as *binding precedent*.<sup>178</sup> The authority of an unpublished opinions lies somewhere between *binding precedent* and *citable precedent*, but where should that ideal line be drawn? Now that federal courts are required to allow citation to unpublished opinions as *citable precedent*, the question remains whether unpublished opinions should serve as more. In addition, in state courts, where FRAP 32.1 does not apply, there still needs to be a movement toward banning no-citation rules. This section argues that, at the bare minimum, courts must ban all no-citation rules. Furthermore, this section argues that a more appropriate rule would require courts to give unpublished opinions a weight similar to that which courts give to interpretive administrative rules under *Skidmore*.

This section argues that (A) courts should apply a *Skidmore* type deference to unpublished opinions; (B) applying such a rule would

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175. *Id.*

176. *Id.*

177. See FED. R. APP. P. 32.1 advisory committee’s note.

178. Barnett, *supra* note 29, at 22.

bring uniformity of treatment to unpublished opinions; (C) a uniform rule would give much needed guidance to attorneys in assessing unpublished opinions; and (D) such a rule would balance concerns for judicial accountability and judicial efficiency.

A. *Skidmore v. Swift & Co.*

In administrative law, when an administrative decision does not have the force and effect of law, a court still gives it the respect it is entitled to under *Skidmore v. Swift & Co.*<sup>179</sup> Although not controlling upon the courts, the rulings, interpretations, and opinions that do not have the force and effect of law are properly referenced by the courts “for guidance.”<sup>180</sup> In determining whether such a decision by an administrative body is owed that level of respect, the court looks to “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>181</sup>

Courts should treat unpublished opinions similarly by looking to them for guidance, even if they lack the power to control. There is little, if any, concern that the use of unpublished opinions will ever reach the first tier of *binding precedent*. An unpublished opinion bears what some have called “a scarlet ‘U’; no one should be surprised to discover that it carries less authority than a ‘published’ opinion.”<sup>182</sup> Allowing unpublished opinions to serve as *persuasive authority*, as “guidance,” enables courts to avoid being bound by an unpublished decision, and doing so “enables a circuit panel to reject an unpublished opinion as *unpersuasive*—with reasons, of course—without having to take the case en banc or otherwise to formally overrule the opinion.”<sup>183</sup> This gives the case the deference that it is owed—acknowledgement—and it gives the public an explanation as to why the court is not persuaded by its reasoning.

Such deference is workable and favorable in other contexts, as demonstrated in administrative law.<sup>184</sup> Allowing citation to unpublished opinions ensures that courts make well-reasoned

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179. 323 U.S. 134, 140 (1944).

180. *Id.*

181. *Id.*

182. Barnett, *supra* note 29, at 22.

183. *Id.* at 23 (emphasis added).

184. *Id.*

decisions based on all the information available, instead of constraining the natural development of law by limiting the information available to both lawyers and judges.<sup>185</sup> In the words of the Honorable United States Chief Justice John Roberts Jr., “[a] lawyer ought to be able to tell a court what it has done.”<sup>186</sup>

*B. Considerations that Give an Unpublished Opinion “Power to Persuade,” if not “Power to Control”*

Under *Skidmore*, the factors that give an administrative decision the power to persuade rely on the administrator’s expertise and carefulness in making his or her decision.<sup>187</sup> In determining whether an unpublished opinion should have the power to persuade, courts should take into account different considerations—especially since the problem with unpublished opinions centers on their lack of careful and thoughtful writing and deliberativeness. The power to persuade should occur if the unpublished opinion (1) is factually indistinguishable from the case at hand; (2) is issued by the same or a controlling court; (3) concerns an unusual question of fact or law not covered in published opinions; and (4) possesses other factors that give it power to persuade, if not power to control.

*1. Factually Indistinguishable Cases*

The first factor that should give an unpublished opinion the power to persuade is if the facts in the case are indistinguishable or very similar to the current facts before the court. Attorneys often wish to cite to unpublished opinions because an unpublished opinion speaks most clearly to their client’s set of facts when no published opinion is as clearly on point.<sup>188</sup> If a published opinion was on point and factually indistinguishable, it is likely it either would not be on appeal in the first place or the lawyer would rather cite to the published opinion.<sup>189</sup> Only when an unpublished opinion speaks where published opinions do not, will a lawyer really want to use the opinion. When a court of law has applied the law directly to a specific

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185. Shuldberg, *supra* note 9, at 568.

186. Laura M. Wilson, *Uncovering Unpublished Opinions*, 120 LOS ANGELES DAILY JOURNAL 7 (January 18, 2007), available at <http://www.nonpublication.com/wilson.htm>.

187. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

188. Barnett, *supra* note 29, at 18.

189. *Id.* at 20.

set of facts, and no other court has done so, the unpublished opinion should serve as guidance and have the power to persuade.

### 2. *Issued by the Same or a Controlling Court*

If the unpublished opinion was issued from a controlling court or from the same court that is now hearing the current case, the unpublished opinion should be given a greater power to persuade than if the opinion was issued from an uncontrolling jurisdiction. For a district court, it is more persuasive if the unpublished opinion came from its own circuit, because it will want to avoid being overturned on appeal. If its circuit court used a line of reasoning once, then logically, the unpublished opinion is persuasive because the circuit court is likely to use that line of reasoning again. When I analyzed the strength of my MCS case in the face of the negative unpublished decision in *Wroncy*, even though it was a non-citable unpublished decision, the fact that it came from the Ninth Circuit was persuasive to my supervisor; on appeal, the Ninth Circuit was not likely to change its mind regarding the scientific validity of MCS, even if it made that determination in an unpublished opinion.<sup>190</sup> Therefore, whether an unpublished opinion is from the same or a controlling court should inform whether that opinion should have the power to persuade.

### 3. *Concerns a Unique Question of Law or Fact*

If the unpublished opinion is speaking to a unique question of law or fact that is not addressed in a line of published opinions, this should also be considered in giving the opinion power to persuade. *Wroncy* determined the scientific validity of MCS,<sup>191</sup> an issue that was unique to the Ninth Circuit and not addressed in any published opinions in that jurisdiction.<sup>192</sup> Prior to FRAP 32.1, some federal circuits specifically had rules allowing citation to unpublished opinions when there was no published opinion that would serve as well.<sup>193</sup> Those rules served to recognize that the value of an unpublished opinion increases when no published opinion speaks on the particular issue. The novelty of the question of law or fact in an

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190. See discussion *supra* Introduction.

191. *Wroncy v. Oregon Dep't. of Transp.*, 94 F. App'x 559, 560 (9th Cir. 2004) (unpublished).

192. See discussion *supra* Introduction.

193. See Barnett, *supra* note 29, at 5 nn.18-19 & 22-23.

unpublished opinion should be one of the factors considered in determining whether an unpublished opinion should have the power to persuade, if not the power to control.

4. *Possesses Other Factors that Give it Power to Persuade, if not Power to Control*

Other general factors should be considered when determining whether an unpublished opinion has the power to persuade a court. These factors could include the length of the opinion, whether the opinion gives a procedural or factual history, and whether the opinion cites to published opinions. Such factors are all considerations that could give extra persuasive power to an unpublished opinion.

C. *The Goal of Uniformity*

Not allowing citation or giving inappropriate deference to unpublished opinions has led to decisions that are contradictory, unclear, and arbitrary when compared to unpublished opinions with similar facts.<sup>194</sup> In turn, variations in how courts accord weight to unpublished opinions create hardships for attorneys who practice in more than one state or federal circuit.<sup>195</sup> Even with FRAP 32.1, local circuit rules remain in place for unpublished opinions issued prior to January 1, 2007, creating date-dependent inconsistencies.<sup>196</sup> FRAP 32.1 also does not state how each circuit must treat the opinion once it is cited,<sup>197</sup> which leaves prominent inconsistencies in the treatment of unpublished opinions throughout the jurisdictions. A rule requiring courts to give unpublished opinions deference similar to administrative law's *Skidmore* deference would bring uniformity across jurisdictions, thereby removing the hardship attorneys face in (1) guessing how courts will treat an unpublished opinion or (2) handling inconsistencies when practicing across different states or jurisdictions. Uniformity also may prevent forum shopping or inconsistent results, such that an unpublished opinion decided prior to

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194. See, e.g., *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001) (decision was contrary to three prior unpublished decisions); *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002) (decision was contrary to two prior unpublished decisions and majority declined to even consider the opinions).

195. Wilson, *supra* note 186.

196. FED. R. APP. P. 32.1(a)(ii).

197. REPORT, *supra* note 11, at 5.

January 1, 2007 could be cited in one jurisdiction but not another, or it could be given more weight in one state over another.<sup>198</sup>

*D. Guidance for Attorneys*

Currently, attorneys must guess how courts will treat unpublished opinions, even after FRAP 32.1. With *Skidmore* type deference based on the above four factors, an attorney can evaluate an unpublished opinion while assessing her client's case and determine whether the court will give the case persuasive value or not. By looking at (1) whether the facts are indistinguishable; (2) whether the issuing court is the same or a controlling court; (3) whether the question of fact or law is unique and not spoken to in a published opinion; and (4) all the other factors that give the opinion the power to persuade, the attorney has a firm basis to assess the legal effect of an unpublished opinion.

*E. Judicial Accountability and Judicial Efficiency Concerns: A Good Balance*

Giving *Skidmore* deference to unpublished opinions will both hold judges accountable to proceed diligently and carefully in the opinion writing process and also relieve concerns that judges can no longer rely on the efficiency of unpublished opinions. The Code of Judicial Conduct requires that judges perform their duties diligently.<sup>199</sup> Being too busy or overworked is not a defense to ethical violations, sanctions, or discipline for attorneys, and should not be so for judges either: “[a] lawyer who failed to perform assiduously because he was too busy would have that excuse fall on deaf ears.”<sup>200</sup> Relying on no-citation rules, or the ability to flatly ignore unpublished citations once cited, allows judges to “deliver second hand justice.”<sup>201</sup> Judges are not ashamed to admit that unpublished opinions are “written in loose, sloppy language” by law clerks.<sup>202</sup> Only by requiring recognition and consideration of these opinions will judges

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198. Wilson, *supra* note 186.

199. David S. Caudill, *Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy*, 62 WASH. & LEE L. REV. 1653, 1662 (2005).

200. *Id.* at 1662 (quoting Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience of an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1222 (2004)).

201. *Id.*

202. *Id.* at 1666.

be forced to take the minimal level of care that justice requires in writing their opinions.

Nevertheless, as long as certain state courts or federal circuits are overburdened, such as the Ninth Circuit, judges are arguably pigeonholed into the practice of issuing the bulk of their opinions without the careful, time consuming deliberation and consideration that published opinions require.<sup>203</sup> The fourth prong—all the other factors that give the opinion the power to persuade, if not the power to control—can relieve the concern that loosely written opinions will be given inappropriate deference by the courts. The key in *Skidmore* deference is that respect is given to a decision when that decision is “entitled to respect” and not otherwise.<sup>204</sup> If an unpublished opinion is not entitled to respect, it will not meet the requirements and will not have the power to persuade.

Courts should employ a uniform rule requiring a *Skidmore* type deference that gives unpublished opinions respect when due based on the previously discussed four factors: (1) if the facts are indistinguishable; (2) if the unpublished opinion is issued by the same or a controlling court; (3) if the opinion addresses a unique question of law or fact not addressed in published opinions; and (4) all those other factors which give it power to persuade, if lacking power to control. Such a rule would bring uniformity to the treatment of unpublished opinions across federal circuits, would give strong guidance to attorneys in assessing their cases, and would balance the concerns of judicial efficiency and judicial accountability.

## V. SOME PRACTICAL IMPLICATIONS

Unfortunately, under the current system, courts do not exercise a *Skidmore* type deference toward unpublished opinions. No uniform rule currently exists mandating how state courts or federal circuits are to treat unpublished opinions and, therefore, attorneys have no guidance on their ethical duties in regard to unpublished opinions. During FRAP 32.1’s comment period, many of the grave concerns regarding no-citation rules centered on their practical effect on attorneys.<sup>205</sup> This section discusses the following: (A) why attorneys want to use unpublished opinions; (B) whether attorneys can

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203. *Id.* at 1662.

204. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

205. Caudill, *supra* note 199, at 1654.

competently represent their clients either under no-citation rules or without guidance in predicting how unpublished opinions will be used; (C) challenges to diligent representation of clients in relation to unpublished opinions; (D) the appearance of frivolous claims when an attorney is unable to cite to unpublished opinions; (E) attorneys' obligations to cite negative unpublished opinions; and, finally, (F) whether the inability to cite to unpublished opinions violates a criminal defendant's due process rights or right to effective assistance of counsel.

A. *Why Do Attorneys Want to Use Unpublished Opinions?*

Evidence has shown that barring citation does not in fact prevent the use of unpublished opinions; rather, it merely changes the way unpublished opinions are used by attorneys.<sup>206</sup> Especially in the assessment of cases, attorneys look to unpublished opinions in making important litigation decisions.<sup>207</sup> One of the main rationales for not allowing the use of unpublished opinions as precedent is that even if the decision was correct, dicta or the reasoned language in the opinion was incorrect.<sup>208</sup> However, “[w]hen a lawyer cites an unpublished opinion, it is less likely to be because of its language than because the facts of that case are closer to those in the case before the court than are the facts of any case decided with a published opinion.”<sup>209</sup> It therefore follows that, if a published opinion was on point and factually indistinguishable, it is likely either the case would not be on appeal in the first place or the lawyer would rather cite the published opinion.<sup>210</sup>

Only when an unpublished opinion speaks where published opinions do not, will a lawyer really want to use the opinion. This may be why lawyers, in general, are strongly opposed to no-citation rules.<sup>211</sup> Despite the plethora of published opinions that exist in the body of current caselaw, many federal circuit judges admit that there are often too few precedents directly on point, making it difficult to decide a case on appeal.<sup>212</sup> “When a lawyer finds one of those few

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206. Shuldberg, *supra* note 9, at 563.

207. *Id.*

208. Barnett, *supra* note 29, at 19 & n.83.

209. *Id.* at 18.

210. *Id.* at 20.

211. *Id.* at 21.

212. *Id.* at 18.

precedents on point, why shouldn't she be allowed to tell the court about it?"<sup>213</sup>

Although lawyers are now no longer prohibited from bringing unpublished opinions to the attention of the court in federal circuits which were decided after January 1, 2007,<sup>214</sup> state courts are still free to promulgate their own rules of court regarding unpublished state court decisions. Furthermore, local rules and circuit rules still govern unpublished opinions prior to January 1, 2007.<sup>215</sup> No-citation rules are still a real issue that lawyers face. While distinctions between published and unpublished opinions remain and rules demanding differential treatment of each persist, attorneys face serious ethical dilemmas.

### *B. Can Attorneys Provide Competent Representation Under No-Citation Rules?*

No-citation rules may compromise an attorney's ability to competently and effectively represent a client, either at trial or on appeal.<sup>216</sup> Model Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct (Model Rules) state that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>217</sup> Such competent representation includes "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."<sup>218</sup> Model Rule 1.1 is the most general and basic ethical rule for attorneys.<sup>219</sup> No-citation rules prevent attorneys from accessing and bringing to the attention of the court an entire body of caselaw on behalf of their clients.<sup>220</sup>

Now that many jurisdictions have banned no-citation rules, attorneys may be subject to ethical violations of Model Rule 1.1, or even claims of malpractice or negligence, by failing to research or use

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213. *Id.*

214. FED. R. APP. P. 32.1.

215. FED. R. APP. P. 32.1(a)(ii).

216. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 419 (2005).

217. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

218. *Id.* at R. 1.1 cmt. 5.

219. Sullivan, *supra* note 216, at 433.

220. *Id.*

unpublished opinions on behalf of a client.<sup>221</sup> Competent representation will now require inquiry into and analysis of the factual and legal elements of unpublished opinions as well as published opinions.<sup>222</sup>

Furthermore, under FRAP 32.1, even though federal circuits must allow citation to unpublished opinions, attorneys must guess as to the potential authority and precedential value the court will give, or not give, the unpublished opinion.<sup>223</sup> It is tenuous at best to expect an attorney to be competent in a legal system which expects her to predict outcomes of controversies when the cases most factually similar have an unusually indeterminate status.<sup>224</sup> On the other hand, ethical duties are often construed in accordance to the conventions and practices of most lawyers and, if most attorneys face this same dilemma, then failing to utilize unpublished opinions might not be considered a violation of the requirement of competence under the Model Rules.<sup>225</sup>

*C. Are Attorneys Able to Provide Diligent Representation in the Face of No-Citation Rules?*

Model Rule 1.3 states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>226</sup> This means that:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.<sup>227</sup>

Even in the face of a no-citation rule, when counsel knows of an unpublished decision on point and favorable to her client, the restraint the court is asking her to use in ignoring that decision may be unreasonable in terms of representation for her client.<sup>228</sup> Although an attorney is only required to take “lawful and ethical” measures to vindicate a client’s cause or endeavor, an attorney may feel placed in

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221. *Id.* at 436.

222. *Id.*

223. Caudill, *supra* note 199, at 1661.

224. *Id.* at 1662.

225. *Id.*

226. MODEL RULES OF PROF’L CONDUCT R. 1.3.

227. *Id.* at R. 1.3 cmt. 1.

228. Sullivan, *supra* note 216, at 428.

an ethical bind between facing sanctions and allowing her client to lose under a factual situation entirely similar to that of another prior successful litigant. An attorney's natural inclination is to advocate for her client, but no-citation rules impose sanctions on attorneys if they bring to the court's attention its own or another court's view of an issue that such court had designated "unpublished."<sup>229</sup> Sanctions seem particularly inappropriate considering that one of the prevalent original rationales for no citation rules included fairness to attorneys by avoiding the burden resulting from having to read additional cases.<sup>230</sup> Thus, there is a problem in assigning blame to the attorneys; rather, we must look to why attorneys desire to cite to unpublished opinions on behalf of their clients, especially when no published opinions are on point.<sup>231</sup>

*D. Can an Attorney Argue Points Based on Unpublished Opinions Without Bringing a Frivolous Claim?*

Model Rule 3.1 states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."<sup>232</sup>

In order to demonstrate a good faith basis for a claim, an attorney must be able to alert the court to the basis for their arguments.<sup>233</sup> Without this ability, the attorney's case collapses when the judge asks the almighty question "What is the basis for your argument?" or "Isn't the law well-settled against your claim, counsel?" Although counsel may be well aware of times when the court has ruled alternatively or used reasoning favorable to his client, the attorney has two options: cite the case and face sanctions, or admit he has no basis and face another sanction for violating Rule 3.1. Although the comments of the Model Rules recognize that "in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change,"<sup>234</sup> no-citation rules prevent an attorney from bringing to the court's attention ways in

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229. *Id.* at 430-431.

230. *Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 589 n.5 (Cal. Ct. App. 2001).

231. *Sullivan*, *supra* note 216, at 431.

232. MODEL RULES OF PROF'L CONDUCT R. 3.1.

233. *Sullivan*, *supra* note 216, at 434.

234. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 1.

which the law may not be clear or static, merely because the court treated the issue in different circumstances in unpublished opinions. Therefore, it seems nearly impossible for the attorney to take the risk to make the arguments based on unpublished opinions in the first place.

*E. Does an Attorney Ethically Have to Cite an Unpublished Opinion Contrary to His or Her Position in Jurisdictions Where No-Citation Rules are Banned?*

Model Rule 3.3 states that “[a] lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel,”<sup>235</sup> meaning that the attorney “has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party.”<sup>236</sup> The underlying rationale is that the court needs to be aware of the properly applicable legal premises to the case.<sup>237</sup> For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys *must* cite to unpublished opinions if those opinions are directly adverse?

Although unclear, the word “authority” in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as “authority.” Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to “directly adverse authority in the *controlling jurisdiction*.”<sup>238</sup> Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite to it. An attorney’s obligation to cite to an unpublished opinion adverse to her client’s opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.<sup>239</sup>

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235. *Id.* at R. 3.3(a)(2).

236. *Id.* at R. 3.3 cmt. 4.

237. *Id.*

238. *Id.* (emphasis added).

239. *See, e.g.,* Sullivan, *supra* note 216, at 436.

*F. Is Ignoring Unpublished Opinions in Criminal Cases a Violation of the Constitution?*

When criminal defendants are on trial, there are concerns greater than an attorney's ethical duties, such as a defendant's constitutional right of due process and right to counsel.<sup>240</sup> When a criminal defendant's counsel is unable to present an argument based on a favorable unpublished decision, that defendant may claim that his due process rights have been violated or that he had ineffective assistance of counsel.<sup>241</sup>

In *Weatherford v. State*,<sup>242</sup> the defendant appealed his conviction from an Arkansas trial court for manufacturing methamphetamine.<sup>243</sup> On appeal, the defendant sought to rely on an unpublished opinion to support an argument of insufficient evidence to convict. Unpublished opinions on point not only affirmed convictions based on factors that were not present in his case but also reversed convictions in cases similar to his based on insufficiency of the evidence.<sup>244</sup> The defendant argued that his inability to rely on these factually similar cases denied him his federal and state guarantees of due process and effective assistance of counsel.<sup>245</sup>

Initially, the defendant argued that his due process rights were violated because inconsistent application of state law is impermissible and denial of the use of unpublished opinions lead to an inconsistent application of state law.<sup>246</sup> He further argued that the no-citation rule prevented the Arkansas court from deciding his case with a clear view of what constituted sufficient evidence because he was prevented from using unpublished opinions to discuss evidentiary sufficiency claims in methamphetamine manufacturing prosecutions.<sup>247</sup> The defendant also argued that the no-citation rule resulted in ineffective assistance of counsel.<sup>248</sup> Ineffective assistance of counsel claims may arise "when counsel's performance is impaired by the operation of a rule . . . that compromises counsel's ability to provide effective

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240. *Id.* at 437.

241. *Id.*

242. 101 S.W.3d 227 (Ark. 2003), *cert denied*, 541 U.S. 1053 (2004).

243. *Id.* at 229.

244. *Id.* at 232–33.

245. *Id.* at 234.

246. *Id.* at 231.

247. *Id.* at 229.

248. *Id.*

representation.”<sup>249</sup> The defendant argued that the no-citation rule prevented his counsel from showing that the evidence was insufficient at trial because his counsel was unable to demonstrate other instances in which courts held comparable evidence insufficient.<sup>250</sup>

The Arkansas Supreme Court upheld the no-citation rule and denied both of the defendant’s claims.<sup>251</sup> The United States Supreme Court denied certiorari<sup>252</sup> and has not addressed either the due process claims or ineffective assistance of counsel claims.<sup>253</sup>

Inconsistent application of law “is not purely theoretical.”<sup>254</sup> When attorneys are unable to demonstrate other instances in which courts have affirmed or reversed based on comparable evidence, attorneys are deprived of their primary method of argument.<sup>255</sup> It is not difficult to imagine, therefore, that counsel would be “ineffective.”<sup>256</sup> This then leads to inconsistent applications of law, and defendants—or other litigants—become subject to unequal or differentiated treatment when panels reach contrary results from the same set of facts.<sup>257</sup>

Attorneys continue to face real ethical conundrums even though FRAP 32.1 has prohibited no-citation rules in federal circuits. Attorneys are still bound to (1) local federal rules for unpublished opinions issued prior to January 1, 2007 and (2) the rules of the state courts in which they practice. This means that attorneys must carefully consider their ethical duties of: competence, diligence, candor toward the tribunal, the appearance of frivolous claims, and whether they are violating their duties of effective assistance of counsel owed to criminal defendants.

#### CONCLUSION

With the availability of unpublished opinions, the original reasons for no-citation rules no longer justify their continued existence. In the face of a long and heated debate, FRAP 32.1 is a step

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249. Sullivan, *supra* note 216, at 442–43.

250. *Weatherford*, 101 S.W.3d at 229.

251. *Id.* at 233–35.

252. *Weatherford v. Arkansas*, 541 U.S. 1053 (2004).

253. *See* Sullivan, *supra* note 216, at 439.

254. *Id.* at 441.

255. *Id.* at 443.

256. *Id.*

257. *Id.* at 442.

toward appropriately addressing the problems associated with unpublished opinions. Citation to unpublished opinions is extremely important. However, FRAP 32.1 is extremely limited and allows unpublished opinions only to reach the very bottom tier of precedent, which does not require courts to give unpublished opinions any particular weight.

Courts should employ a uniform rule requiring a *Skidmore* type deference that gives unpublished opinions respect when due based on four factors: (1) if the facts are indistinguishable; (2) if the unpublished opinion is issued in the same or a controlling court; (3) if the opinion addresses a unique question of law or fact not addressed in published opinions; and (4) all those other factors which give it power to persuade, if lacking power to control. Such a rule would bring uniformity to the treatment of unpublished opinions across federal circuits, give strong guidance to attorneys in assessing their cases, and balance the concerns of judicial efficiency and judicial accountability.

Attorneys face real ethical conundrums even though FRAP 32.1 has prohibited no-citation rules in federal circuits. Attorneys are still bound to (1) local federal rules for unpublished opinions issued prior to January 1, 2007 and (2) the rules of the state courts in which they practice. This means that attorneys must carefully consider their ethical duties of competence, diligence, candor toward the tribunal, the appearance of frivolous claims, and also consider whether they are violating their duties of effective assistance of counsel owed to criminal defendants. Until a uniform rule is in place, such as requiring a *Skidmore* type deference, attorneys will continue to face challenging ethical conundrums in relation to unpublished opinions.