THE ETHICAL CONUNDRUMS OF UNPUBLISHED OPINIONS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 to 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 M p,nwuit,

opinion.[3] I consulted the Ninth Circuit's rule on unpublished

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.[7]

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 Why are there unpublished opinions?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 What happens when, unlike in my situation, the unpublished opinion is *favorable* to a client?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This article first argues that courts should uniformly treat unpublished opinions with a deference analogous to *Skidmore*[8] deference in administrative law, giving the opinions persuasive value when due.[9] Second, this article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 Part I discusses the background and history of unpublished opinions.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 tmor f(p)- [illegible]

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[11] 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"[12] by publishing "only those opinions which are of general precedential value."[13] 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.[14] 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.[15] 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.[16]

About eighty percent of opinions are designated as unpublished, according to the judicial conference report of September 2005.[17] 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

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.[18] 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.[19] 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.[20] 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).[21] First, judicial efficiency would suffer because judges would feel pressure to carefully write their opinions.[22] Second, citation

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.[38]

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*.[39] *Anastasoff* held that the Eighth Circuit rule declaring unpublished opinions as not precedent[40] was unconstitutional under Article III "because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[41] Citing *Marbury v. Madison*,[42] the court determined that every judicial decision is, or should be, "a declaration and interpretation of a general principle or rule of law."[43] According to the *Anastasoff* panel, this "declaration of law" *must* be applied in all subsequent cases to parties who are similarly situated.[44] Those principles of precedent, it continued, were "well established and well regarded at the time this nation was founded."[45] 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.[46]

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

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.'"[47] *Anastasoff* refuted the notion that all opinions must be published.[48] 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.[49] However, *Anastasoff* contended that such a pronouncement by the court should "have nothing to do with the authoritative effect of any court decision."[50]

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."[51] 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."[52] 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."[53]

Although the three-panel decision was later reheard and vacated *en banc*,[54] 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

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which it felt was "served by taking the time to make the precedential opinions [it does] write as lucid and consistent as humanly possible."[67]

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."[68]

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."

any regard to *stare decisis* or the opinion's status as precedent, the decisions must be able to persuade on their own argumentative merits.[76] 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.[77] 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.[78] 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 .2195 ldi6(own 00004 Tc0.06to(0 gen sevinally)- how recepgard to)]

(FRAP) 32.1, many federal circuit courts also had similar rules.[81] 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.[82] 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."[83] Other courts allow use of unpublished opinions for their *precedential value*.[84] There are five states that allow citation for precedent.[85] Other states have murky rules involving unpublished opinions and are considered to sit "on the fence."[86] 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.[87]

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.[88] Twenty-one states allow citation to unpublished opinions, while twenty-five states forbid citation.[89] The trend has clearly been moving toward banning no-citation rules.[90] 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.[91]

However, there exists little argument over whether unpublished opinions should serve as *binding precedent*.[92] With the exception of

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.

Judge Arnold, most commentators, attorneys, and judges accept the proposition that unpublished opinions are not binding to any degree on the courts.[93] 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.[94] 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.[95] Another interesting practice exists when the issuing court determines an opinion should be published, but a higher court disagrees, and in turn *de*publishes that opinion.

II. D

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

A. The Depublication Process in the California Courts

The California Supreme Court began depublishing selected opinions of the California Courts of Appeal in 1971.[99] 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."[100] 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.[101] The unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding."[102] However, the actual decision of the courts of appeal stands unchanged.[103]

B. The Changing the Message Behind Depublication

Originally, it was understood by the legal community that depublication 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."[104] In the face of an opinion that did not warrant a grant or retransfer, the court would often resort to depublication 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."[105] Thus, depublication traditionally gave guidance to lawyers by implying "what the supreme court consider[ed] the law [was] *not*."[106]

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. Ct8

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appellate opinion opposing the depublished one, the depublished one is more likely than not to be 'followed.'"[128]

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

A. Background

The Advisory Committee on Appellate Rules proposed the recent rule 32.1 and published it for comment in August of 2003.[132] 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.[133] The advisory committee recommended that the Committee on Rules of Practice and Procedure (Committee) approve the rule in June 2004.[134] 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.[135] The studies "failed to support" any contention that the new rule would impose additional work on judges and lawyers.[136] 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."[137] 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."[138] 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.[139] 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."[140] The advisory committee "found the evidence overwhelming that unpublished opinions can be valuable source[s] of 'insight' and 'information.'"[141]

Unpublished opinions may be helpful to courts, especially in addressing cases which have similar fact patterns.[142]

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.[143] Despite the rules against citing unpublished opinions, both lawyers and judges regularly read them, and this also signified their value.[144]

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."[145] 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.[146] 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.[147]

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.[148]

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.[149] If they were truly "worthless" opinions, unpublished opinions likely would not be cited by attorneys, even in circuits that forbid such citation.[150] The Report

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.[151]

as prisoners, the poor, the middle class, and parties appearing pro se.[159]

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.[160] 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."[161]

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.[162]

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.[163]

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."[164] 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

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 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."[175]

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.[176]

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

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.*[179] 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."[180] 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."[181]

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

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.[190] 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

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.[194] 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.[195] Even with FRAP 32.1, local circuit rules remain in place for unpublished opinions issued prior to January 1, 2007, creating date-dependent inconsistencies.[196] FRAP 32.1 also does not state how each circuit must treat the opinion once it is cited,[197] 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*

January 1, 2007 could be cited in one jurisdiction but not another, or it could be given more weight in one state over another.[198]

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.[199] 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."[200] Relying on no-citation rules, or the ability to flatly ignore unpublished citations once cited, allows judges to "deliver second hand justice."[201] Judges are not ashamed to admit that unpublished opinions are "written in loose, sloppy language" by law clerks.[202] Only by requiring recognition and consideration of these opinions will judges

198. Wilson, *supra* note 186.

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.[203] 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.[204] 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.[205] This section discusses the following: (A) why attorneys want to use unpublished opinions; (B) whether attorneys can

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

precedents on point, why shouldn't she be allowed to tell the court about it?"[213]

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,[214] stats

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

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.[223] 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.[224] 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.[225]

C. Are Attorneys Able to Provid

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."[229] 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.[230] 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.[231]

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

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.

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.[240] 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.[241]

In *Weatherford v. State*,[242] the defendant appealed his conviction .0847 T1pable -0.78006 Tcfro

representation."[249] 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.[250]

The Arkansas Supreme Court upheld the no-citation rule and denied both of the defendant's claims.[251] The United States Supreme Court denied certiorari[252] and has not addressed either the due process