

Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor

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I. INTRODUCTION

One of the greatest jurists of our time, Oliver Wendell Holmes, Jr., described what he meant by the law as “[t]he prophecies of what the courts will do in fact, and nothing more pretentious”² Attorneys

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² Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1887).

[T]he command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then is

who practice before the federal courts of appeals are in the business of predicting what the courts will “do in fact” by analyzing cases decided in the past—cases that make up the body of law, both binding and persuasive, known as “precedent.”³ American jurisprudence is rooted in the doctrine of stare decisis, by which attorneys render reasoned prophecies about future court decisions by analyzing opinions from days gone by.⁴

prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Id. at 457. In his essay, Holmes articulated what is now known as the “predictive theory of law.” See BLACK’S LAW DICTIONARY 1216 (8th ed. 2004); see also LLEWELLYN, *infra* note 3, at 82.

³ See KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 5-6 (Michael Ansaldi, trans., Paul Gewirtz ed., 1989).

It is almost a sociological necessity . . . for a precedent system of some sort to arise in situations where the legislature has given no directives (or when those directives are overtaken by changing circumstances and the conflicts they engender). Judges must be economical with their energies. They all find it hard to decide difficult cases. It is much easier to follow an earlier decision. Also, a wise judge is held in high regard. His decisions linger in the mind, and other judges feel compelled to give a like judgment in a like case. Besides this, there is that remarkable, widespread basic sense of justice which requires that like cases be treated alike. Be that as it may, the upshot is that, at a minimum, some kind of precedential law must arise once there are professional judges and written records, and then add to that professional lawyers, and then the modern industrial state. Precedent systems, though, can be rigid or relaxed, fixed or fluctuating, regulated or unregulated. . . . In any event, this process was substantially furthered by the introduction of written pleadings in the 16th century—soon followed by a requirement that the specific point at issue be unalterably set before trial. Once this happened, a court’s opinions could be read with reference to definite fact situations, thereby making the scope of precedent ascertainable with greater precision than before. Toward the end of the sixteenth century the system of “Reporters”—that is, printed collections of holdings and opinions—also began to take on great significance. . . . Even so, it was not until the close of the eighteenth century that the now-orthodox theory of truly binding precedent began to be worked out and regulated by appellate review.

Id. For one definition of “precedent,” see *infra* note 189.

⁴ LLEWELLYN, *supra* note 3, at 81-82.

[Lawyers] play a game of chance, in which the deciding factor is the relevant court’s degree of insight into the new facts. For a lawyer to acknowledge this means attaining a far greater measure of legal certainty. For now he will adjust his predictions, his interpretations of prior decisions, and his arguments to accord with a theory that corresponds to fact rather than one that floats in thin air. This is true not only of litigation but also of advising clients about to enter into legal transactions. To the extent he can *predict* the insight a judge will have, a lawyer will be able to foresee that certain *conceivable* results will probably, in actual fact, not ensue. He fruitfully marries a knowledge of decision making’s “normative” side to the insights acquired from legal sociology and thereby attains a higher level of *predictability*. One must recall over and over that legal certainty is part of

Ironically, at this juncture of the twenty-first century, some eighty percent⁵ of the decisions issued each year by the thirteen federal courts of appeals are designated as “unpublished” or “nonprecedential.”⁶ Notwithstanding the traditional role of *stare decisis* in the development of American common law,⁷ most of the United States Courts of Appeals at least discourage, if not outright prohibit, the citation of “unpublished” or “nonprecedential” written opinions in appellate briefs and oral

the world of “What Is,” not the world of “What Ought to Be,” and that sociological factors are therefore particularly relevant.

Id. (citations omitted).

⁵ Table 1.6, U.S. Courts of Appeals - Type of Opinion or Order Filed in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs [hereinafter Table 1.6], available at <http://www.uscourts.gov/judicialfactsfigures/table1.06.pdf> (last visited Feb. 27, 2005). In the fiscal year ending September 30, 2003, the federal courts of appeals, excluding the Federal Circuit, terminated 27,009 cases, of which 79.9 percent were designated as unpublished. *Id.*; Table S-3, U.S. Courts of Appeals - Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submissions on Briefs During the 12-Month Period Ending September 30, 2003 [hereinafter Table S-3], available at <http://www.uscourts.gov/judbus2003/tables/s3.pdf> (last visited Feb. 27, 2005). The national average masks a range as low as 9.2 percent for the First Circuit to a high of 91.2 percent for the Fourth Circuit. *Id.* By comparison, the percentage of unpublished decisions issued by the federal circuits in fiscal year 1989 was 64.7. See Table 1.6, *supra*. The percentage topped out at 80.5 percent in fiscal year 2002. Since 2000, the overall annual percentage has hovered within a half percentage point of 80 percent. *Id.*

⁶ “Unpublished” does not mean what it purports to mean. See, e.g., William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y. L. SCH. L. REV. 429, 432 (2002-03) (noting that “vast numbers of what lawyers call ‘unpublished opinions’ are not really unpublished at all”). In fact, “unpublished” means whatever the issuing court so designating an opinion wants it to mean. For example, shortly after West initiated publication of the Federal Appendix in September 2001, the First Circuit redefined the term as follows:

A published opinion is one that appears in the ordinary West Federal Reporter series (*not including West’s Federal Appendix*) or as a recent opinion intended to be so published. All slip opinions released by the clerk’s office are intended to be so published unless they bear the legend “Not For Publication” or some comparable phraseology.

1ST CIR. R. 36(b)(2)(F) (emphasis added) (interim amendment effective Sept. 24, 2001), available at http://www.bostonbar.org/pw/bbaweek/v4i5_100101.htm (last visited March 30, 2005); see 8TH CIR. R. 28A(i) (“Unpublished opinions are decisions which a court designates for unpublished status.”); 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, 3 & n.10 (2002) (citing and discussing First Circuit’s interim rule); see also *infra* note 24 (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 186 (Penguin Books ed. 1998)).

⁷ See Richard B. Cappali, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 761 (2003) (“To label [opinions] nonprecedential is to deprive them of *stare decisis* effects.”); Mills, *supra* note 6, at 432 (“The rules restricting citation of unpublished opinions are intended as enforcement mechanisms for negating their precedential value.”).

arguments.⁸ Four circuits have restrictive rules that strictly prohibit the citation of “unpublished” opinions, except in “related cases” for purposes such as res judicata, collateral estoppel, double jeopardy, or law of the case.⁹ Three circuits have nonrestrictive rules that neither prohibit nor discourage litigants from citing “unpublished” opinions in briefs or oral argument.¹⁰ The other six circuits¹¹ have adopted rules including “discouraging words,”¹² which expressly disfavor citation of unpublished opinions except in related cases and otherwise only when “no published opinion . . . would serve as well.”¹³

At the same time, federal circuit courts expect attorneys appearing before them to comply with the ethical duty of candor, as expressed in ethical standards, procedural rules, and substantive law. As

⁸ See Appendix I (table summarizing current publication and citation rules for each federal circuit). Some circuits flatly prohibit citation of opinions designated as “unpublished” or “nonprecedential.” Others expressly disfavor their citation, yet permit them to be cited for their persuasive authority if no precedential opinion serves as well. *Id.* For comparable summary information concerning citation rules and practices in the federal circuits in 1985, see Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 60-65, Tables 8 & 9 (Federal Judicial Center 1985), available at 1985 WL 71560.

⁹ The Second, Seventh, Ninth, and Federal Circuits are deemed to have restrictive citation policies, also known as “no-citation” rules. See Stienstra, *supra* note 8, at 26, Table 1 & n.2 (“A circuit’s citation policy is defined as restrictive if citation is permitted only in related cases or to support a claim of res judicata or collateral estoppel, or the law of the case.”) In 1985, seven circuits maintained restrictive policies, including these four plus the First, Eighth, and District of Columbia Circuits. *Id.* at Table 1.

¹⁰ The Third, Fifth, and District of Columbia Circuits are deemed to have nonrestrictive citation policies. See *id.* at 26 n.2 (“Circuits that allow citation if the unpublished case is relevant or if no better precedent is available are not considered to have a restrictive citation policy.”) The Fifth Circuit does not consider unpublished opinions issued on or after January 1, 1996 to be precedential, but they may be freely cited for their persuasive value. 5TH CIR. R. 47.5.4. Unpublished opinions issued before January 1, 1996 are deemed to be precedential, but the court discourages their citation except in related cases. See 5TH CIR. R. 47.5.3. The District of Columbia Circuit has abandoned its previously restrictive policy, but only for opinions issued on or after January 1, 2002. See D.C. CIR. R. 28(c)(1)(B).

¹¹ The First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits disfavor citation of unpublished opinions, but permit their citation if no published opinion would serve as well.

¹² See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. PRAC. & PROCESS 473 (2003) (“Although nine of the thirteen circuits now allow citation of their unpublished opinions, all nine discourage the practice; they all have language in their rules stating that such citation is ‘disfavored’”); *id.* at 497 (defending rules discouraging but permitting citation of unpublished opinions); see also Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 10-11, available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (discussing and rejecting Professor Barnett’s suggested amendment to proposed FED. R. APP. P. 32.1 that would allow local rules “discouraging,” but not outright prohibiting, citation of nonprecedential opinions).

¹³ *E.g.*, 4TH CIR. R. 36(c).

officers of the court, attorneys are expected to engage in professional conduct that protects and defends the integrity of the judicial system, even if that means compromising their ethical duties as advocates for their clients.¹⁴

This article explores the inherent conflict between federal circuit rules prohibiting or discouraging citation of “unpublished” opinions, on the one hand, and the universally acknowledged standards of professional conduct requiring attorneys to fully research and disclose relevant legal authority, on the other. The premise of the article is that nonuniform circuit rules restricting attorneys from citing the great majority of federal appellate opinions undermine the integrity of our judicial system by greatly diminishing the predictability of circuit court decisions. The resulting uncertainty is one significant cause of the increasing proliferation of federal appeals,¹⁵ which negates (and arguably outweighs) any benefits that may have accrued since no-citation rules were originally proposed and adopted during the 1970s.

What this article does not address, except by way of background, is whether restrictive citation rules are unconstitutional. Nor, for that matter, does the article address whether a federal appellate court should assign precedential or persuasive value to its unpublished opinions.

¹⁴ See *infra* notes 94-101 and accompanying text.

¹⁵ See Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures, *Recommendations for Change*, 67 F.R.D. 195 (1975).

The studies of the Commission show four major consequences of the failure of the federal judicial system to provide adequate capacity for the declaration of national law. In a very real sense, however, each of the four is but a different facet of the same phenomenon: unnecessary and undesirable uncertainty. For the judge, uncertainty is the lack of a body of precedents adequate for confident decision; for the practitioner, it is a lack of stability sufficient to provide predictability adequate for effective service to clients and society. Some uncertainty is, of course, inevitable. No lawyer steeped in the tradition of case-by-case development of the law, or sensitive to the inevitable problems of applying even a settled rule to a given fact situation, would pursue the chimera of certainty as an absolute. Moreover, we would not, [even] if we could, accept certainty at the price of stifling new wisdom and needed change. Yet, to recognize the inevitability of some uncertainty does not require that subordination of clarity and stability which results in wasteful proliferation of litigation and threatens public as well as private interests. A prudent balance must be struck.

Id. at 217; see also 1 WILLIAM CRANCH, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES iii (Frederick C. Brightly, ed., 3d ed. 1911) (“Whatever tends to render the laws certain, equally tends to limit [judicial] discretion; and perhaps, nothing conduces more to that object than the publication of reports”), quoted in Howard Slavitt, *Selling the Integrity of The System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv. C.R.-C.L. L. Rev. 109, 109 & n.1 (1995).

These critically important issues are well beyond the scope of this article and must wait until another day.

Others have addressed the constitutional arguments against “no-citation” rules raised by Judge Richard Arnold¹⁶ in *Anastasoff v. United States*,¹⁷ which held that the Eighth Circuit’s local rule restricting the citation of unpublished decisions as precedent exceeded the limited powers conferred by Article III of the United States Constitution.¹⁸ A number of observers have criticized Judge Arnold’s reasoning, but still others have acknowledged additional constitutional implications, notably with respect to the Due Process Clause¹⁹ and the First Amendment.²⁰ The principal opponents in the debate have been the legal academy on the one hand²¹ and several federal circuit judges²² on the other.

¹⁶ Judge Arnold did not live to see the outcome of the constitutional debate. He died on September 23, 2004, from complications related to medical treatment for lymphoma. On October 16, 2004, he was posthumously awarded the Lewis F. Powell, Jr. Award for Professionalism and Ethics by the American Inns of Court. He had been selected to receive the 2004 award earlier in the year, before his untimely death. The award was presented at the annual American Inns of Court Celebration of Excellence. *See Judge Richard Arnold to receive the 2004 American Inns of Court Lewis F. Powell, Jr. Award*, at <http://www.innsofcourt.org/contentViewer.asp?breadCrumb=6,123,125,1366> (last visited Feb. 27, 2005).

¹⁷ 223 F.3d 898, *vacated as moot on reh’g*, 235 F.3d 1054 (8th Cir. 2000).

¹⁸ *Id.* at 905.

¹⁹ See, e.g., Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 215, 217 (1992) (observing that the due process argument rests upon the right to fair trials and fair tribunals); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS, 175, 193-95 (2001) (acknowledging that citation restrictions present legitimate due process issues); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695, 722, 731 (2001) (concluding that federal circuit courts’ no-citation rules violate procedural due process); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 223 (2001) (concluding that limited publication rules violate the Fifth Amendment’s due process and equal protection guarantees).

²⁰ See, e.g., David Greenwald & Frederick A.O. Schwartz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1161-66 (2002); Mark D. Hinderks & Steve A. Leben, *supra* note 19, at 215-17; Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 780-83 (2004); Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1227-30 (2003).

²¹ See, e.g., Barnett, *supra* note 12; Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004). Some federal circuit judges have sided with the legal academy in support of efforts to reform no-citation rules. See, e.g., Richard S.

Scholarly discourse has also addressed the pros and cons of “no-citation” rules for the development of a consistent body of substantive law or “precedent” that applies with equal force to all litigants within each circuit.²³

The article concludes that rules restricting citation of opinions issued by the federal courts of appeals are an anachronism. The reasons originally cited in justification of no-citation rules have long since become moot with the astounding technological innovations of the last two decades. Moreover, their continued existence and threatened enforcement by the federal circuits contradict longstanding norms and values governing attorneys’ professional conduct. When local rules purport to restrict attorneys from citing unpublished opinions, they must yield to the conflicting duty of candor imposed by standards of ethical conduct, rules of procedure, and substantive law. The attorney’s duty of candor to the court and the duty to uphold the integrity of the judicial

Arnold, *The Federal Courts: Causes of Discontent*, 56 S.M.U. L. REV. 767, 777-80 (2003); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Testimony of Judge Edward R. Becker, Transcript of 2004 Advisory Committee Hearing, *infra* note 68, at 246-47 (supporting proposed FED. R. APP. P. 32.1); Letter from Judge Frank H. Easterbrook, Seventh Circuit Court of Appeals, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Feb. 13, 2004) (supporting proposed FED. R. APP. P. 32.1), available at http://www.secretjustice.org/pdf_files/Comments/03-AP-367.pdf (last visited Feb. 27, 2005).

²² See, e.g., Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 42 (June 2004) (“Because unpublished dispositions tend to be thin on the facts, and written in loose, sloppy language . . . they will create a veritable amusement park for lawyers fond of playing games.”); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193 (1999) (“adamantly” opposing citation of unpublished opinions); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 914 (1986) (“[H]ard as it may be for academia to believe, the nonprecedent is really not a precedent, and the rule [limiting citation of unpublished opinions] works as intended.”); see also Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1296-97 (2004).

Broadly speaking, federal appellate judges commenting on the proposed [R]ule [32.1] doubt the need for a uniform rule, forecast greater use of summary dispositions if the rule is adopted, differentiate unpublished opinions from other non-binding sources that may be cited, and vigorously dispute the proposition that citation can be divorced from precedential status.

Id. (footnotes omitted).

²³ See Pearson, *supra* note 22, at 1306 (“The courts of appeals should permit the citation of all opinions, abbreviated or otherwise, for whatever they may be worth in the “free market” of precedents.”); Leane C. Medford, Bruce H. White & William L. Medford, *The Continuing Controversy over the Precedential Effect of Unpublished Opinions*, 20 AM. BANKR. INST. J. 26, 27 (Nov. 2001) (predicting that the controversy is likely to continue until the United States Supreme Court puts it to rest). See generally Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R. 5TH 499 (2003 & Supp. 2005) (collecting cases and other legal authorities).

system outweigh the duty to comply with local circuit rules barring citation of “unpublished” legal authority.

No-citation rules artificially impose fictional status on unpublished²⁴ opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld²⁵ that imposes an outmoded and unjustified double bind on the federal bar.

²⁴ “Publish,” as defined by BLACK’S LAW DICTIONARY 1268 (8th ed. 2004), means “[t]o distribute copies (of a work) to the public.” As many others have noted, the term “unpublished” is a misnomer – a legal fiction – because copies of all judicial opinions, unless sealed by the court, are distributed to the public to a greater or lesser degree. *See, e.g.,* Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 711 n.2 (2004) (concluding that the term “unpublished” is a misnomer). Some courts even provide access to “unpublished” opinions by subscription service. Even that method of access is no longer required as of December 17, 2004, when every federal circuit will be required to provide the public internet access to all its written opinions, whether designated for “publication” or not. *See infra* notes 257-62 and accompanying text.

The fiction of definitions is aptly illustrated by this passage from a familiar children’s book:

“I don’t know what you mean by ‘glory,’” Alice said [to Humpty Dumpty].

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean, neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master - that’s all.” Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again.

“They’ve a temper, some of them - particularly verbs: they’re the proudest - adjectives you can do anything with, but not verbs - however, *I* can manage the whole lot of them! Impenetrability! That’s what *I* say!”

“Would you tell me, please,” said Alice, “what that means?”

“Now you talk like a reasonable child,” said Humpty Dumpty, looking very much pleased. “I meant by ‘impenetrability’ that we’ve had enough of that subject, and it would be just as well if you’d mention what you mean to do next, as I suppose you don’t mean to stop here all the rest of your life.”

“That’s a great deal to make one word mean,” Alice said in a thoughtful tone.

“When I make a word do a lot of work like that,” said Humpty Dumpty, “I always pay it extra.”

“Oh!” said Alice. She was too much puzzled to make any other remark.

Lewis Carroll, *THROUGH THE LOOKING GLASS* 186 (Penguin Books ed. 1998).

²⁵ The more I think about the comments on Rule 32.1, the more I am struck by how strange the current system is. Unpublished opinions are the crazy uncle in the attic of the

II. THE SAGA OF “UNPUBLISHED” OPINIONS: KNOWING THE LAW OF THE LAND

In the late 1700s, nearly a century before Holmes described his understanding of the law in terms of pragmatic prophecies, Jeremy Bentham challenged a contemporary jurist’s representation that “[e]very man has the means of knowing all the laws he is bound by.”²⁶ Bentham both asked and answered the following rhetorical question, using language characteristic of the late eighteenth century, yet sounding a familiar note in the early twenty-first:

What way, then, has any man of coming at this [common law]? Only by watching [court] proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth. These proceedings [the judges] won’t publish themselves, and if anybody else publishes them, it is what they call a contempt of court, and a man may be sent to jail for it.²⁷

....

Counsellors, who have nothing better to do, watch these cases as well as they can, and set them down in their *note-books*, to make a trade of them; Some of them, to drive a penny, run the risk of being sent to jail, and publish their notebooks which they call reports. But this is as it happens, and a judge hears a case out of one of these report-books, or says it is good for nothing, and forbids it to be spoken of, as he pleases.

federal judiciary, and no-citation rules are the whispered instructions to party guests not to hurt the hosts’ feelings by mentioning that uncle. Memorandum from Patrick J. Schiltz to Advisory Committee on Appellate Rules, Re: Proposed Amendments to Federal Rules of Appellate Procedure Published for Comment in August 2003, at 97 (March 18, 2004), available at <http://www.nonpublication.com/schiltz.pdf> (last visited Feb. 27, 2005). “[U]npublished opinions have become the blind spot, the Bermuda Triangle of jurisprudence, the Twilight Zone where the Constitution ceases to exist, because the unpublished case is assumed to be comparatively unimportant, and is calculated to be the least likely to obtain Supreme Court review.” Letter to The Honorable Howard Coble, Chairman, Subcommittee on Courts, the Internet, and Intellectual Property, from Jonathan Lewin, Norfolk, Virginia (July 8, 2002) (urging legislation to remove “the shield of secrecy from unlawful judicial opinions” by allowing appellants to compel publication of decisions in their own cases), reprinted in *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong., 2d Sess., at 305-06 (2002), available at <http://judiciary.house.gov/legacy/80454.PDF> (last visited Feb. 27, 2005).

²⁶ Jeremy Bentham, *Truth versus Ashhurst; or, Law As It Is, Contrasted With What It Is Said to Be* (1792), reprinted in *THE WORKS OF JEREMY BENTHAM* 235 (1843) (citing BURROWS’ REPORTS, preface).

²⁷ *Id.* (citing BURROWS’ REPORTS, preface).

How should plain men know what is the law, when judges cannot tell what it is themselves?²⁸

. . . .

ObeY it we must: but, to obey it, must we not know it? And shall they whose business it is to make and obey it, be suffered to keep it from us any longer?²⁹

As Bentham and Holmes both acknowledged so long ago, the manner in which cases are actually decided best reflects the law in the practical sense of the word, not what judges declare the law to be in a sanitized minority of decisions selectively reported as “precedential.”³⁰ For judge-made law to have any practical value for actual or potential litigants, it must be made known to them;³¹ as a matter of jurisprudence,

²⁸ *Id.*

²⁹ *Id.* at 236.

³⁰ See, e.g., Cappali, *supra* note 7, at 768 (noting that “the true content of law” involving diverse factual settings “is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings.”); *id.* at 775 (stating that nonprecedent rules reverse the maxim that what a court does, not what it says, exemplifies the law); see also Letter from Stephen R. Barnett to The Honorable Samuel A. Alito, Jr., *Further Comments of Stephen R. Barnett On Proposed Federal Rule of Appellate Procedure 32.1 In Reply to Judge Kozinski*, at 4 (Feb. 17, 2004) [hereinafter *Further Comments of Stephen R. Barnett*], available at <http://www.nonpublication.com/barnettresponse321.pdf> (last visited Feb. 24, 2005). “[L]aw is not what judges say, but what they decide.” *Id.* (emphasis in original).

The maxim that what a court does exemplifies the law rather than what it says is attributed to the legal realism movement, “which pierces theory and bald axioms and exposes how judges actually behave.” Cappali, *supra* note 7, at 775 (citing Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 THE GREEN BAG: AN ENTERTAINING J. OF L. 17, 17 (2000)). Indeed, Oliver Wendell Holmes, Jr. has been credited with heavily influencing the American legal realist movement, and *The Path of the Law* has been called his most important contribution to the “seedbed.” See EVA H. HANKS ET AL., *ELEMENTS OF LAW* 512 (1994); see also *supra* note 2 and accompanying text (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1887)).

³¹ David Greenwald & Frederick A.O. Schwartz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1156-57 (2002).

Reasoned written opinions enable people to learn what the law is and to act in accordance with it. Reasoned written opinions also help resolve future disputes by providing precedents for decisions. . . . Those purposes—the derivation of the efficiencies that come from public reliance on precedent and from citation thereto—fully justify the production of written opinions at public expense.

Those purposes, however, are obviously thwarted when the opinion cannot be cited. In such instances, members of the public cannot reasonably rely upon the opinion as a guide for future conduct, nor can judges consider it as a guide for decision in later cases. . . . [N]oncitable opinions [are utterly

what the courts have done in the past must shape the *ratio decidendi* for resolving contemporary disputes.³²

Contrary to the doctrine of stare decisis, nearly all federal courts of appeals maintain explicit rules governing the issuance and citation of “unpublished” or “nonprecedential” opinions.³³ Adopted in the 1970s at the behest of the United States Judicial Conference,³⁴ circuit court rules distinguishing “published” from “unpublished” opinions have generated considerable controversy from the very beginning.³⁵ The practice originated in response to the dramatic caseload increases in the late 1960s and early 1970s, prompting administrative measures in an effort to stem the tide of new opinions in keeping with the number of circuit judgeships then authorized by Congress.

In 1972, the Judicial Conference³⁶ urged each circuit to adopt a “publication plan” for managing its caseload.³⁷ The publication plans

worthless] to the public at large. Taxpayers are well within their rights to ask why they are paying for them.

Id.

³² See *Further Comments of Stephen R. Barnett, supra* note 30, at 4. “As we all learned in the first weeks of law school, what judges say is only ‘dictum’; such words are to be distinguished from the ‘holding’ of a case, or the *ratio decidendi*, which alone is the law that is made.” *Id.*

³³ See Appendix I (table summarizing current publication and citation rules for each federal circuit).

³⁴ Stienstra, *supra* note 8, at 7 & n.13 (citing Reports of the Proceedings of the Judicial Conference of the United States (October 1972)).

³⁵ “Of the recent innovations, none has been more controversial than the practice of disposing of some cases without a published decision, a practice that has been adopted to some extent by all federal appellate courts.” *Id.* at 2.

³⁶ The Judicial Conference was initially established by Congress in 1922 as the Conference of Senior Circuit Judges to “serve as the principal policy making body concerned with the administration of the United States Courts.” Judicial Conference of the United States, available at <http://www.uscourts.gov/judconf.html> (last visited Feb. 24, 2005). The name was changed to the Judicial Conference of the United States in 1948. *Id.*; see 28 U.S.C.A. § 331 (2005). Among other things, Congress has charged the Judicial Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.” 28 U.S.C.A. § 331 (2005).

³⁷ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 8 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). In 1971, the Federal Judicial Center established the Advisory Council on Appellate Justice, whose members were lawyers, law professors, and judges. The Council began a study of appellate processes, and in 1973 it published its report, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice* (Federal Judicial Center 1973). The report “has been described as the ‘seminal document in the movement toward an official policy of limiting publication.’” Stienstra, *supra* note 8, at 7 & nn.14-15 (quoting Daniel N. Hoffman, *Nonpublication of Federal*

developed by the circuits over the next two years included rules governing citation of unpublished decisions; many of those provisions differed among the circuits.³⁸ At the time they were adopted, the well-meaning intention of “no-citation rules” was to avoid the perceived unfairness if well-financed institutional and corporate litigants were permitted to amass a large bank of unpublished opinions “not designated for publication.”³⁹ The perceived problem was that opinions “not designated for publication,” if citable, would operate to the disadvantage of infrequent litigants who might not have a feasible means of indexing and retrieving unpublished opinions.⁴⁰

Thus, by the mid-1970s, nearly all circuits⁴¹ had adopted explicit rules providing for written decisions to be designated either “for publication” or “not for publication.” Generally, the rules authorized the issuing panel or the judge authoring the opinion to decide whether a particular opinion should be published or unpublished,⁴² and some circuits adopted guidelines for judges to apply in making the determination.⁴³ Typically accompanying each circuit’s plan for

Appellate Court Opinions, 6 JUST. SYS. J. 405 (1981)). Among other recommendations, *Standards for Publication of Judicial Opinions* proposed four standards for determining whether to publish an opinion, as well as a model rule prohibiting citation of unpublished opinions. Stienstra, *supra* note 8, at 7-8. The proposed rule stated, “Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other material presented to the court.” *Id.* at 8 n.19 (quoting *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice* 23 (Federal Judicial Center 1973)).

³⁸ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 8 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

³⁹ Stienstra, *supra* note 8, at 8, 10 (noting concerns that attorneys with “abundant resources” or those appearing routinely before the appellate court (such as the U.S. Attorney’s Office) would have an unfair advantage if permitted to cite unpublished opinions).

⁴⁰ See, e.g., Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 12 (September 2004) (“No-citation rules may have been necessary to level the playing field in years past when access to unpublished opinions was limited to large firms or institutional entities . . .”), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

⁴¹ The exception was the Third Circuit.

⁴² See, e.g., 5TH CIR. R. 47.5.2 (stating that an “opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication.”); 6TH CIR. R. 206(b) (“An opinion or order shall be designated for publication upon the request of any member of the panel.”).

⁴³ See, e.g., 6TH CIR. R. 206(a) (addressing seven criteria to be considered by panels determining whether to designate an opinion for publication); 7TH CIR. R. 53(c) (providing that an opinion will be published if any one of six independent criteria is met).

managing the issuance of its opinions were stringent rules prohibiting appellate counsel, whether in briefs or oral argument, from citing opinions “not designated for publication.”⁴⁴

In the meantime, computer-assisted legal research was in its infancy. In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.⁴⁵ Over time, most “unpublished decisions” became increasingly accessible to attorneys who could afford to subscribe to one of the proprietary computer research services. Other specialized publishers of legal research materials also selectively disseminated unofficial reports of “unpublished” opinions for their subscribers.⁴⁶ Thus, the pragmatic limitations the courts had initially imposed on the public availability of “unpublished” paper opinions gradually lost hold in favor of the commercial publishers.

In September 2001, just as the online availability of unpublished opinions became nearly ubiquitous, West Publishing Company initiated production of a new reporter service. The Federal Appendix publishes federal circuit court opinions designated by the issuing court as “unpublished” or “nonprecedential.”⁴⁷ Initially, all federal courts of appeals except the Third, Fifth, and Eleventh Circuits granted West permission to reprint their “unpublished” opinions in bound volumes.⁴⁸

⁴⁴ See, e.g., 9TH CIR. R. 36-3(b) (providing that unpublished dispositions and orders “may not be cited to or by the courts of this circuit” except under specified circumstances). See generally Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 7-9 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168-72 (1978) (reviewing the history of limited publication/no-citation plans).

⁴⁵ Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 621 (2000).

⁴⁶ See, e.g., George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 479 (1988) (noting that specialized services unofficially publish opinions not designated for publication); see also, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 19, at 147 (Columbia Law Review Ass’n et al. eds., 17th ed. 2000). “Cases . . . are often published unofficially in topical compilations called ‘services,’ which appear in looseleaf form initially and sometimes are published later as bound volumes.” *Id.*; see *id.* at 343-48 (listing numerous frequently cited services).

⁴⁷ Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 259 (2002); see also Barnett, *supra* note 6, at 2-3 & nn.6-9.

⁴⁸ Brooks, *supra* note 47, at 260; Mills, *supra* note 6, at 444 (noting West’s stated policy to publish every “unpublished” opinion sent to publishers, omitting cases so

Not long after, the Third Circuit announced that its opinions would be made available to legal publishers for dissemination effective January 2, 2002.⁴⁹ In the four years since West initiated publication of the Federal Appendix, more than 117 volumes have been issued.

Thus began the controversy that, thirty years later, continues to generate heated commentary and debate among the judiciary, the academic community, and the federal bar.⁵⁰ Since the mid-1970s, circuit opinions “not designated for publication” have proliferated.⁵¹ Litigants began to challenge nonpublication and no-citation rules almost immediately after they were adopted.⁵² In 1975, the final report of the Hruska Commission⁵³ discussed the controversy and “fundamental problems” associated with no-citation policies, and suggested further study by the Judicial Conference.⁵⁴ As early as 1985, the Federal Judicial Center,⁵⁵ noting the increasing problems associated with

abbreviated as to preclude “a synopsis and at least one headnote”). Decisions published in the Federal Appendix are also available on Westlaw and Lexis.

⁴⁹ Barnett, *supra* note 6, at 3 & n.12 (quoting Third Circuit’s press releases dated Dec. 5, 2001 and Feb. 21, 2002).

⁵⁰ See generally Memorandum from Patrick J. Schiltz to Advisory Committee on Appellate Rules, Re: Proposed Amendments to Federal Rules of Appellate Procedure Published for Comment in August 2003, at 36-91 (March 18, 2004), available at <http://www.nonpublication.com/schiltz.pdf> (last visited Feb. 27, 2005) (summarizing public comments in response to proposed FED. R. APP. P. 32.1).

⁵¹ See Table 1.6, *supra* note 5 (illustrating increase in unpublished opinions issued annually by all federal circuits, from 12,394 in 1989 to 21,557 in 2003).

⁵² See, e.g., *Browder v. Dir., Dep’t of Corr.*, 434 U.S. 257, 258 n.1 (1978) (acknowledging, but not reaching, petitioner’s challenge to “the [constitutional] validity of the Seventh Circuit’s ‘unpublished opinion’ rule”).

⁵³ In 1972, Congress established the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures (commonly known as the Hruska Commission) to study problems concerning the federal appellate courts. The Commission held public hearings across the country in 1974-75, at which judges, attorneys, and law professors presented their concerns regarding the federal circuits’ limited publication plans and restrictive citation rules. See generally HEARINGS BEFORE THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, SECOND PHASE (Vols. I & II, 1974-75), cited in Stienstra, *supra* note 8, at 9 n.21.

⁵⁴ Stienstra, *supra* note 8, at 9-12 (citing *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change* 51 (1975)).

⁵⁵ The Federal Judicial Center was established in 1967 to “further the development and adoption of improved judicial administration in the courts of the United States.” 28 U.S.C.A. § 620(a) (2005). The Center is the arm of the federal judicial system devoted to research and education. Among its other specific statutory duties, the Center is directed to make recommendations about the operation and study of the federal courts, and to conduct and promote research on federal judicial procedures and court operations. 28 U.S.C.A. § 620(b)(1)-(2) (2005). By law, the Chief Justice of the United States Supreme Court chairs the Center’s Board. Its members also include the Director of the Administrative Office of the U.S. Courts and seven judges (including two circuit judges) elected by the Judicial Conference. 28 U.S.C.A. § 621(a)(1)-(3) (2005).

unpublished opinions, engaged in a comprehensive study of the practice and its effects on litigants.⁵⁶ In 1995, the American Bar Association issued a formal ethics opinion concluding that the citation of an unpublished opinion in disregard of a court's no-citation rule would amount to a violation of the ethical rules.⁵⁷

With the advent of the internet in the mid-1990s, commentators in the academic community predicted that technological innovation would undermine the original justifications for limiting citation of unpublished decisions.⁵⁸ In late 2001, the American Bar Association adopted a resolution declaring that the practice of prohibiting the citation of unpublished opinions is "contrary to the best interests of the public and the legal profession," and urged federal courts of appeals to permit

⁵⁶ See Stienstra, *supra* note 8.

⁵⁷ Rule 3.4(c) of the ABA Model Rules of Professional Conduct reads as follows:
A lawyer shall not:

.....

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]

MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2002).

A formal ethics opinion initially issued in 1994 and later revised and clarified in 1995 addressed the issue as follows:

Where, then, a court's rule of procedure contains a specific prohibition against citing an unpublished opinion, a lawyer who does so in that forum violates Rule 3.4.

In a jurisdiction which has a prohibiting rule a lawyer might ask permission of the court to cite an unpublished case. However, until such permission has been expressly granted, the lawyer should scrupulously refrain from presenting the unpublished decision to that court.

On the other hand, there is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not For Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such an opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995).

⁵⁸ See, e.g., Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 544 (1997) ("The digital availability of information directly impacts both what it means for an opinion to be "unpublished" and the rationale supporting the content of existing limited publication plans."); cf. Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 199 (1997) ("The tectonic plates of legal information are shifting."); MacLachlan, *supra* note 45, at 647 (urging courts to accept responsibility to the legal system and to the public by holding lawyers accountable to a standard of competence in legal research "reflective of the reality of readily accessible information").

citation to “relevant unpublished opinions.”⁵⁹ Even Congress got involved. On June 27, 2002, the Subcommittee on Courts, the Internet, and Intellectual Property of the United States House Judiciary Committee held an “oversight hearing” on unpublished opinions.⁶⁰

The following May, the Judicial Conference’s Advisory Committee on Appellate Rules approved a proposed addition to the Federal Rules of Appellate Procedure addressing the citation of unpublished opinions.⁶¹ The new rule was published for comment in August 2003.⁶²

The Committee proposed to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “non-precedential,” or the like. New Rule 32.1 would also require parties who cite “unpublished” or “non-precedential” opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.⁶³

⁵⁹ ABA Resolution 01A115 (August 1, 2001), *available at* <http://www.abanet.org/crimjust/policy/cjpol.html> (last visited Feb. 27, 2005).

RESOLVED, THAT the American Bar Association opposes the practice of various federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.

FURTHER RESOLVED, THAT the American Bar Association urges the federal courts of appeals uniformly to:

- (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
- (2) Permit citation to relevant unpublished opinions.

Id.

⁶⁰ *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong., 2d Sess., at 305-06 (2002) [hereinafter *Unpublished Judicial Opinions*], *available at* <http://judiciary.house.gov/legacy/80454.PDF> (last visited Feb. 27, 2005).

⁶¹ See Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (May 22, 2003), *available at* <http://www.uscourts.gov/rules/Reports/AP5-2003.pdf> (last visited Feb. 27, 2005) (reporting action by advisory committee approving three proposed amendments to Federal Rules of Appellate Procedure).

⁶² Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 1, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005); see Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure Submitted for Public Comment: A Summary for Bench and Bar (Administrative Office of the U.S. Courts August 2003), *available at* <http://www.uscourts.gov/rules/summary0803.pdf> (last visited Feb. 27, 2005).

⁶³ Memorandum from Patrick J. Schiltz, Reporter, to Advisory Committee on Appellate Rules, Re: Proposed Amendments to Federal Rules of Appellate Procedure

The proposed new rule generated a paper war of public comments.⁶⁴ By January 2004, however, when the Judicial Conference Committee on Rules of Practice and Procedure⁶⁵ initially discussed the Advisory Committee's proposal, several members expressed their support.⁶⁶ Some participants observed that the traditional distinction between "published" and "unpublished" opinions was "no longer meaningful."⁶⁷

The comment period culminated in a public hearing on this and other proposed rules in Washington, D.C., on April 13, 2004.⁶⁸ Nearly all the testimony presented that day focused on proposed Fed. R. App. P.

Published for Comment in August 2003, at 4 (March 18, 2004), *available at* <http://www.nonpublication.com/schiltz.pdf> (last visited Feb. 27, 2005).

⁶⁴ The public comment period ended on February 16, 2004. *Id.* at 1. Of the more than 500 public comments the Advisory Committee received addressing several proposed changes to the Rules of Appellate Procedure, more than 95 percent related solely to Rule 32.1. *Id.*; *see also* Minutes of January 15-16, 2004 Meeting, Judicial Conference Committee on Rules of Practice and Procedure, Phoenix, Arizona, at 9-10, *available at* <http://www.uscourts.gov/rules/Minutes/jan2004.pdf> (last visited Feb. 27, 2005) (noting that the rule had attracted a good deal of opposition including a letter-writing campaign, with the vast majority coming from the Ninth Circuit; however, bar groups offered considerable support and encouragement for the rule).

⁶⁵ The Judicial Conference Committee on Rules of Practice and Procedure is commonly known as the "Standing Committee."

⁶⁶ Minutes of January 15-16, 2004 Meeting, Judicial Conference Committee on Rules of Practice and Procedure, Phoenix, Arizona, at 10, *available at* <http://www.uscourts.gov/rules/Minutes/jan2004.pdf> (last visited Feb. 27, 2005).

⁶⁷ *Id.*

There was a clear consensus among the participants that unpublished opinions are very useful and that the committee should take no position on whether unpublished opinions should be given precedent [sic]. Several participants argued that many cases do not break new ground or raise serious legal issues. They simply do not merit the attention of a careful, precedential opinion. In fact, they said, the courts of appeals could not function effectively if they were bound by unpublished or non-precedential opinions. The proposed rule, they said, merely permits attorneys to cite these opinions for whatever weight they are worth.

One member cautioned, however, that allowing attorneys to cite unpublished opinions could increase the burdens on lawyers in light of their professional responsibilities to be aware of the decisions of the court and to represent their clients vigorously.

Id.; *see* Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005). Committee Reporter Patrick J. Schlitz, summarizing the January meeting, reported that "in the course of an hour-long discussion, several members of the Standing Committee, as well as several of the advisory committee chairs and reporters, spoke in support of new Rule 32.1 [and] [n]o one expressed opposition . . ." *Id.* at 1-2.

⁶⁸ *See* Transcript of Testimony, Public Hearing Before Advisory Committee on Appellate Rules, Administrative Offices of the U.S. Courts, April 13, 2004, at 224 [hereinafter cited as Transcript of 2004 Advisory Committee Hearing], *available at* <http://www.nonpublication.com/aphearing.htm> (last visited Feb. 27, 2005).

32.1, the most controversial of the proposed rules.⁶⁹ The hearing testimony was mixed.⁷⁰ However, at the Advisory Committee meeting

⁶⁹ See Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 7, available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005). See generally Transcript of 2004 Advisory Committee Hearing, *supra* note 68.

⁷⁰ See generally Transcript of 2004 Advisory Committee Hearing, *supra* note 68. In one of the more colorful colloquies during the hearing, Judge Becker was questioned by Mr. Sanford Svetcov, a practicing attorney from the Ninth Circuit and a member of the Advisory Committee:

JUDGE BECKER: I have always operated under the 11th commandment, that thou shalt not let the tail wag the dog, and it strikes me that if the Ninth Circuit is our caliper, the tail's wagging the dog. At some point something's going to happen to the Ninth Circuit. . . . [A]t some point my guess is the Ninth Circuit's going to be divided in some way and maybe the problem will take care of itself.

MR. SVETCOV: I've testified . . . before the White Commission in favor of some divisional accommodation within the Ninth Circuit, . . . but the fact of the matter is splitting the Ninth Circuit will still leave, unless California is split—

JUDGE BECKER: Oh, I'm for that, too.

MR. SVETCOV: You know, that's something whose time has not come, Judge Becker, and I submit to you the same is true with Rule 32.1 and nothing further needs to be—

JUDGE BECKER: My point, Mr. Svetcov, is if what they [have] given you [in an unpublished opinion] isn't worth anything, then you don't cite it. That's all. I mean the issue here is not the quality of their work product but the question of whether it's citable. If they've given you two paragraphs that are incomprehensible, then Sanford Svetcov, good lawyer that he is, isn't going to bother citing it. And the lawyers who are not of the Sanford Svetcov caliber, and they do cite it, it's going to take Alex Kozinski—I don't know the difference between a microsecond or a nanosecond but it'll be that fast to toss it aside. So I don't see the burden.

MR. SVETCOV: Well, put yourself in my office. Do I read the 777 opinions that are published [by the Ninth Circuit] and also the 4,000 or 5,000 that are not?

JUDGE BECKER: The answer is neither you nor anybody else reads the 700 that were published. When I started sitting with the Third Circuit 30 years ago . . . we had an audience at that time. The courts of appeals had an audience. We don't have an audience anymore. The bar is so huge, it is so specialized, it is so fractured that no [one any] longer reads all the opinions. You read the opinions that are in your area and nobody in their right mind's going to read the 7,000 or however many there are nonprecedential or unpublished opinions, but you've got research tools which will identify if it's of any value to you.

It strikes me, Mr. Svetcov, that this is an in *terrorem* argument that in the real—I mean I'm not qualified to talk about the economics of law practice; I've been out of it for over 33 years, but my sense is that in terms of the economics of law practice, you're not going to invest a lot of time and a lot of your clients' money in that enterprise.

MR. SVETCOV: I don't. That's the point. But if I'm facing my opponents citing to them on a regular basis because the floodgates are opened up to

immediately following the hearing, all but one of the seven members present spoke in support of the proposed new rule.⁷¹ As later reported to the Judicial Conference,⁷² “The advisory committee rejected claims that adoption of rules permitting citation would result in dire consequences. Courts that have permitted citation of unpublished opinions simply have not experienced any serious adverse consequences.”⁷³ After discussion, the Advisory Committee voted to recommend Rule 32.1 favorably.⁷⁴

that stuff and I don’t find the same level of talent on both sides of the case, then I’m faced with having to deal with—

JUDGE BECKER: Then the question is whether your opponent’s got a brain or half a brain. If he’s got half a brain and he’s citing garbage, then you don’t worry about it. If it’s stuff that doesn’t amount to a hill of beans you’re not going to spend any time on it. But if he cites an opinion, a seven- or eight-page opinion which is thoughtful, well then you’d damned well better deal with it because the court’s going to look at it. So what else is new? So what’s wrong with that?

MR. SVETCOV: Well, as I said, if it’s thoughtful you can adopt that reasoning and make it part of your case without citing to the—

JUDGE BECKER: Well, I heard—

MR. SVETCOV: Judges may or may not have signed off [on the reasoning of written opinions not designated for publication]—

JUDGE BECKER: I heard that. I find that argument underwhelming, to paraphrase the old Four Roses ad, Mr. Svetcov.

MR. SVETCOV: I’ve underwhelmed a lot of judges in my time.

Testimony of Judge Edward R. Becker, Transcript of 2004 Advisory Committee Hearing, *supra* note 68, at 249-53.

⁷¹ Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 7, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005). Most of the members agreed that whatever problems unpublished opinions may cause, local rules that “gag attorneys” are not the proper way to deal with the issue. *Id.* at 8.

⁷² See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 10 (September 2004), *available at* <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

⁷³ *Id.*

⁷⁴ See Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 9, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005) (noting one dissent and one absence). The Advisory Committee also amended the rule to remove one clause that was deemed unnecessary. *Id.* at 12. Other amendments were discussed, but not approved. *Id.* at 9-11. One would have made the new rule operate prospectively only, *id.* at 9, and another would have permitted local circuit rules disfavoring or discouraging citation of unpublished opinions. *Id.* at 10. Although the Advisory Committee opposed both amendments, which would have narrowed the scope of the new rule, the members agreed that if either the Standing Committee or the full Judicial Conference failed to approve Rule 32.1 as they had currently drafted it, the Advisory Committee would consider the possibility of recommending a more limited version of the rule in lieu of none at all. *Id.* at 11.

The text of the proposed new rule, with the amendment adopted by the Committee shown in striketype, reads as follows:

Rule 32.1. Citation of Judicial Dispositions

The Judicial Conference Committee on Rules of Practice and Procedure, more commonly known as the Standing Committee, met on June 17-18, 2004, to consider the Advisory Committee's proposed new rules.⁷⁵ After discussion, the Standing Committee voted to return proposed Rule 32.1 to the Advisory Committee on Appellate Rules for further study.⁷⁶ In a lengthy report to the Chief Justice and the Judicial Conference in September 2004, the Standing Committee carefully documented the previous expressions of concern by the Judicial Conference regarding the nonuniformity of no-citation rules among the circuits.⁷⁷ In addition, the report acknowledged the Conference's

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, ~~unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.~~

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

Id. at 2-3; *see id.* at 12.

⁷⁵ *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 1 (September 2004), *available at* <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

⁷⁶ *Id.* at 13.

Several courts of appeals have expressed concerns with some aspects of the proposed rule. These concerns are mainly centered on the belief that permitting citation of nonprecedential opinions will significantly increase the workload of the courts. In response to that increase, these courts predict that time to disposition will increase as will the number of summary judgment [sic] orders. These concerns can be tested empirically in the nine circuits that now permit citation. In an effort to reach a greater consensus among the courts, and in deference to the circuits that oppose the proposed rule, the Committee [on Rules of Practice and Procedure] decided to defer approving the proposed new rule in favor of such an empirical study. The Committee concluded that some further consideration by the advisory committee would be helpful once the empirical study was completed. This further consideration would take into account the results of the empirical study but need not be limited to empirical issues. The Committee was particularly interested in the advisory committee's further consideration of the application of the proposed rule to state court unpublished opinions. The Committee was careful to state that its action was neutral and should not be understood to express disapproval of the proposal.

Id.; *see also* Pearson, *supra* note 22, at 1296 n.532.

⁷⁷ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 8-9 (September 2004), *available at* <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). "The [A]dvisory [C]ommittee [on Appellate Rules] concluded that the promulgation of uniform citation rules was timely,

predisposition favoring uniform procedures regarding citation of unpublished opinions, as expressed in 1995 when it recommended that “the relevant committees of the Judicial Conference should work together to develop a *uniform set of procedures and mechanisms* for access to circuit court opinions, guidelines for publication or distribution, and *clear standards for citation*.”⁷⁸

The most recent and perhaps most significant development in the continuing saga of “unpublished” opinions is the E-Government Act of 2002.⁷⁹ Section 205(a)(5) of the Act expressly requires all federal circuits to provide electronic access, no later than December 17, 2004, to “all written opinions,” whether designated for publication or not.⁸⁰ Therefore, at least prospectively, Congress has spoken, trumping any remaining practical distinction between “unpublished” and “published” opinions issued by the federal courts of appeals.⁸¹

III. THE ETHICAL DILEMMA OF “UNPUBLISHED” OPINIONS: TO CITE OR NOT TO CITE?

No uniform code of professional conduct governs practice in the federal court system.⁸² The federal courts have not been able to develop

consistent with the views of the Committee on Court Administration in 1972, the Judicial Conference in 1974, the Federal Courts Study Committee in 1992, and the Judicial Conference again in 1995, which had urged that uniform citation standards be prescribed.” *Id.* at 10-11.

⁷⁸ *Id.* at 8-9 (quoting *Long Range Plan for the Federal Courts* 70 (December 1995)) (emphasis added by Judicial Conference Committee on Rules of Practice and Procedure).

⁷⁹ See *id.* at 9. “The E-Government Act of 2002 requires all federal courts to post all opinions, including ‘unpublished’ opinions, on the court web site.” *Id.*

⁸⁰ E-Government Act of 2002, Pub. L. No. 107-347, § 205(f), 116 Stat. 2899, 2915 (2002). The Act provides that not later than two years after the Dec. 17, 2002 effective date of Title II, §§ 201-216, 116 Stat. 2910, the websites required by section 205(a) must be established. Each website must contain certain information or links to websites providing the information, specifically including:

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(Emphasis added.) In addition, the Act requires that all written opinions issued after the effective date of section 205 must remain available online. See Pub. L. No. 107-347, § 205(b)(2), 116 Stat. 2899, 2914.

⁸¹ “In an ironic counterpoint to court rules that draw a sharp distinction between published and unpublished opinions, the spread of computerized legal research has meant that ‘unpublished’ opinions generally are as readily available as those designated as ‘published.’” *Unpublished Judicial Opinions*, *supra* note 60, at 44 (prepared statement of Arthur D. Hellman).

⁸² Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, Research Paper No. 44, at 5 (September 29, 2004 draft), available at http://ssrn.com/abstract_id=597862 (last visited Feb. 27, 2005); see also STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND

the necessary consensus to adopt a uniform code of ethics for the federal bar;⁸³ nor have they uniformly incorporated the ethical rules of the respective states in which the federal courts sit.⁸⁴ Attorneys who practice in many federal jurisdictions, including Department of Justice attorneys, have expressed concern about inconsistencies in the enforcement of ethical rules and the imposition of sanctions.⁸⁵

The federal courts draw on several sources to regulate litigation ethics.⁸⁶ While nearly all federal circuits have adopted or incorporated codes governing the conduct of litigants,⁸⁷ ethical rules of conduct adopted by attorneys' licensing jurisdictions or by the tribunals in which they practice are not the only means of regulating attorney conduct.⁸⁸ The federal courts also draw on procedural rules, norms of practice, and

STANDARDS 587 (2005) (although seriously considered in the 1990s, federal courts have not adopted Federal Rules of Professional Conduct).

⁸³ See Minutes of January 15-16, 2004 Meeting, Judicial Conference Committee on Rules of Practice and Procedure, Phoenix, Arizona, available at <http://www.uscourts.gov/rules/Minutes/jan2004.pdf> (last visited Feb. 27, 2005).

[T]he committee's extensive efforts in considering potential attorney conduct rules have been placed on indefinite hold. . . . [H]owever, . . . the committee [will] be ready to respond quickly if Congress were to enact legislation calling for the judiciary to initiate attorney conduct rules and if the Department of Justice, the Conference of Chief Justices, and the American Bar Association were to agree on the substance of the proposed rules.

Id. at 20. For a collection of materials reflecting the extensive work devoted to the subject, see Daniel R. Coquillette & Marie Leary, Administrative Office of the United States Courts, *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct* (1997), available at <http://www.uscourts.gov/rules/WorkingPapers-AttorneyConduct.pdf> (last visited Feb. 27, 2005).

⁸⁴ McMorrow, *supra* note 82, at 6. The Judicial Conference Committee on Rules of Practice and Procedure (generally known as the Standing Committee) appointed an ad hoc task force in 1998 to formally study a proposal to adopt a core set of ten uniform rules of professional conduct, which would have applied in federal district courts and courts of appeals. Minutes of June 18-19 Meeting, Judicial Conference Committee on Rules of Practice and Procedure, Santa Fe, New Mexico, at 41-42, available at <http://www.uscourts.gov/rules/Minutes/june1998.pdf> (last visited Feb. 27, 2005); see Professional Responsibility Standards, Rules & Statutes 683-93 (John S. Dzienkowski abr. ed., West 2000-01) (reprinting draft federal rules of attorney conduct). Proposed Rule 7 would have adopted MODEL RULES OF PROF'L CONDUCT R. 3.3 virtually in its entirety. See *id.* at 690. The note accompanying the proposed rule explained the need for the rule as follows: "To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts." *Id.* (citing Roger C. Cramton, Memorandum to Participants of the Special Study Conference 2-3 (Jan. 8, 1996)).

⁸⁵ McMorrow, *supra* note 82, at 6-7.

⁸⁶ *Id.* at 7.

⁸⁷ See Appendix II (table summarizing each federal circuit's attorney disciplinary codes).

⁸⁸ McMorrow, *supra* note 82, at 5 n.13.

formal ethical codes.⁸⁹ While ethical rules impose a kind of “strict liability” for their breach,⁹⁰ attorney conduct is also governed by applicable procedural rules and substantive law.⁹¹ In addition, the federal courts have the inherent power to regulate the conduct of attorneys and litigants who participate in proceedings before them.⁹² Because of the lack of uniformity in the approach to regulating attorney conduct, the practicing bar faces the challenging task of anticipating how any particular federal court will respond to an ethical dilemma.⁹³

In particular, lawyers have an ethical duty of candor to the court.⁹⁴ Among other things, the duty of candor prohibits attorneys from

⁸⁹ *Id.* at 7.

⁹⁰ L. RAY PATTERSON, *LAWYER’S LAW: PROCEDURAL, MALPRACTICE AND DISCIPLINARY ISSUES* 17 (4th ed. 1999).

⁹¹ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 42 cmt. a (2000). A lawyer who engages in misconduct while representing a client is subject not only to professional discipline, but also to civil liability and criminal prosecution. *Id.*; see MODEL RULES OF PROF’L CONDUCT R. 8.4(b) & cmt. 2 (2002) (while a lawyer is “personally answerable to the entire criminal law,” professional accountability rests only on offenses that suggest “lack of those characteristics relevant to law practice[.]” such as dishonesty or breach of trust).

⁹² See *In re Snyder*, 472 U.S. 634, 643-44 (1985) (reversing Eighth Circuit’s suspension of a lawyer for six months for “contemptuous or contumacious conduct”).

Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer’s role as an officer of the court which granted admission. The standard for disciplining attorneys practicing before the courts of appeals is set forth in Federal Rule of Appellate Procedure 46:

“(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. . . .”

The phrase “conduct unbecoming a member of the bar” must be read in light of the “complex code of behavior” to which attorneys are subject. Essentially, this reflects the burdens inherent in the attorney’s dual obligations to clients and to the system of justice.

Id. (emphasis added by the court) (internal citations and footnotes omitted); see also McMorrow, *supra* note 82, at 7. “[I]n practice the rules of professional conduct function like standards, serving to guide the federal courts but not unduly constrain their decisionmaking.” *Id.* at 8.

⁹³ McMorrow, *supra* note 82, at 9.

⁹⁴ MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2002); see also *supra* note 84 (discussing Proposed Federal Rule of Professional Conduct 7). The following passage from a nineteenth century text illustrates that the duty of candor has deep roots in American legal ethics.

There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth,—our fortunes, reputations, domestic peace, the future of those dearest to us, nay, our liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without

knowingly making a false statement of law to the court, or from failing to correct a false statement of material law that the attorney has previously made to the court.⁹⁵ Moreover, the duty of candor requires an attorney to disclose authority in the controlling jurisdiction that the attorney knows is *directly adverse* to the position taken on the client's behalf.⁹⁶ Recognizing the possible conflict between the attorney's duty of candor to the court and the duty of loyalty to the client, the rule expressly provides that the duty of candor applies, even if it means disclosing information otherwise protected by the ethical duty to maintain confidentiality of client information.⁹⁷ To qualify as a violation, an affirmative misrepresentation of the law is not required. Under some circumstances, the failure to make a disclosure is considered the ethical equivalent of an affirmative misrepresentation.⁹⁸

In addition to the ethical code provisions addressing the lawyer's duty as an advocate, a separate ethical rule explicitly defines professional misconduct to include "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation"⁹⁹ Rule 8.4 addresses the broad duty of an attorney to maintain the integrity of the profession, and it also prohibits "conduct that is prejudicial to the administration of justice . . .

suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity, and candor: they are the cardinal virtues of a lawyer. Let him always seek to have a clear understanding of his object: be sure it is honest and right, and then march directly to it. The covert, indirect, and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions, weighs everything in the balances of worldly policy, and ends most generally, in the practical adoption of the vile maxim, "that the end sanctifies the means."

GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 169-70 (4th ed. 1876).

⁹⁵ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2002).

⁹⁶ *Id.* 3.3(a)(2); *see, e.g., In re Hendrix*, 986 F.2d 195, 200-01 (7th Cir. 1993) (Posner, J.) (acknowledging circuit division on whether failure to acknowledge binding adverse precedent violates FED. R. CIV. P. 11, but if "counsel *knowingly* concealed dispositive adverse authority[,] it engaged in professional misconduct" contrary to MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (1983) [now MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2002)].

⁹⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2002) (citing MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002)). *See generally* Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303 (1995).

When a lawyer finds herself caught in a bind over clashing allegiances owed to court and client, the scales must tilt toward the court. Times where the lawyer's duty owed to the court trumps loyalty to the client range far and wide. On the most obvious level, an attorney may never be a party to conduct prejudicial to the administration of justice.

Id. at 312-13 (internal citations omitted).

⁹⁸ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (2002).

⁹⁹ *Id.* 8.4(c).

¹⁰⁰ Acknowledging the potential for conflicting ethical and legal obligations, the commentary provides:

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.¹⁰¹

For the express purpose of ensuring fairness to the opposing party and counsel, the Model Rules also prohibit an attorney from “knowingly disobey[ing] an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists”¹⁰² The Model Rules provide no commentary directly pertaining to this subsection. However, a formal ethics advisory opinion issued by the American Bar Association in 1994, later revised in 1995, expressly relied on this ethical rule.¹⁰³ The opinion concluded that the citation of unpublished dispositions amounted to a breach of Rule 3.4(c), but only if the jurisdiction had adopted a specific rule prohibiting citation of such opinions:¹⁰⁴

It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, “not for publication.” On the other hand, there is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban.¹⁰⁵

¹⁰⁰ *Id.* 8.4(d).

¹⁰¹ *Id.* 8.4 cmt. 4. Rule 1.2(d) provides that an attorney may not counsel a client to engage in criminal or fraudulent conduct, but “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).

¹⁰² MODEL RULES OF PROF’L CONDUCT R. 3.4(c) (2002).

¹⁰³ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-386R (1995).

¹⁰⁴ See *id.* A 1963 informal ethics advisory opinion had concluded that citation of unreported opinions as such did not pose an ethical problem, even in a jurisdiction like Tennessee, which at that time did not encourage the citation of such opinions except for the value of their reasoning. See ABA Comm. on Prof’l Ethics, Informal Op. 667 (1963). However, the informal opinion concluded with a caveat that there was nothing unethical about citing to an unreported opinion in the absence of “specific court rules or the customs or practice of the bar or of a particular court” to the contrary. *Id.* Interestingly, Formal Opinion 94-386R did not cite the dictum in the 1963 informal opinion, even though it directly supported the result reached in the 1995 opinion.

¹⁰⁵ ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 94-386R (1995); see also Cristi Ray, *Comments and Current Developments, Recent Opinions from the ABA Standing Committee on Ethics and Professional Responsibility*, 8 GEO. J. LEGAL ETHICS 1099, 1116 (1995) (reviewing ABA Comm. on Ethics and Prof’l Responsibility,

The opinion did not address the express possibility that an attorney may openly refuse to comply with a court's no-citation rule based on an assertion that no valid obligation exists to comply with the local rule.¹⁰⁶

Beyond the rules of ethics, an attorney must abide by laws prohibiting fraud and misrepresentation, which apply to lawyers and nonlawyers alike.¹⁰⁷ Violations may occur not only in the form of affirmative misrepresentations, but also failure to comply with obligations to disclose.¹⁰⁸ In fact, the ethical duty to disclose directly adverse authority known to the attorney is just such an obligation.¹⁰⁹ A court could quite rightly conclude, for example, that an attorney's failure to cite pertinent legal authority, known to be directly contrary to the client's position, amounts to a deliberate misrepresentation of the law.¹¹⁰

Formal Op. 94-386 (1994)). The original advisory opinion issued in 1994 recognized that the Sixth and Tenth Circuits had "recently suspended their bans against use of unpublished opinions, partly because of the . . . electronic availability of the opinions." *Id.* at 1117-18 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386, at 2 (1994)). While attorneys in jurisdictions that had not lifted their bans might request special permission to cite an unpublished opinion, they were cautioned to comply with the relevant tribunal's rule, "regardless of what the trend may be in the legal field generally." *Id.* at 1118. "[I]n those jurisdictions where the ban has not been suspended, a lawyer violates Model Rule 3.4(c) by citing unpublished decisions, even if he believes that the policy behind the prohibition has been called into question by the actions taken by the Tenth Circuit and the Sixth Circuit." *Id.* at 1118 n.80 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386, at 2 (1994)). The revised version of the opinion issued in 1995 deleted all discussion of "temporary suspension of such bans." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R, at 1 n.* (1995). The revised opinion also clarified that citing an unpublished opinion to a court without such a ban is not an ethical violation, even if the originating jurisdiction precludes its citation. However, the lawyer must advise the court that the cited opinion was expressly limited in reach by the issuing court. *Id.* at 2.

¹⁰⁶ See MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2002).

¹⁰⁷ See SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 103 (2004) (noting that lawyer codes incorporate the vast external law of fraud); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (inherent power of federal courts allow a judgment to be vacated "upon proof that [] fraud has been perpetrated on the court").

This "historic power of equity to set aside fraudulently begotten judgments[]" is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

Id. (citation omitted) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944)).

¹⁰⁸ MARTYN & FOX, *supra* note 107, at 105.

¹⁰⁹ See *supra* note 96 and accompanying text. However, opposing counsel who fails to cite the "adverse authority" to the court is unlikely to charge the violator with fraud or misrepresentation, if for no other reason than embarrassment for overlooking legal authority supporting the client's position.

¹¹⁰ See *Hendrix*, 986 F.2d at 200 (chastising counsel for failing to cite a published opinion from the same circuit that the court would have had to overrule if counsel's appeal were to succeed); see also *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J.,

Various procedural rules also impose ethical responsibilities on counsel to fully disclose relevant legal authority to the tribunal, including lower court opinions and unpublished decisions.¹¹¹ Some circuits have held,¹¹² for example, that a failure to expressly acknowledge binding adverse legal precedent violates Fed. R. Civ. P. 11.¹¹³ Others, however,

joined by Rehnquist, C.J., and Thomas, J., dissenting) (“[U]nlike the Court, [parties] cannot afford the luxury of ignoring inconvenient precedent . . .”).

¹¹¹ See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 111 cmt. d, Reporter’s Note (2000).

“Legal authority” includes not only case-law precedents, but also statutes, ordinances, regulations, and administrative rulings. The obligation to cite adverse case law is not limited to appellate decisions. A decision must be cited even if the appeal remains pending, so long as applicable law provides that the decision has force as precedent pending appeal.

Case-law precedent includes an unpublished memorandum opinion, an unpublished report filed by a magistrate, and an adverse federal habeas corpus ruling. The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself.

Id. (internal citations omitted). *But see id.* (lawyer’s duty to disclose unpublished authority should not apply in jurisdictions prohibiting citation of unpublished opinions).

¹¹² See *Hendrix*, 986 F.2d at 201 (citing *Thompson v. Duke*, 940 F.2d 192, 196 n.2 (7th Cir. 1991)); see also, e.g., *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1355 (Fed. Cir. 2003) (upholding sanctions for FED. R. CIV. P. 11 violations for concealing Supreme Court case of which counsel was or should have been aware; her attempt to conceal it from the court and opposing counsel intentionally or negligently misled the court and violated the attorney’s fundamental duty to be candid and scrupulously accurate); *Barth v. District of Columbia*, 15 F.3d 1159, No. 92-7093, 1993 WL 523999 *4 (D.C. Cir. 2003) (Henderson, J., dissenting) (duty of candor requires erring on the side of disclosure in treating adverse authority so as not to impede trial court’s disposition; endorsing an approach to Rule 11 sanctions comparable to that taken in *Hendrix* under FED. R. APP. P. 38); *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (sanctioning plaintiff’s counsel for Rule 11 violation for failing to cite an Eleventh Circuit decision directly contrary to client’s position that defendants were not entitled to legislative immunity); *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987) (affirming FED. R. CIV. P. 11 sanctions awarded by trial court and awarding double costs and attorney’s fees on appeal, in part for ignoring controlling Supreme Court authority).

¹¹³ See *Norfolk and Western R. Co.*, 814 F.2d 1192, 1198 (7th Cir. 1987). “The ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.” *Id.* (citation omitted). The pertinent portions of FED. R. CIV. P. 11 provide as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

....

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

have rejected the view that Rule 11 imposes a duty of candor.¹¹⁴ Similarly, Fed. R. App. P. 38 has been invoked as the basis for sanctioning attorneys who file frivolous appeals without citing dispositive contrary authority.¹¹⁵

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

FED. R. CIV. P. 11(b)(2), (c).

¹¹⁴ See, e.g., *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1988) (reversing district court's holding that Rule 11 imposes a "duty of candor" requiring counsel to label arguments either as supported by existing law, or contrary to existing law but supported by a good faith attempt to extend or modify the law).

We . . . hold that counsel may not be found to have violated Rule 11 merely for failing to "label" the argument advanced. Counsel should not be sanctioned for choosing the wrong characterization for their theories.

If an attorney explains that after adequate preliminary research, in good faith, he determined to seek reversal of a particular precedent, it is difficult to see how the pre-filing legal inquiry could be faulted. Nevertheless, while proper argument identification may be a defense to a Rule 11 sanction, errors in argument identification do not constitute a Rule 11 violation.

Of course, this is not to suggest that prudent attorneys should avoid alerting the court when the position they advocate clearly departs from settled and controlling legal precedent. Such argument identifications might illuminate the thoroughness of the pre-filing legal investigation.

Id. at 96; see also *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1534, 1542 (9th Cir. 1986) (reversing holding that appellant violated Rule 11 by failing to state that its position was grounded in a "'good faith argument for the extension, modification, or reversal of existing law' rather than implying that it was 'warranted by existing law,'" and by failing to cite contrary authority in violation of the ABA Model Rules of Professional Conduct) (quoting *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984)). See generally *Daisy Hurst Floyd, Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035, 1058 (1995) ("Courts have not been consistent . . . in aligning a decision on Rule 11 sanctions with Model Rule 3.3 standards.").

¹¹⁵ See *Hendrix*, 986 F.2d at 201 (filing a frivolous suit or appeal, as well as filing a suit or appeal for an improper purpose, are both sanctionable under FED. R. APP. P. 38).

The court does not ask whether the appeal might have been nonfrivolous if presented differently, with arguments and authorities to which the appellant in fact never alluded. If the appeal is blocked by authorities that the appellant ignored, the appellant is sanctioned without inquiry into whether the authorities if acknowledged might have been contested.

Id. at 200-01 (citing *Brooks v. Allison Div.*, 874 F.2d 489 (7th Cir. 1989)); see also *McEnery v. Merit Sys. Prot. Bd.*, 963 F.2d 1512, 1516-17 (Fed. Cir. 1992) (awarding sanctions for violating FED. R. APP. P. 38 by failing to cite or discuss controlling authority); *Judith D. Fischer, Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 5 (1997). "The implicit misrepresentation of bringing unfounded claims is . . . covered by the Model Rules, which provided that a 'lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous.'" *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 3.1 (1997)).

The federal circuits' no-citation rules establish a dangerous ethical dilemma for the federal bar. They directly conflict with ethical duties imposed on attorneys by the ABA Model Rules of Professional Conduct and their counterparts, by Rule 11 of the Federal Rules of Civil Procedure, and by Rule 38 of the Federal Rules of Appellate Procedure. No-citation rules have been adopted under the rather indeterminate statutory authority of the various federal circuits to issue local procedural rules.¹¹⁶ However, because Rule 11 and Rule 38 are uniform procedural rules that Congress has tacitly endorsed under the Rules Enabling Act,¹¹⁷ they control over any conflicting nonuniform local rule prohibiting or even discouraging citation of relevant legal authority, published or not. As such, the local rules are arguably preempted by the nationally sanctioned procedural rules and therefore amount to a legal nullity.¹¹⁸

Even in federal circuits that insist on strictly enforcing no-citation rules notwithstanding the fact that they are irreconcilable with an attorney's duty of candor,¹¹⁹ an attorney may ethically decline to comply with the rules by simply asserting a belief that no obligation to comply

¹¹⁶ See 28 U.S.C.A. § 2071(a) (2005); FED. R. APP. P. 47(a)(1). All local rules, however, are preempted to the extent they are inconsistent with Acts of Congress and general rules of practice and procedure adopted by the United States Supreme Court under 28 U.S.C.A. § 2072 (2005). "Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." *Id.*; see FED. R. APP. P. 47(a)(1) (providing that "local rule[s] must be consistent with - but not duplicative of - Acts of Congress and rules adopted under 28 U.S.C. § 2072").

¹¹⁷ 28 U.S.C.A. §§ 2071-2072 (2005).

¹¹⁸ See *supra* note 116 (interpreting 28 U.S.C.A. § 2071(a) (2005)).

¹¹⁹ See, e.g., *In re Violation of Rule 28(c)*, 388 F.3d 1383, 1384 (Fed. Cir. 2004), in which a panel of the Federal Circuit directed counsel to demonstrate why it should not impose sanctions for filing a reply brief contrary to FED. R. APP. P. 28(c). The panel declined to impose sanctions, accepting the attorney's representation that the violation was inadvertent. *Id.* at 1385. However, the panel quoted FED. R. APP. P. 46(c), which permits a court of appeals to discipline an attorney for failure to comply with any court rule after affording reasonable notice, an opportunity to show cause, and a hearing if requested. *Id.* at 1385 n.1. The panel continued:

This court, in order to get its work done, must insist on strict compliance with its rules. Violations of Rule 28(c)—and of other procedural rules such as Federal Circuit Rule 47.6 which prohibits the citation of nonprecedential opinions, or the rules governing situations in which a cross-appeal is appropriate—are all too frequent. In addition to imposing an unfair burden on opposing parties, violations of our rules also burden the court. The court must consider a large number of appeals each year. It can only conduct its work fairly and efficiently if counsel cooperate by abiding by the pertinent rules.

Id. at 1385 (emphasis added); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 111 cmt. d, Reporter's Note (2000) (stating that the duty to disclose unpublished adverse authority should not apply in jurisdictions that prohibit citation of unpublished opinions).

exists.¹²⁰ An attorney who has a legitimate basis to believe that an unpublished decision of a circuit court is the most relevant and persuasive authority on point has an ethical obligation to cite it, as an officer of both the court and the judicial system as a whole.¹²¹ Anything to the contrary in a local circuit rule, which by its very nature has never been submitted to the United States Supreme Court or Congress for approval under the Rules Enabling Act, is not worth the paper (or the website, for that matter) on which it is published.

IV. ARNOLD V. KOZINSKI: THE CONSTITUTIONAL DUEL THAT FUELED THE FIRE

In 1999, the ongoing debate about unpublished circuit court opinions escalated to a higher profile with the publication of counterpoint articles by two noted judges, Judge Richard S. Arnold¹²² of the Eighth Circuit and Judge Alex Kozinski¹²³ of the Ninth Circuit. Presaging their imminent legal jousting match,¹²⁴ Judge Arnold argued that “all decisions have precedential significance.”¹²⁵ He reasoned, “When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, . . . the power that is being exercised [cannot] properly be called “judicial[.]”¹²⁶ Rather, he contended that unpublished decisionmaking was “more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions[.]”¹²⁷

¹²⁰ See MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2002).

¹²¹ See FED. R. CIV. P. 11(b); MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2002); see also *supra* note 84 (discussing Proposed Federal Rule of Professional Conduct 7); cf. FED. R. APP. P. 38 (authorizing sanctions for filing frivolous appeals). “[C]itation of [unpublished] opinions may sometimes be ethically required by duty to client if they are the most persuasive precedents available in common sense terms.” William T. Hangley, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 665 n.73 (2002).

¹²² Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

¹²³ Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAW. 43 (June 2000), available at <http://www.nonpublication.com/don't%20cite%20this.htm> (last visited Feb. 27, 2005).

¹²⁴ Compare *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g*, 235 F.3d 1054 (8th Cir. 2000) with *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

¹²⁵ Arnold, *supra* note 122, at 222.

¹²⁶ *Id.* at 226.

¹²⁷ *Id.*

For his part, Judge Kozinski¹²⁸ bluntly asserted, “So far as Ninth Circuit law is concerned, memdispos [unpublished memorandum dispositions] are a nullity.”¹²⁹ Noting the crushing workload of the Ninth Circuit, Judge Kozinski argued that nonpublication plans offer a feasible solution. “Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions.”¹³⁰ Further, he noted,

Using the language of a memdispo to predict how the court would decide a different case would be highly misleading.¹³¹ . . . Trying to extract from memdispos a precedential value that we didn’t put into them . . . would also damage the court in important and permanent ways. . . . [W]e can say with confidence that citation of memdispos is an uncommonly bad idea. We urge lawyers to drop it once and for all.¹³²

¹²⁸ Judge Kozinski’s co-author, Stephen Reinhardt, is also a Ninth Circuit judge. *See How Appealing’s Twenty Questions Site*, Questions 15, 16 (Feb. 2, 2004) (interviewing Judge Reinhardt in part concerning his friendship with Judge Kozinski and his defense of the Ninth Circuit’s local rule prohibiting citation of unpublished opinions), at http://legalaffairs.org/howappealing/20q/2004_02_01_20q-appellateblog_archive.html (last visited Feb. 27, 2005).

¹²⁹ Kozinski & Reinhardt, *supra* note 123, at 43.

¹³⁰ *Id.* The authors’ remark begs the question of whether opinions designated as nonprecedential affect non-parties. However, as one commentator has observed, “there are many unpublished decisions that do present important legal questions, the resolution of which have substantial implications for individuals other than the parties involved.” Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 776 (2004). Further, the robust proprietary market for those opinions belies the authors’ assumption that they affect only the parties to the appeal.

[L]awyers, district court judges, and appellate judges regularly read unpublished opinions despite local prohibitions against citing them. Citation of unpublished opinions by lawyers and judges provide[s] further evidence of the value of unpublished opinions.

Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 11 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). Unpublished opinions offer valuable insight and information. *Id.* In addition, they are also helpful when addressing recurring issues that involve similar fact patterns. *Id.* Finally, unpublished opinions can be particularly helpful to district judges who strive for uniformity when applying relatively settled law to novel facts. *Id.*; Pether, *supra* note 21, at 1532 (“[T]he practice of many lawyers and judges belies the claim that unpublished decisions are ‘nonprecedential’”); see also *Caron v. United States*, 183 F. Supp. 2d 149, 158 & n.7 (D. Mass. 2001) (Young, C.J.) (“[T]here is no genuine tension between district court decisions which cite ‘unpublished’ appellate decisions and the local circuit ‘no-citation’ rules[.]” because district judges are required to cite the sources on which they base their reasoning.).

¹³¹ Kozinski & Reinhardt, *supra* note 123, at 44.

¹³² *Id.* at 81.

Late in 2000, not long after the sparring circuit judges publicly staked out their respective positions in legal commentary, Judge Arnold presided over a three-judge panel that issued a startling published opinion—*Anastasoff v. United States*.¹³³ The panel announced that the Eighth Circuit’s local rule¹³⁴ that “disfavored” citation of unpublished opinions (but nevertheless permitted them to be cited for their persuasive value under certain circumstances) exceeded the scope of judicial power conferred by Article III of the United States Constitution.¹³⁵ In reaching his conclusion, Judge Arnold issued a call to arms: *Anastasoff* declared unconstitutional the Eighth Circuit’s local rule providing that “unpublished” opinions may not be cited as precedent.¹³⁶ He reasoned that the court’s rule deeming unpublished opinions to be nonprecedential exceeded the scope of Article III because the judiciary’s selective publication rules had the effect of usurping the legislative domain.¹³⁷

Although the *Anastasoff* opinion was vacated on rehearing after the underlying dispute was resolved,¹³⁸ Judge Arnold’s direct challenge to the long-standing practice of issuing unpublished opinions took on a life of its own.¹³⁹ Not long after *Anastasoff* was vacated, Judge Kozinski returned the volley¹⁴⁰ on behalf of the Ninth Circuit in *Hart v. Massanari*.¹⁴¹ In *Hart*, Judge Kozinski took Judge Arnold to task, harshly criticizing his constitutional analysis:

The question raised by *Anastasoff* is whether one particular aspect of the binding authority principle—the decision of which

¹³³ 223 F.3d 898, *vacated as moot on reh’g*, 235 F.3d 1054 (8th Cir. 2000).

¹³⁴ 8TH CIR. R. 28A(i) (1998) (version in effect at the time *Anastasoff* was decided).

¹³⁵ *Anastasoff*, 223 F.3d at 905.

¹³⁶ *Id.*

¹³⁷ *See id.* at 901. “The judicial power to determine law is a power only to determine what the law is, not to invent it.” *Id.* (citing 1 Blackstone, COMMENTARIES *69). Although Judge Arnold grounded his constitutional challenge on the limitations Article III imposes on the power of the federal courts, it also could be persuasively characterized as a separation of powers argument. *See id.* (“In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power.”).

¹³⁸ *Anastasoff v. United States*, 235 F.3d 1054 (en banc), *vacating* 223 F.3d 898 (8th Cir. 2000).

¹³⁹ *See, e.g., Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing *en banc*) (“*Anastasoff* has generated substantial controversy, and its historical research and conclusions have been criticized.”).

¹⁴⁰ “Judge Arnold is one of the ornaments of the federal judiciary, a judge widely respected for his erudition and wisdom. But even Homer nods, and Judge Arnold took a big nod on this one. While his argument in *Anastasoff* has superficial appeal, closer examination exposes its flaws.” *Unpublished Judicial Opinions*, *supra* note 60, at 14-15 (prepared statement of Alex Kozinski).

¹⁴¹ 266 F.3d 1155 (9th Cir. 2001).

rulings of an appellate court are binding—is a matter of judicial policy or constitutional imperative. We believe *Anastasoff* erred in holding that, as a constitutional matter, courts of appeals may not decide which of their opinions will be deemed binding on themselves and the courts below them. For the reasons explained, the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy. Were it otherwise, it would cast doubt on the federal court practice of limiting the binding effect of appellate decisions to the courts of a particular circuit. Circuit boundaries—and the very system of circuit courts—are a matter of judicial administration, not constitutional law.¹⁴²

....

Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision. The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not. Without clearer guidance than that offered in *Anastasoff*, we see no constitutional basis for abdicating this important aspect of our judicial responsibility.¹⁴³

¹⁴² *Id.* at 1175-76. *But see* U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress to “constitute tribunals inferior to the Supreme Court”); U.S. CONST. art. III, § 1 (“judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish”); 28 U.S.C.A. § 48 (2005) (establishing circuit boundaries).

¹⁴³ 266 F.3d at 1180 (internal footnote omitted). Effective July 1, 2000, less than a year before *Hart* was issued, the Ninth Circuit adopted a temporary rule permitting citation of unpublished decisions under limited circumstances. Originally set to expire on December 31, 2002, the temporary rule has since been extended until July 1, 2005. *See* 9th Cir. Rule 36-3 advisory committee’s note. The temporary rule upheld by *Hart* reads as follows:

Circuit Rule 36-3. Citation of Unpublished Dispositions or Orders

(a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel.

In the wake of *Anastasoff* and *Hart*, other federal circuits have generally followed the Ninth Circuit's position as espoused in *Hart*.¹⁴⁴ The Fifth Circuit, for example, apparently adopted the Ninth Circuit's position that unpublished decisions need not have precedential value¹⁴⁵

(b) Citation: Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

9th CIR. R. 36-3. The previous version of Rule 36-3 was even more restrictive, prohibiting citation of unpublished opinions in briefs, oral argument, opinions, memoranda, or orders except for purposes of the doctrines of law of the case, *res judicata*, or collateral estoppel. *See* 9TH CIR. R. 36-3 (effective July 1, 1995).

¹⁴⁴ In addition to its decision in *Hart*, the Ninth Circuit has rejected two other constitutional challenges to the rule, in both cases for lack of standing. In *Schmier v. U.S. Ct. of Appeals for Ninth Cir.*, 279 F.3d 817 (9th Cir. 2002), the constitutionality of the Ninth Circuit's rule was directly challenged by an attorney who is well-known for his opposition to no-citation rules. *See generally The Committee for the Rule of Law—Overview*, at <http://www.nonpublication.com/WELCOME.HTML> (last visited Feb. 27, 2005). *Schmier* chairs the Committee for the Rule of Law, "a group of concerned lawyers, academics, jurists, and other citizens." *Id.* His complaint sought a writ of mandamus or prohibition, asserting several constitutional grounds barring enforcement of the Ninth Circuit's rule prohibiting citation of unpublished opinions. 279 F.3d at 819. Although the Ninth Circuit affirmed the district court's judgment dismissing his claim with prejudice for lack of standing, *id.* at 823-24, the court noted, "Given the wide range of interest shown in the debate about unpublished opinions, and assuming that parties with personal stakes in live controversies will properly raise the issue with the federal courts, we think it is only a matter of time before the theoretical questions raised by *Schmier's* complaint are all properly presented and resolved." *Id.* at 825.

In a more recent appeal by an unsuccessful habeas corpus petitioner who challenged the constitutionality of its no-citation rules, the Ninth Circuit once again affirmed a judgment dismissing the claim for lack of standing. *See Loritz v. U.S. Ct. of Appeals for Ninth Cir.*, 382 F.3d 990, 992 (9th Cir. 2004).

¹⁴⁵ In the Fifth Circuit, any unpublished opinion issued on or after January 1, 1996, has persuasive but not precedential value, except under the doctrines of *res judicata*, collateral estoppel, or the law of the case. 5TH CIR. R. 47.5.4. The unpublished decision at issue in *Williams* was decided in 1999 and therefore was not binding. *See Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (table of unreported decisions) (affirmed without argument). Disregarding *Anderson*, the *Williams* panel instead decided the merits by applying the analysis in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), an earlier published decision. *See Williams v. Dallas Area Rapid Transit*, 242 F.3d at 315, 318-19

when it denied rehearing *en banc* in *Williams v. Dallas Area Rapid Transit*.¹⁴⁶ The defendant asserted governmental immunity, relying on the most recent decision on point, an unpublished opinion issued in 1999.¹⁴⁷ That decision specifically held that Dallas Area Rapid Transit (DART) was immune from suit.¹⁴⁸ However, the *Williams* panel, relying on a 1986 published decision to which DART had not been a party, held that the defendant was not entitled to governmental immunity.¹⁴⁹ The *Williams* court held that the published opinion controlled, rejecting the defendant's assertion of immunity based on the more recent—and more specific—unpublished opinion.¹⁵⁰ The judge who authored *Williams* later dissented to the order denying DART a rehearing *en banc*:

[T]his is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions. Although I believe the panel reached a correct result, I respectfully dissent from the denial of rehearing *en banc*, which would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice in this circuit.¹⁵¹

In *In re Bagdade*,¹⁵² the Seventh Circuit cited *Hart* with approval when it considered imposing sanctions against an attorney, in part for

(citing *Clark* as controlling authority), *reh'g en banc denied*, 256 F.3d 260 (5th Cir.), *cert. denied*, 534 U.S. 1042 (2001).

¹⁴⁶ 256 F.3d 260 (5th Cir. 2001) (Smith, J., joined by Jones and DeMoss, JJ., dissenting) (denying petition for rehearing *en banc*). Judge Smith authored the original opinion in *Williams*. See *Williams*, 242 F.3d at 317.

¹⁴⁷ See *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (table of unreported decisions), *cert. denied*, 528 U.S. 1062 (1999). In *Anderson*, the Fifth Circuit affirmed, without argument, the unpublished decision of a federal magistrate judge holding that DART was entitled to governmental immunity. See *Anderson v. DART*, No. CA3:97-CV-1834-BC, 1998 WL 686782 (N.D. Tex. Sept. 29, 1998). The unpublished opinion of the lower court in *Anderson* did not mention *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), on which the *Williams* court later relied to hold that DART was not immune from suit.

¹⁴⁸ See *Anderson*, 1998 WL 686782, at *8.

¹⁴⁹ *Williams*, 242 F.3d at 317, 318-19 (citing *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986)).

¹⁵⁰ *Id.* at 318 n.1 (citing *Anderson v. DART*, No. CA3:97-CV-1834-BC, 1998 WL 686782 (N.D. Tex. Sept. 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999) (table of unreported decisions), *cert. denied*, 528 U.S. 1062 (1999)).

¹⁵¹ 256 F.3d at 261 (internal citation omitted) (Smith, J., dissenting). “The law is supposed to inform the choices of potential litigants. How can this circuit’s decisions do so, if they carry no predictive effect?” *Id.* at 263.

¹⁵² 334 F.3d 568, 583 (7th Cir. 2003). “Generally, sanctions have not been imposed solely for citation to an unpublished order if it appears that the attorney’s violation was not willful.” *Id.* (citing *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) and *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001)). In *Sorchini*, a *per curiam* opinion that predated *Hart*, the court held, “Unpublished dispositions are neither

citing an unpublished order in violation of the circuit's local rule.¹⁵³ In *Symbol Technologies, Inc. v. Lemelson Medical, Education & Research Foundation*,¹⁵⁴ the defendant, relying on two unpublished, nonprecedential decisions, argued that the Federal Circuit had rejected prosecution laches as a defense to a claim of patent infringement.¹⁵⁵ The Federal Circuit politely rejected *Anastasoff's* holding that unpublished decisions must be treated as precedential, and instead "subscribe[d] to the comprehensive, scholarly treatment of the issue in refutation of *Anastasoff* set out in *Hart*."¹⁵⁶ The panel found it unnecessary to "do little more than signal [its] agreement with it by synopsisizing the main points" because "Judge Kozinski's opinion for the *Hart* court [was] so thorough."¹⁵⁷

Sister circuits thus have generally followed the Ninth Circuit's reasoning in *Hart* rather than the Eighth Circuit's rationale in *Anastasoff*. Nevertheless, a number of federal district courts continue to cite unpublished circuit court opinions at least as persuasive authority, even while openly acknowledging their nonprecedential status under some local circuit rules.¹⁵⁸ In a recent decision, for example, the United States

persuasive nor controlling authority, and the limited exceptions to the noncitation rule contained in section (b) [of Ninth Circuit Rule 36-3] are not intended to change that." *Sorchini*, 250 F.3d at 709 (2-1 decision). Judge Kozinski also took part as a member of the *Sorchini* majority. *Id.* at 707.

¹⁵³ *Bagdade*, 334 F.3d at 583 (citing 7TH CIR. R. 53(b)(2)(iv) (2002)).

¹⁵⁴ 277 F.3d 1361 (Fed. Cir. 2002).

¹⁵⁵ *Id.* at 1363.

¹⁵⁶ *Id.* at 1367 (citation omitted).

¹⁵⁷ *Id.* at 1367 n.* (so designated in original).

¹⁵⁸ See, e.g., *Griffy's Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 673 (2001) (Baskir, C.J.), *quoted in* *Watson v. Sec'y of Dep't of Health and Human Servs.*, No. 96-639V, 2001 WL 1682537, *18 n.33 (Fed. Cl. Dec. 18, 2001) (unreported); *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 104 n.1 (D. Mass. 1999) (Young, C.J.) (acknowledging that while an unpublished opinion was "'not citable as precedent' under FED. CIR. LOC. R. 47.6(b)[, t]his hardly means . . . that it cannot be cited at all"); see also *Caron v. United States*, 183 F. Supp. 2d 149, 158 & n.7 (D. Mass. 2001) (Young, C.J.) (defending position that unpublished federal appellate court opinions may be cited by the district court for their persuasive value notwithstanding local circuit rules to the contrary).

The establishment of publication rules has proven to be a watershed event in the history of federal court case law. Prior to this time, all or very nearly all federal appellate court opinions in the United States were published in print. However, the publication rules have so systematically reduced the number of published opinions that currently more than 79 percent of federal circuit court opinions are unpublished.

Ironically, citation rules have had no effect whatsoever on actual publication and the associated legal research costs. Lawbook publishers have simply gone ahead and published the so-called "unpublished" judicial decisions, noting them as such. Indeed, the lawbook publishers must relish

District Court for the District of Massachusetts opined that it was bound by an unpublished opinion of the First Circuit, even though the same opinion might *not* be binding on other panels of the First Circuit.¹⁵⁹ After acknowledging the holdings of both *Anastasoff* and *Hart*, the court found the reasoning of *Anastasoff* “especially compelling,” and therefore treated the First Circuit’s unpublished decision with “great care and respect.”¹⁶⁰ Finally, district courts in the Ninth Circuit have narrowly

the additional pages of decisions now being devoted to debating the propriety of the no-citation rules.

.....
 It suffices here simply to say that, at least within the First Circuit, I believe the no-citation rule has no application to judicial opinions. *Giese*, 43 F. Supp. 2d at 103 n.1.

More generally, I believe fundamentally that judges are society’s teachers of the law. As Professor William Christianson has said, “[t]eaching is a very special kind of caring.” In everything we do and say as judges, our society expects us to epitomize and articulate its most basic values.

Basic to the discharge of my judicial duty, therefore, is the duty to *explain* clearly, to teach *why* I am deciding as I do. Where an unpublished decision persuades me and best explains the course of my own reasoning, I cite it. While the courts of appeal properly mull the precedential effect of their decisions on the development of the law, that aspect of no-citation rules is, thus far, of no moment to me. My citation means only that I find the readily available unpublished decision *persuasive*, just as I would had the same three appellate judges in my circuit (or the circuit within which I am sitting) collaborated in a published law review article. My citation, therefore, is an acknowledgment of such reasoning, a sign of respect to the authors, and an explanation to the public that I found such reasoning persuasive. It is only in this fashion that the common law can grow.

Finally, there is no genuine tension between district court decisions which cite “unpublished” appellate decisions and the local circuit “no-citation” rules. Unlike an attorney, under the Federal Rules of Civil and Criminal Procedure, I am expressly and properly *required* to state my reasoning. FED. R. CIV. P. 52(a); FED. R. CRIM. P. 12(e), (g). I would violate these rules were I to fail to cite a source I actually used to inform my reasoning. Moreover, these nationally uniform rules adopted pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-72, take precedence over any locally adopted rule, *id.*; *United States v. Claros*, 17 F.3d 1041, 1045 (7th Cir.1994) (“A local rule may not be inconsistent with the Constitution, a statute of the United States, or with a national rule governing the conduct of litigation in the United States courts.”).

Id. (emphasis in original; internal citations to secondary sources omitted).

¹⁵⁹ *Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 159-60 (D. Mass. 2004) (Young, C.J.).

¹⁶⁰ *Id.* at 160 n.9. The district court nevertheless held that the appellate court’s opinion was readily distinguishable. *Id.* After quoting 1ST CIR. R. 32.3(a)(2), which disfavors the citation of unpublished opinions, the court “note[d] with some concern . . . that the constitutionality of this local rule is suspect under the reasoning of *Anastasoff*.” *Id.* at 160 n.10.

Although a full discussion is beyond the scope of this article, state courts have also addressed the constitutional controversy. For example, the Arkansas Supreme Court has explicitly rejected a claim that its rule prohibiting parties from citing unpublished

interpreted the local no-citation rule, which purports to preclude citation of unpublished opinions “to or by” the courts of that circuit.¹⁶¹ The lower courts have held that the rule does not bar a district court within the Ninth Circuit from considering unpublished decisions of *other* courts, including district courts within the circuit, as persuasive authority.¹⁶²

V. THE ETHICAL QUESTION BEGGED BY THE CONSTITUTIONAL DEBATE

Although *Anastasoff* and *Hart* are the leading cases in the controversy over unpublished opinions, they are distinguishable from a factual, procedural, and ethical standpoint. In *Anastasoff*, the only Eighth Circuit decision directly on point was an unpublished opinion that was directly adverse to Faye Anastasoff’s claim for a tax refund.¹⁶³ The taxpayer’s counsel cited the opinion but argued it should not apply,¹⁶⁴ citing the Eighth Circuit’s local rule providing that unpublished opinions

opinions of the state court of appeals violated a criminal defendant’s due process rights under either the United States or Arkansas Constitutions. See *Weatherford v. State*, 101 S.W.3d 227, 231, 234 (Ark. 2003) (upholding ARK. SUP. CT. R. 5-2(d)). More recently, in *Schaaf v. Kaufman*, 850 A.2d 655, 657-58 (Pa. Super. Ct. 2004), the Pennsylvania Superior Court granted appellee’s motion to strike a citation in appellant’s brief to an unpublished memorandum decision, invoking Pa. Sup. Ct. Internal Operating Procedure 65.37(A). The court rejected appellant’s argument that the rule violated the Pennsylvania Constitution’s Vesting Clause and Due Course of Law Clause. *Id.* at 658.

Perhaps in response to *Weatherford*, 2005 House Bill 1107 was recently introduced in the Arkansas General Assembly for the purpose of permitting citation of unpublished opinions. Specifically, the bill would strike language in ARK. SUP. CT. R. 5-2(d) that currently prohibits citation of unpublished opinions of the Arkansas Court of Appeals. See H.B. 1107, 85th Gen. Assem., Reg. Sess. (Ark. 2005), available at <http://www.arkleg.state.ar.us/ftproot/bills/2005/public/HB1107.pdf> (last visited Feb. 27, 2005).

¹⁶¹ 9TH CIR. R. 36-3(b).

With minor exceptions dealing with subjects like *res judicata* and double jeopardy, none of the judges of our circuit—district judges, magistrate judges, bankruptcy judges, even circuit judges—may rely on these unpublished dispositions in making their decisions. . . . The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context, and that context alone, the unpublished disposition may not be considered.

Unpublished Judicial Opinions, *supra* note 60, at 12 (prepared statement of Alex Kozinski).

¹⁶² See *Herring v. Teradyne, Inc.*, 256 F. Supp. 2d 1118, 1128 n.2 (S.D. Cal. 2002) (citing *Alvarenga-Villalobos v. Reno*, 133 F. Supp. 2d 1164, 1167-68 (N.D. Cal. 2000) (holding that Ninth Circuit rule does not bar citation of unpublished Third Circuit decision) and *In re Antablian*, 140 B.R. 534, 536 (C.D. Cal. 1992) (holding that Ninth Circuit Rule does not bar citation of unpublished opinions of any court other than Ninth Circuit)).

¹⁶³ *Anastasoff*, 223 F.3d at 899, *vacated as moot on reh’g*, 235 F.3d 1054 (8th Cir. 2000).

¹⁶⁴ *Id.* at 899, 905.

are not precedent.¹⁶⁵ Judge Arnold's opinion concluded that the local rule's treatment of unpublished opinions as nonprecedential exceeded the circuit court's constitutional power under Article III.¹⁶⁶ Having done so, the panel conferred precedential status on the only relevant decision ever issued by the Eighth Circuit,¹⁶⁷ reaffirmed it, and held that it barred the tax refund.¹⁶⁸

Notably, *Anastasoff* did not address the ethical implications of no-citation rules. To the contrary, the Eighth Circuit's Rule 28A(i) *permitted* citation of the relevant unpublished opinion under the circumstances, and counsel for both parties openly advocated their respective positions as to whether the court should follow the cited decision.¹⁶⁹ The issue in *Anastasoff* was whether the local rule required the court to *disregard* the unpublished decision, even in the absence of

¹⁶⁵ See 8TH CIR. R. 28A(i).
Rule 28A. Briefs

.....
(i) Citation of Unpublished Opinion. Unpublished opinions are decisions which a court designates for unpublished status. They 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.* . . . When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Id. (emphasis added).

¹⁶⁶ *Anastasoff*, 223 F.3d at 905.

The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that it is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.'" *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring)). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Id.

¹⁶⁷ 223 F.3d at 899 (citing *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished)).

¹⁶⁸ *Id.* at 905. "Ms. Anastasoff's interpretation of [26 U.S.C.] § 7502 was directly addressed and rejected in *Christie*. EIGHTH CIR. R. 28A(i) does not free us from our obligation to follow that decision." *Id.* (internal footnote omitted).

¹⁶⁹ See 223 F.3d at 899; *see also* Brief for the Appellee at 3 n.2, 2000 WL 34017025, *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (No. 99-3917).

any other directly applicable authority from the same circuit.¹⁷⁰ When *Anastasoff* was vacated on rehearing, Judge Arnold, writing for the majority, specifically held, “The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”¹⁷¹ Today, the Eighth Circuit’s Local Rule 28A(i) remains unchanged, and courts in that circuit continue to rely on it to restrict, but not prohibit, citation of unpublished opinions.¹⁷²

In *Hart*, on the other hand, an attorney’s professional conduct was directly at issue. The appeal challenged the denial of a claim for Supplemental Security Income benefits under the Social Security Act.¹⁷³ Appellant’s counsel cited an unpublished decision in a footnote in his opening brief.¹⁷⁴ When the court *sua sponte* ordered him to show

¹⁷⁰ 223 F.3d at 899.

¹⁷¹ *Anastasoff v. United States*, 235 F.3d 1054, 1056, *vacating* 223 F.3d 898 (8th Cir. 2000).

¹⁷² *See, e.g., United States v. Yirkovsky*, 338 F.3d 936, 946 n.3 (8th Cir. 2003) (Heaney, J., dissenting) (acknowledging that Rule 28A(i) remains binding in the Eighth Circuit); *see also Anastasoff*, 223 F.3d at 905 (Heaney, J., concurring) (“I agree fully with Judge Arnold’s opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions.”).

¹⁷³ *Hart v. Massanari*, 20 Fed. Appx. 668, 669, No. 99-56472, 2001 WL 1135601, at *1 (9th Cir. Sept. 24, 2001).

¹⁷⁴ *Hart*, 266 F.3d at 1158-59. Ironically, the unpublished opinion that triggered Judge Kozinski’s 24-page treatise was not even listed in the appellant’s table of authorities; rather, it was cited only in a footnote in appellant’s opening brief, and only for the purpose of advising the panel that the Ninth Circuit had not previously ruled on the merits of the issue in dispute. *See* Appellant’s Opening Brief at n.6, *Hart v. Massanari*, 20 Fed. Appx. 668 (9th Cir. 2001) (99-56472). Appellant’s counsel cited the unpublished opinion neither for its precedential value nor its persuasive value; rather, the unpublished opinion was cited only to demonstrate that the Ninth Circuit, unlike several others, had never reached the merits of the substantive issue. *See id.* The fact that the published opinion in *Hart* was a thinly disguised advisory opinion addressing the precedential value of unpublished dispositions is illustrated by the brevity of the Ninth Circuit’s two-page *unpublished* opinion on the merits. *See Hart*, 20 Fed. Appx. 668 (9th Cir. 2001) (99-56472) (unpublished opinion).

cause why he should not be sanctioned for citing the unpublished decision in violation of the Ninth Circuit's no-citation rule,¹⁷⁵ the attorney responded that the local rule might be unconstitutional under the ruling in *Anastasoff*.¹⁷⁶ In reply, Judge Kozinski took the opportunity to write a lengthy published (and therefore citable) opinion defending the Ninth Circuit's no-citation rules in light of *Anastasoff*.¹⁷⁷ In the end, however, the panel declined to impose any sanctions at all and discharged the show cause order.¹⁷⁸

Scholarly commentary in the wake of *Anastasoff* and *Hart* has been prolific, particularly with respect to the constitutionality of local rules limiting the precedential value of unpublished opinions. Nevertheless, few if any commentators have addressed the ethical implications of nonuniform local rules governing the precedential status and citability of unpublished dispositions. Focusing on the difficulty of reconciling conflicting obligations, the second part of this article explores the ethical dilemmas no-citation rules impose on the federal bar, particularly the increasing number of attorneys who practice in more than one circuit.¹⁷⁹

Published commentary by practicing attorneys offers a pragmatic perspective on the current patchwork of local citation rules among the

¹⁷⁵ *Hart*, 266 F.3d at 1159; see 9TH CIR. R. 36-3(a), (b) ("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 . . .").

¹⁷⁶ *Hart*, 266 F.3d at 1159. "*Anastasoff*, while vacated, continues to have persuasive force. It may seduce members of our bar into violating our Rule 36-3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest." *Id.* (internal citation omitted).

¹⁷⁷ *Id.* at 1159-80. *Hart* acknowledged in passing that "[o]ur rule, unlike that of the Eighth Circuit, prohibits citation of an unpublished disposition to any of the courts of our circuit. The Eighth Circuit's rule allows citation in some circumstances, but provides that the authority is persuasive rather than binding." *Id.* at 1160 n.2.

¹⁷⁸ *Id.* at 1180. In a single concluding paragraph, the panel succinctly addressed whether to impose sanctions against appellant's counsel for violating 9TH CIR. R. 36-3:

Contrary to counsel's contention, then, we conclude that Rule 36-3 is constitutional. We also find that counsel violated the rule. Nevertheless, we are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.

Id.

¹⁷⁹ See Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules (May 22, 2003), at 30, 38, available at <http://www.uscourts.gov/rules/Reports/AP5-2003.pdf> (last visited Feb. 27, 2005) (noting two reasons for the proposed new rule: (1) local circuit rules on citation differ dramatically, and (2) the differences create a particular hardship for practitioners who practice in more than one circuit).

circuits.¹⁸⁰ This part of the article summarizes the various functions served by federal circuit opinions and the disparate effects of circuit publication plans. Second, this part discusses the ethical duty of candor and procedural rules imposing the risk of sanctions on attorneys who violate their ethical duties as officers of the court. Third, proposed Fed. R. App. P. 32.1 is discussed, including the somewhat tenuous present status of the proposed new rule and its potential remedial effect on the ethical dilemmas posed by no-citation rules. Fourth, the article discusses the implications of the E-Government Act of 2002 as it directly applies to the availability of judicial opinions issued by the federal courts of appeals. Finally, the article recommends a legislative solution, if the Judicial Conference and ultimately the United States Supreme Court fail to exercise their supervisory and statutory authority to ensure uniformity among the circuits by overriding local no-citation rules.

VI. THE MULTIPLE FUNCTIONS OF JUDICIAL DECISIONS AND THE DISPARATE EFFECTS OF CIRCUIT PUBLICATION PLANS

Decisions rendered by a federal court of appeals, like those of any other appellate court, serve three primary functions: dispositive, predictive, and lawmaking.¹⁸¹ Under the first and most pragmatic perspective, an appellate court decision simply serves a dispositive function: to resolve the legal dispute pending before the court.¹⁸² The

¹⁸⁰ Compare, e.g., Charles L. Babcock, *The Problem with Unpublished Opinions*, 20 COMM. LAWYER 13, 14 (Spring 2002) (opposing no-citation rules); Hanglely, *supra* note 121, at 690-91 (supporting rules permitting citation of “unpublished” decisions in the interest of effective advocacy); Andrew M. Low, *Unpublished Opinions*, 32 COLO. LAW. 39, 40 (Mar. 2003) (opposing no-citation rules); Roy H. Wepner, *Are Federal Appellate Practitioners Free at Last? Proposed Rule Change Lifts Ban on Citation of Unpublished Decisions that is Still in Effect in Certain Federal Appeals Courts*, 175 N.J.L.J. 272 (2004) (opposing no-citation rules) with, e.g., Gregory S. Fisher, *Citing to the Unpublished Opinion*, 40 ARIZ. ATT’Y 8, 8 (Feb. 2004) (opposing uniform rule permitting citation) and Medford, White & Medford, *supra* note 23, at 27 (predicting that the controversy is likely to continue until the United States Supreme Court addresses the issue); Robert E. Shapiro, 29 LITIGATION 63, 65 (Fall 2002) (taking a middle ground by urging courts not to issue written opinions except in cases that warrant them, and suggesting that such opinions should be citable).

¹⁸¹ “All opinions reside somewhere on a continuum that moves from simple dispute resolution to law-making and also on a rhetorical line that moves from informing to persuading.” ELIZABETH FAJANS, MARY R. FALK & HELENE S. SHAPO, WRITING FOR LAW PRACTICE 339 (2004); see *id.* at 334 (three primary functions of judicial writing are dispute resolution, predictive guidance, and lawmaking); see also Weaver, *supra* note 46, at 481. “Judicial opinions serve two basic purposes: (1) to settle the particular dispute before the court, and (2) to establish the law that is used to decide other cases.” *Id.* (citing Leflar, *Sources of Judge Made Law*, 24 OKLA. L. REV. 319, 319 (1971)).

¹⁸² Many commentators have referred to the “error-correcting” function of the appellate courts. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712

circuit's written decision, absent further proceedings on appeal, ultimately triggers issuance of the mandate¹⁸³ to the lower court. The mandate has the legal effect of ensuring that the circuit panel's decision is implemented by ordering certain action by the lower court from which the appeal was taken.¹⁸⁴ If the district court's decision is affirmed, it becomes final upon the issuance of the mandate.¹⁸⁵ If reversed, the panel may vacate the district court's judgment or remand for further proceedings before the district court.¹⁸⁶ In any further proceedings, the written decision of the circuit panel embodies "the law of the case," and any subsequent rulings by the district court, and even the appellate court on further appeal, must be consistent with the circuit's initial written decision.¹⁸⁷

The dispositive aspects of a circuit panel's decision may also affect future litigation between some or all of the same parties. A decision will

(2000/2001). However, in carrying out their primary function of resolving disputes, the federal circuits do not simply correct errors. Under the harmless error doctrine, for example, the appellate courts often affirm the result reached by the district court while acknowledging that an error may have occurred. *See, e.g., Hart v. Massanari*, 20 Fed. Appx. 668, 669, No. 99-56472, 2001 WL 1135601, at *1 (9th Cir. Sept. 24, 2001) (holding that any error by the administrative law judge in refusing to allow appellant to comment on post-hearing reports was harmless). Even when the appellate court does identify reversible error, the typical result is to remand for further proceedings. The pragmatic function the appellate courts serve for the parties to the appeal is more accurately characterized as dispositive. Whether errors are corrected or not, the decision by the federal circuit court resolves the issues raised on appeal, either terminating the litigation for all practical purposes, or by remanding to the trial court for further proceedings. "For the litigants, dispute resolution is a decision's most fundamental purpose." FAJANS, FALK & SHAPO, *supra* note 181, at 338.

¹⁸³ A mandate is "[a]n order from an appellate court directing a lower court to take a specified action," or in the alternative, "[a] judicial command directed to an officer of the court to enforce a court order." BLACK'S LAW DICTIONARY 980 (8th ed. 2004).

¹⁸⁴ *See* FED. R. APP. P. 41.

¹⁸⁵ *See id.* Advisory Committee's notes to 1998 amendments; *see, e.g., Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1286 n.2 (9th Cir. 1997) ("In federal court . . . a judgment does not become final following appeal until the case is returned to district court and the mandate is spread."); *see also* 16A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND OTHER MATTERS § 3987 (1999 & Supp. 2004) (noting that "[u]ntil the mandate issues, . . . the case ordinarily remains within the jurisdiction of the court of appeals and the district court lacks power to proceed further with respect to the matters involved with the appeal").

¹⁸⁶ *See* 28 U.S.C.A. § 2106 (2005).

¹⁸⁷ *See, e.g., Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) (reaffirming that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court."); *see also* 18B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND OTHER MATTERS § 4478.3 (2002 & Supp. 2004). "Law-of-the-case terminology is often employed to express the principle that an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system." *Id.*

have res judicata or collateral estoppel effect if one or more of the parties to a legal dispute attempt to relitigate the same dispute in another forum or at a later time. It is only for this limited dispositive purpose that *all* circuits allow citation of unpublished opinions.¹⁸⁸ In other words, whether an opinion is designated for publication or not, all federal courts of appeals acknowledge that it may be cited for its dispositive value with respect to the parties to the appeal.¹⁸⁹

Second, a federal circuit decision serves a predictive function¹⁹⁰ with respect to the likely outcome of other similar disputes pending before the same court. All written decisions emanating from the federal circuit provide an important basis from which attorneys predict how the same or similar disputes will be resolved by that circuit. Whether designated for publication or not, written opinions offer a window into the thought processes of the judges who decided the issue.¹⁹¹ Especially in the absence of any precedential opinion directly on point, an “unpublished” opinion offers the practicing bar a strong indication how the judges who served on the panel, as well as their colleagues in the same circuit, will analyze and decide similar cases in the future.¹⁹² The predictive function is the one most practicing attorneys assign to written decisions of the federal circuits.¹⁹³

Third, appellate court decisions serve an important lawmaking function by shaping the bounds of the law itself, or by interpreting and

¹⁸⁸ See Appendix I (table of current publication and citation rules for each federal circuit).

¹⁸⁹ Some circuit rules suggest that they are permitting such opinions to be cited for their “precedential” value. However, the word “precedential” suggests that a rule of law articulated in one case will be applied to another involving different parties. See BLACK’S LAW DICTIONARY 1280 (8th ed. 2004) (defining “precedent” as “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”). Citing an unpublished opinion for purposes of res judicata, collateral estoppel, or the law of the case doctrine is more accurately described as a dispositive function.

¹⁹⁰ FAJANS, FALK & SHAPO, *supra* note 181, at 338; *see supra* note 2.

¹⁹¹ See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 11 (September 2004) (noting that lawyers, district court judges, and appellate judges regularly read unpublished opinions despite local prohibitions against citing them, and that unpublished opinions are helpful when addressing recurring issues involving similar fact patterns), *available at* <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

¹⁹² See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 947 (1989) (noting that even information about an individual judge may have value for litigants).

¹⁹³ See, e.g., *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, J., joined by Jones and DeMoss, JJ., dissenting from denial of rehearing en banc). “The law is supposed to inform the choices of potential litigants. How can this circuit’s [unpublished] decisions do so, if they carry no predictive effect?” *Id.*

applying a statute in the context of novel facts.¹⁹⁴ The precedential effect assigned to an appellate court decision directly controls the extent to which it contributes to the body of law within the circuit.¹⁹⁵ The lawmaking function of the federal circuits also extends to state law, because decisions rendered in diversity and habeas corpus cases often address novel state law issues.¹⁹⁶ While a federal circuit's decision on an issue of state law is not binding on state courts, as a practical matter it does bind federal district courts within the same circuit with respect to similar disputes, at least until the state appellate courts have had the opportunity to address the issue.¹⁹⁷

In some instances, because of the nature of the issue itself, the federal courts may have numerous opportunities to address a novel issue of state law without any intervening decisions by the state courts. When that occurs, the federal circuits perform an important role in predicting and shaping the contours of state law in the interim between precedential state court decisions on the same issue.¹⁹⁸ Thus, even though a federal circuit court decision on a matter of state law is non-binding on state courts, the decision serves an important lawmaking function.

¹⁹⁴ See Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 553 (2004); ABA Comm'n on Standards of Judicial Administration, STANDARDS RELATING TO APPELLATE COURTS § 3.00, commentary, at 5 (1994) (noting that one of the functions of the appellate courts is "to formulate and develop the law for general application in the legal system"); see also Pearson, *supra* note 22, at 1262 (noting that neither Congress nor the Supreme Court has clearly delineated the courts of appeals' lawmaking function).

¹⁹⁵ See Steinman, *supra* note 194, at 583.

A system where courts are free to decide cases knowing that the decision will not bind them in the future could undermine the legitimacy of the court by permitting arbitrary or unprincipled decisionmaking. The essence of principled decisionmaking, arguably, is to base decisions on principles that will hold fast beyond just the immediate case. Thus, allowing broad judicial lawmaking can legitimate the judicial role, because it helps to ensure that decisions are reached in a principled manner.

Id.

¹⁹⁶ See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (holding that a common law tort was committed under California law when defendants produced a commercial using a deliberate imitation of a professional singer's widely known, distinctive voice); *Keener v. Ridenour*, 594 F.2d 581, 586-87 (6th Cir. 1979) (citing several unpublished decisions of Ohio appellate courts in examining availability of additional state law remedies in reviewing dismissal of habeas corpus petition).

¹⁹⁷ Empirical research should be undertaken to determine whether the circuit courts designate decisions in diversity cases as "unpublished" more or less frequently than they do in non-diversity cases.

¹⁹⁸ See, e.g., *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 957-58 (6th Cir. 1980) (interpreting Tennessee law in a diversity case to hold that the exclusive right to publicity does not survive a celebrity's death).

As compared to the judicial decision itself, the panel's written *opinion* in each case serves a different purpose.¹⁹⁹ While the decision's primary purpose is to resolve the specific dispute presented to the appellate court, the purpose of an opinion is to articulate the reasoning the panel followed in reaching its decision – or at least the reasoning the panel elects to state explicitly for the record.²⁰⁰ In the words of one noted circuit judge, only through explanation can judges “reinforce our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what we do One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.”²⁰¹

In order to keep up with crushing dockets, federal appeals courts have devised alternative methods of disposition to avoid the need to issue a full opinion in every case. For example, many appellate courts have adopted a “summary calendar” for cases in which oral argument is not considered necessary.²⁰² Others use a “summary disposition” procedure for issuing abbreviated decisions in certain cases.²⁰³ Unpublished opinions were devised for similar reasons – to reduce the workload on each judge associated with preparing a full opinion in virtually every case.²⁰⁴ The degree to which each circuit makes use of procedures designed to expedite the judicial workload varies considerably.²⁰⁵

To the extent that the federal courts of appeals limit the use of these alternative methods of disposition, including unpublished opinions, to routine decisions not involving issues of first impression or novel fact patterns, procedural rules limiting citation of those decisions should be noncontroversial.²⁰⁶ On the other hand, when appellate courts resort to

¹⁹⁹ See *Wright v. Sec’y for Dep’t of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). “A judicial decision and a judicial opinion are not the same thing. The chief responsibility of judges is to decide the case before them. They may, or may not, attempt to explain the decision in an opinion.” *Id.*

²⁰⁰ *Id.*

²⁰¹ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372; see FAJANS, FALK & SHAPO, *supra* note 181, at 342 (judicial obligation to write persuasive opinions explaining decision outcomes is a “check on unbridled exercises of power”).

²⁰² See, e.g., 5TH CIR. R. 34.2.

²⁰³ See, e.g., U.S. Court. of Appeals for the D.C. Circuit, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 35-36 (2002), available at [http://www.cadc.uscourts.gov/internet/internet.nsf/650f3eec0dfb990fca25692100069854/e4556c08772a8ceec85256eb7007149af/\\$FILE/finalhandbook2002.pdf](http://www.cadc.uscourts.gov/internet/internet.nsf/650f3eec0dfb990fca25692100069854/e4556c08772a8ceec85256eb7007149af/$FILE/finalhandbook2002.pdf) (last visited Feb. 27, 2005).

²⁰⁴ See *supra* notes 34-38 and accompanying text.

²⁰⁵ See, e.g., Table S-3, *supra* note 5.

²⁰⁶ See Dean A. Morande, Comment, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 758 (2004) (hypothesizing that if the appellate courts followed their publication guidelines, the entire debate would be moot).

the use of unpublished decisions to address novel legal issues or apply settled law to novel fact patterns, it should be no surprise when future litigants seek to persuade the court to rely on those decisions, at least as persuasive legal authority.²⁰⁷

Several circuits' local rules include guidelines for publication of decisions.²⁰⁸ However, it has been questioned whether the federal courts

²⁰⁷ *E.g.*, Weaver, *supra* note 46, at 492 (advocating a rule allowing free citation of unpublished opinions as persuasive authority).

Unpublished decisions are law as much as are published decisions for dispute settling purposes. The application of the doctrines of res judicata, law of the case, and collateral estoppel to unpublished opinions assures their capacity to settle disputes. But unpublished opinions, because of their lack of promulgation, are not precedents. They are not fit subjects for the application of the doctrine of stare decisis. Yet, because the reasoning found in unpublished decisions may be useful in establishing the law, their citation should be allowed for that purpose.

Id. at 493; see Howard Slavitt, *Selling the Integrity of The System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995). "Even if one accepts the private law model premise that the purpose of litigation is to resolve the dispute between the parties, once a court issues a judgment the private dispute should be thought of as public property." *Id.* at 138; see also Vincent M. Cox, Note, *Freeing Unpublished Opinions from Exile: Going Beyond the Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1*, 44 WASHBURN L.J. 105, 105 (2004) (some lawyers advocate that unpublished opinions should be freely citable to the courts).

²⁰⁸ *Id.* at 759-64 (surveying publication plans in the federal courts of appeals); see, e.g., 7TH CIR. R. 53(c), (d).

(c) Guidelines for Method of Disposition.

(1) Published Opinions. A published opinion will be filed when the decision

- (i) establishes a new, or changes an existing rule of law;
- (ii) involves an issue of continuing public interest;
- (iii) criticizes or questions existing law;
- (iv) constitutes a significant and non-duplicative contribution to legal literature
 - (A) by a historical review of law,
 - (B) by describing legislative history, or
 - (C) by resolving or creating a conflict in the law;
- (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
- (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) Unpublished Orders. When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

(d) Determination of Whether Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished order shall be made by a majority of the panel rendering the decision.

of appeals uniformly comply with their own publication guidelines.²⁰⁹ As a practical matter, as caseloads continue to increase, the federal circuits have increasingly opted for nonpublication of their decisions in significant numbers.²¹⁰ Empirical research suggests that limited publication rules are effective in reducing appellate delay.²¹¹ However, the increasing numbers of unpublished decisions are not limited to routine cases, as the circuits' nonpublication guidelines and judicial commentary would suggest. Instead, the data show that large numbers of unpublished opinions are issued to resolve non-routine categories of appeals.²¹²

It is no wonder, then, that no-citation rules are controversial. Attorneys should not be threatened with sanctions for citing unpublished opinions to the very courts that issue those decisions, especially when the courts themselves fail to follow their own guidelines for determining whether opinions warrant publication. If nonprecedential status were reserved for truly routine decisions, no credible attorney would have any reason to cite those opinions because they would have no persuasive value.²¹³ The issue has become increasingly controversial²¹⁴ because the

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in this rule.

7TH CIR. R. 53(c), (d).

²⁰⁹ See Robert J. Van Der Velde, *Quiet Justice: Unreported Opinions of the United States Courts of Appeals – A Modest Proposal for Change*, 35 COURT REVIEW 20, 26 (1998) (noting that data suggests that circuit policies regarding nonpublication are not uniformly implemented); Morande, *supra* note 206, at 758 (hypothesizing that if the appellate courts followed their guidelines for publication of decisions, the entire “publication debate” would be moot).

²¹⁰ Van Der Velde, *supra* note 209, at 20. In 1981, for example, slightly less than half of all dispositions by the federal circuits were unpublished decisions. *Id.* at 22 (citing Stienstra, *supra* note 8, at 40-41 && 40 tbl. 2). In 2003, 79.5 percent of all dispositions were unpublished. See Table S-3, *supra* note 5.

²¹¹ Van Der Velde, *supra* note 209, at 24 & 51 tbl. 5 (comparing mean days pending for published decisions as compared to unpublished decisions, by category; concluding that for nearly every category, cases resolved by unpublished decisions were completed in fewer days, on average, than those terminating in published decisions). “[S]ignificant time savings occur through the use of limited publication plans by the appellate courts. With each variable examined, unpublished cases were concluded more quickly than published cases, and in some cases several months sooner.” *Id.* at 26.

²¹² *Id.* at 26-27.

²¹³ “[A] lawyer who relies on an unpublished opinion in a brief or oral argument is in effect acknowledging that no published opinion supports the lawyer’s position. That is a

proportion of nonprecedential decisions issued by the courts of appeals has increased dramatically over the last decade.²¹⁵

VII. ETHICAL DUTY OF CANDOR V. LOCAL NO-CITATION RULES

As an officer of the court,²¹⁶ every attorney owes the tribunal an ethical duty of candor.²¹⁷ The duty of candor has been acknowledged as

substantial disincentive to promiscuous citation of unpublished rulings.” *Unpublished Judicial Opinions*, *supra* note 60, at 53 (prepared statement of Arthur D. Hellman); *see also id.* at 55 n.47 (“It is instructive to browse through a volume of the Federal Appendix. The vast majority of the opinions have nothing in them that anyone would want to cite.”).

²¹⁴ Judge Samuel A. Alito, Jr., chair of the Advisory Committee on Appellate Rules, anticipated the controversy as early as May 2002, when he received a “decidedly mixed response” from his survey of circuit chief judges about the Justice Department’s proposal to permit citation of unpublished opinions. *See* Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 3-4 (May 21, 2002), *available at* <http://www.uscourts.gov/rules/Reports/AP5-2002.pdf> (last visited Feb. 27, 2005); *see also* Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 2 (December 6, 2002) (reporting that the Committee had in principle approved proposed FED. R. APP. P. 32.1 that would permit citation of unpublished opinions, “a controversial matter” likely to generate substantial comments), *available at* <http://www.uscourts.gov/rules/Reports/AP12-2002.pdf> (last visited Feb. 27, 2005).

²¹⁵ *See* Table 1.6, *supra* note 5.

²¹⁶ SHARSWOOD, *supra* note 94, at 83-84.

[T]he lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question. This is the office which the advocate performs. . . . The court or jury ought certainly to hear and weigh both sides; and the office of counsel is to assist them by doing that, which the client in person, from want of learning, experience, and address, is unable to do in a proper manner.

Id.

²¹⁷ *See* MODEL RULES OF PROF’L CONDUCT R. 3.3: Candor Toward the Tribunal (2001).

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) 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

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6 [client confidentiality].

The amendments adopted by the ABA in November 2002 omitted the qualifying word “material” from the prohibition against making false statements to a tribunal and combined former subsections (a)(1) and (a)(2):

(a) A lawyer shall not knowingly:

paramount in numerous published opinions issued by federal courts of appeals.²¹⁸ In addition, an attorney is barred by various procedural rules

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [client confidentiality].

MODEL RULES OF PROF'L CONDUCT R. 3.3: Candor Toward the Tribunal (2002). The commentary to the revised rule clarifies the applicability of the rule:

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal.

Id. cmt. [2].

²¹⁸ See, e.g., *United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993).

[W]e are confident that a general duty of candor to the court exists in connection with an attorney's role as an officer of the court.

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

While no one would want to disagree with these generalities about the obvious, it is important to reaffirm, on a general basis, the principle that *lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process*. Each lawyer undoubtedly has an important duty of confidentiality to his client and must surely advocate his client's position vigorously, but only if it is truth which the client seeks to advance. The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. It is without note, therefore, that we recognize that *the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit*. See 1 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* 575-76 (1990) ('[W]here there is danger that the tribunal will be misled, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself.').

While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision-making process, see *Hazard* at 575, and

from bringing frivolous appeals. For example, federal courts of appeals have authority to impose sanctions upon determining that an appeal is frivolous, after giving notice to the attorney and a reasonable opportunity to respond.²¹⁹ In addition, after reasonable notice and a hearing, if requested, the federal circuits may impose discipline, including suspension or disbarment, for “conduct unbecoming a member of the court’s bar” or “failure to comply with any court rule.”²²⁰ Finally, an attorney who submits a document to the court represents to the best of his or her knowledge that the claims, defenses, and arguments presented are “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment

Rule 3.4 articulates an analogous duty to opposing lawyers, *neither of these rules nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process.*

Id. at 457-58 (emphasis added); *see also* Monee Nursery & Landscaping Co. v. Int’l Union of Operating Eng’rs, Local 150, AFL-CIO, 348 F.3d 671, 678 n.4 (7th Cir. 2003).

[A]n intentional misstatement of law before a court is a serious offense that violates Rule 3.3(a) of the Model Rules of Professional Conduct (“a lawyer shall not knowingly make a false statement of material fact or law to a tribunal”) and can lead to sanctions under Rule 11(c) of the Federal Rules of Civil Procedure.

Id. at 678 n.4 (citing Teamsters Local No. 579 v. B & M Transit, Inc., 882 F.2d 274, 280 (7th Cir. 1989)); *LaSalle Nat’l Bank v. First Conn. Holding Group, LLC*, 287 F.3d 279, 293 (3d Cir. 2002) (“as an officer of the court, an attorney must comport himself/herself with integrity and honesty when making representations regarding a matter in litigation”); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (“By failing to cite controlling adverse authority, the conduct of appellant’s counsel was inappropriate and potentially a violation of counsel’s duty of candor toward the court.”) (citing MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3)); *United States v. Ogbonna*, 184 F.3d 447, 449 n.2 (5th Cir. 1999) (“Attorneys are not to file or give aid in filing briefs that base their arguments on case law contrary to binding Fifth Circuit precedent without mentioning the binding precedent. Frivolous arguments are not to be made to this court.”) (citing FED. R. APP. P. 38); *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F.3d 675, 675-76 (9th Cir. 1996). “Rule 3.3(a)(3) prohibits an attorney from knowingly failing to disclose controlling authority directly adverse to the position advocated. The rule is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball.” *Id.*; *see also* *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994).

Every lawyer is an officer of the court. . . . [I]n addition to his duty of diligently researching his client’s case, he always has a duty of candor to the tribunal. . . . The duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience.

Id. at 1095 & n.5; *In re Hendrix*, 986 F.2d 195, 201 (7th Cir. 1993) (Posner, J.) (while federal circuits are divided as to “whether failure to acknowledge binding adverse precedent violates FED. R. CIV. P. 11,” knowing concealment of dispositive adverse authority amounts to professional misconduct contrary to Rule 3.3(a)(3) (1983)).

²¹⁹ *See* FED. R. APP. P. 38.

²²⁰ FED. R. APP. P. 46(b), (c).

of new law”²²¹ Rule 11 specifically permits the court to take the initiative to impose sanctions for violations by issuing an order describing the challenged conduct and directing counsel to show cause why the conduct did not violate the rule.²²²

Beyond the procedural and ethical rules expressly conferring sanctioning power, the United States Supreme Court has expressly declared that the federal courts have the inherent power, “incidental to all [c]ourts,” to discipline attorneys appearing before them.²²³ In addition,

it is firmly established that “[t]he power to punish for contempts is inherent in all courts.” This power reaches both conduct before the court and that beyond the court’s confines, for “[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.”²²⁴

The attorney’s duty of candor to the court outweighs even the attorney’s ethical duties to the client.²²⁵ “As officers of the court, lawyers who practice in federal court have an obligation to assist the judges to keep within the boundaries fixed by the Constitution and Congress; it is precisely to impose a duty of assistance on the bar that lawyers are called ‘officers of the court.’”²²⁶ Whether embodied in statute, procedural rules, or disciplinary rules, the duty of candor and honesty to the tribunal is deeply rooted in American jurisprudence.²²⁷

²²¹ FED. R. CIV. P. 11(b)(2). The rule also authorizes the imposition of appropriate sanctions for violations of subsection (b). *See* FED. R. CIV. P. 11(c).

²²² *See* FED. R. CIV. P. 11(c)(1)(B); *see, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (ordering appellant’s counsel to show cause why he should not be sanctioned for violating Ninth Circuit’s no-citation rule).

²²³ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)); *see, e.g.*, *Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) (quoting *Chambers*).

²²⁴ *Chambers*, 501 U.S. at 44 (citations omitted).

²²⁵ *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2002); *see, e.g.*, *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067 (7th Cir. 2000) (attorney’s duties to protect client confidentiality and advocate vigorously are qualified by the duty to be honest with the court).

²²⁶ *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir. 2002).

²²⁷ *See* EDWARD ABBOTT PARRY, *THE SEVEN LAMPS OF ADVOCACY* (1923).

The best advocates of all generations have been advocates of honesty. Abraham Lincoln founded his fame and success in the profession on what some called his “perverse honesty.” On his first appearance in the Supreme Court of Illinois he addressed the court as follows: “This is the first case I have ever had in this court, and I have therefore examined it with great care. As the court will perceive by looking at the abstract of the record, the only question in the case is one of authority. I have not been able to find any authority to sustain my side of the case, but I have found several cases

Local rules prohibiting or discouraging the citation of legal authority of any kind directly contradict the attorney's duty of candor. The courts have made it very clear that an attorney has an overarching duty to protect the integrity of the judicial system,²²⁸ and yet that very system, through the enforcement of local rules discouraging citation of unpublished opinions, threatens to sanction attorneys who act in good faith to bring relevant legal authority to the attention of the court. If the federal courts of appeals mean what they say—that an attorney's ethical duty of candor to the court overrides even the ethical duty of loyalty to the client—then the federal judiciary must remove the practicing bar from the horns of the ethical dilemma: Comply with the duty of candor and risk sanctions for violating local no-citation rules? Or comply with local no-citation rules and violate the duty of candor to the court?

No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as “unpublished,” in violation of the rules of the court and the ethical rules requiring attorneys to follow them.²²⁹ On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of “unpublished” opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.²³⁰

directly in point on the other side. I will now give these authorities to the court, and then submit the case.” . . . If an advocate knows the law to be *x*, it is not honest to lead the court to believe that it is *y*. Whether the advocate does this by directly mis-stating the law, or by *deliberately omitting to state it fully within the means of his knowledge, it is equally without excuse, and dims the lamp of honesty.*

For the advocate must remember that he is not only the servant of the client, but the friend of the court, and honesty is as essential to true friendship as it is to sound advocacy.

Id. at 19-20 (emphasis added).

²²⁸ “The general duty of candor and truth thus takes its shape from the larger object of preserving the integrity of the judicial system.” *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 458 (4th Cir. 1993).

²²⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2002), which reads as follows:

A lawyer shall not: . . .

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]

Id.; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995).

²³⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

The federal circuit courts have repeatedly echoed the words of the Fourth Circuit in *United States v. Shaffer Equipment Company*.²³¹

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.²³²

Yet ironically, the Fourth Circuit's local rule, as well as those of most other federal circuits, discourages attorneys from telling the "whole truth" to the court if it means citing its own unpublished opinions.²³³ No-citation rules are simply antithetical to the expressed values of the federal circuit courts favoring attorney conduct that protects the integrity of the judicial system.²³⁴

²³¹ *Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993); see also *supra* note 218 and accompanying text.

²³² *Shaffer Equip. Co.*, 11 F.3d at 457.

²³³ 4TH CIR. R. 36(c). However, the Fourth Circuit's local rule does permit citation of unpublished opinions in limited circumstances:

Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If counsel believes, nevertheless, that an unpublished disposition of this court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.

Id.; see Appendix I.

²³⁴ See Slavitt, *supra* note 207, at 142.

As precedent, [a federal judge's] ideas and reasoning are society's property. The system of precedent preserves the reasoning of prevailing as well as losing arguments so that future courts can continue to reason through and to revise the applicable rules. While separate opinions may not always lead to changes in the majority viewpoint, a majority rule's ability to withstand contrary reasoning adds to its validity. It is the reliance on tradition and the equal opportunity of litigants to influence this tradition that provides judicial legitimacy in a political democracy. It is a question of priorities, of how highly we value precedent when calculating the most "efficient" distribution of resources. The courts cannot afford to ignore efficiency, but at the same

VIII. PROPOSED FEDERAL RULE OF APPELLATE PROCEDURE 32.1:
A SOLUTION STALLED BY STUDY

The proposed new Rule 32.1 of the Federal Rules of Appellate Procedure represents the culmination of years of debate about the propriety of no-citation rules. From the very beginning, proposals to develop nonpublication plans and no-citation rules were controversial. In 2001, in the aftermath of the constitutional debate concerning the precedential value of unpublished opinions, the Solicitor General of the Department of Justice proposed adoption of a new federal rule of appellate practice.²³⁵ In April 2002, the Advisory Committee on Appellate Rules endorsed the proposal in concept, with some modifications.²³⁶ In November 2003, the Advisory Committee issued a proposed new rule for public comment.²³⁷ If approved, Rule 32.1 would

time judicial integrity is an intangible. An equation cannot adequately measure the costs of selling the integrity of the system of precedent.

Id. (internal footnotes omitted).

²³⁵ See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 9 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). “In January 2001, the Solicitor General, on behalf of the Department of Justice, proposed specific language amending the Federal Rules of Appellate Procedure to provide for uniform procedures governing the citation of unpublished opinions. The [Advisory] [C]ommittee [on Appellate Rules] is now studying the Justice Department proposal.” *Unpublished Judicial Opinions*, *supra* note 60, at 7 (prepared statement of Samuel A. Alito, Jr.); see also *id.* at 9 (summarizing Department of Justice proposal); *id.* at 54 (prepared statement of Arthur D. Hellman).

²³⁶ Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules 3-4 (May 21, 2002), available at <http://www.uscourts.gov/rules/Reports/AP5-2002.pdf> (last visited Feb. 27, 2005).

²³⁷ As issued for public comment, proposed FED. R. APP. P. 32.1 read as follows:

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

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

Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 2-3 (May 22, 2003), available at <http://www.uscourts.gov/rules/Reports/AP5-2003.pdf> (last visited Feb. 27, 2005) (proposing to add new Rule 32.1 “that would require courts to permit the citation of judicial opinions, orders, judgments,

prohibit any circuit from restricting citation of opinions designated as “‘unpublished,’ ‘nonprecedential,’ or the like” to any greater extent than restrictions imposed on the citation of other opinions issued by the circuit.²³⁸

The new rule would permit citation of unpublished dispositions in all federal circuits. As proposed, the rule would not require any circuit to give precedential or even persuasive value to any unpublished opinion; as a practical matter the new rule would simply remove the threat of sanctions for attorneys who cite unpublished opinions in appellate briefs and oral arguments.²³⁹ By doing so, proposed Rule 32.1, while limited, is a step in the right direction. The practicing bar should not continue to shoulder the risk of *sua sponte* enforcement of nonuniform local rules governing citation of unpublished opinions that contradict longstanding normative principles underlying the American judicial system—candor and honesty in advocacy.

The Advisory Committee on Appellate Rules has wisely rejected proposed amendments that would dilute the effect of the proposed rule.²⁴⁰ One such amendment would have given the rule only prospective effect, thus allowing circuit courts to continue enforcing no-citation rules for unpublished decisions issued prior to the effective date of the new rule.²⁴¹ Another would have permitted circuits to retain local rules disfavoring citation of unpublished opinions.²⁴² Both suggested amendments would have undermined the Committee’s purpose for proposing the new rule in the first place.²⁴³

Despite earlier indications of support, the Standing Committee apparently had a change of heart when the Advisory Committee’s recommendation was considered at the June 2004 meeting. In its

or other written dispositions that have been designated as ‘unpublished,’ ‘non-precedential,’ or the like”).

²³⁸ *Id.* However, on April 14, 2004, the Advisory Committee on Appellate Rules amended the proposed rule to omit the “unless” clause in subsection (a) referring to restrictions imposed on the citation of other opinions issued by the circuit. *See Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 12, available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005).

²³⁹ *See Wepner, supra* note 180, at 273. “Presumably, the committee is suggesting that while unpublished appellate decisions normally are not quite as elegant as Shakespearean sonnets, they just might be more on point.” *Id.*

²⁴⁰ *See supra* note 74; *see also* Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 9-11, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005).

²⁴¹ *See* Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 9-11, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005).

²⁴² *Id.*

²⁴³ *Id.*

September 2004 report to the Judicial Conference, the Standing Committee stopped short of approving the proposed new rule pending the outcome of an empirical study.²⁴⁴

Several courts of appeals have expressed concerns with some aspects of the proposed rule. These concerns are mainly centered on the belief that permitting citation of nonprecedential opinions will significantly increase the workload of the courts. In response to that increase, these courts predict that time to disposition will increase as will the number of summary judgment [sic] orders. These concerns can be tested empirically in the nine circuits that now permit citation. In an effort to reach a greater consensus among the courts, and in deference to the circuits that oppose the proposed rule, the Committee decided to defer approving the proposed new rule in favor of such an empirical study. The Committee concluded that some further consideration by the advisory committee would be helpful once the empirical study was completed. This further consideration would take into account the results of the empirical study but need not be limited to empirical issues. The Committee was particularly interested in the advisory committee's further consideration of the application of the proposed rule to state court unpublished opinions. The Committee was careful to state that its action was neutral and should not be understood to express disapproval of the proposal.²⁴⁵

The Standing Committee's failure to recommend approval of Rule 32.1 to the Judicial Conference is disappointing. After three years of debate,²⁴⁶ the considered and well-documented opinion of the Advisory

²⁴⁴ See generally Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 7-13 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

²⁴⁵ *Id.* at 13.

²⁴⁶ The Justice Department initially recommended a new rule permitting citation of unpublished opinions in January 2001. See *supra* note 235. At its April 2002 meeting, the Advisory Committee on Appellate Rules discussed the proposal and indicated that it favored such a rule. See Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 3-4 (May 21, 2002), available at <http://www.uscourts.gov/rules/Reports/AP5-2002.pdf> (last visited Feb. 27, 2005). At its November 2002 meeting, the Committee considered three alternative versions of the proposed new rule. See Memorandum to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 35 (December 6, 2002), available at <http://www.uscourts.gov/rules/Reports/AP12-2002.pdf> (last visited Feb. 27, 2005). After lengthy discussion, *id.* at 34-39, the Committee voted 7-1, with one abstention, to approve Alternative B in substance, with certain revisions. *Id.* at 39. A year later, in

Committee on Appellate Rules was to recommend adoption of the new rule.²⁴⁷ Testimony presented at the public hearing on April 13, 2004, repeatedly demonstrated that the nine circuits that do not prohibit citation of unpublished opinions have not experienced the dire consequences predicted by the opponents of the proposed rule.²⁴⁸ While empirical

August 2003, proposed FED. R. APP. P. 32.1 and accompanying comments were published for public comment. See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 3-4 (September 2003), available at <http://www.uscourts.gov/rules/Reports/ST9-2003.pdf> (last visited Feb. 27, 2005). Finally, on April 14, 2004, the Advisory Committee recommended adoption of the new rule with one modification. See Memorandum to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, at 1-2, 42-127 (May 14, 2004) (including Committee's recommended rule and advisory committee notes and a summary of all public comments on the proposal), available at <http://www.uscourts.gov/rules/Reports/AP5-2004.pdf> (last visited Feb. 27, 2005).

²⁴⁷ See Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 11, available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005).

²⁴⁸ See Transcript of 2004 Advisory Committee Hearing, *supra* note 68. For example, Judge Bright, a senior judge on the Eighth Circuit Court of Appeals, testified as follows in response to questions from the Committee Chair:

JUDGE ALITO: Thank you very much, Judge Bright. Let me ask you a question to start out that draws on your unique experience of having sat with so many different circuits. I don't think any of our other witnesses has had that experience. You've sat with circuits that prohibit the citation of unpublished opinions, circuits that have no prohibition, circuits that limit the citation to certain circumstances, I guess including your own circuit.

I wondered if you have noticed any effect that these local rules have had on either the work of the lawyers or the work of the judges. We've had conflicting comments from a variety of commenters. We've had those who've predicted that if Rule 32.1 is adopted many very serious adverse consequences will occur. We've had others who've said that if you look to the experiences of the circuits that do not prohibit the citation of unpublished opinions, there's really very little evidence, if any, that this has had any major effect either on the work of the lawyers or on the work of the courts. And I wondered whether you have noticed that in the circuits where the citation of unpublished opinions is allowed that when you are preparing for an argument you have been burdened with a great many citations to unpublished opinions that don't seem to be well written or well reasoned and whether this has materially, the knowledge that the opinion will be citable when you're writing an unpublished opinion, has made the process of producing the opinion much more burdensome than it is in the circuits that prohibit their citation.

JUDGE BRIGHT: I'm glad to answer that question. I'm going to focus it right on [the Third] circuit because I've been sitting there for a long time, even before Judge Becker was chief, and he and I have been close friends.

I have to say in all honesty there really doesn't seem to be any difference. I've sat on the Third Circuit. There may have been some unpublished opinions that have been cited. I can't remember them and I didn't pay any attention to them if I could. And the same goes in every one of the circuits—even the Eighth Circuit, the same.

research is a commendable idea in order to determine the administrative consequences of adopting the proposed new rule, to delay its approval pending the results of such a study is to give credence to the flawed reasoning that led to adoption of no-citation rules thirty years ago. As the Advisory Committee concluded after reviewing some 500 written comments and hearing testimony at its day-long public hearing, whatever problems unpublished opinions may cause, local rules that “gag attorneys” are not the proper way to deal with the issue.²⁴⁹

It is unclear how the empirical study proposed by the Standing Committee will be conducted. Presumably the study will be carried out by the Federal Judicial Center, the research arm of the federal judicial system.²⁵⁰ Even after the empirical research is completed, however, the Standing Committee anticipates “further consideration” by the Advisory Committee on Appellate Rules, which is likely to result in further significant delays.²⁵¹ In addition, the Standing Committee’s report suggests that the Advisory Committee need not limit its “further consideration” to the results of the empirical study.²⁵²

In particular, the Standing Committee has expressed interest in the Advisory Committee’s “further consideration of the application of the proposed rule to state court unpublished opinions.”²⁵³ This comment is somewhat puzzling. Surely, in the interest of comity, the proposed federal rule could not require state appellate courts to allow citation of

But there’s a difference and the big difference is this. Right now every one of the circuits has a warning—we don’t want to hear unpublished opinions but you can cite it if really it’s persuasive, something like the Eighth Circuit. That’s true, I think, in almost all the circuits. It’s certainly true in the circuits where I’ve sat and they allow publication.

But if you’re going to make it a level playing field with this new rule, there’s no longer [going] to be the deterrence. Sure, the court can say we don’t like you to cite them but the rule says you can, but [proposed Rule 32.1] is going to put nonpublished and published opinions as far as being in the briefs on the same level. And if I were sure that it wouldn’t make any difference I’d say go ahead, but I am not sure. I really think if you open the doors, you’re going to cause a problem. And if it isn’t a problem today, let’s not change it.

Id. at 19-22.

²⁴⁹ Minutes of April 13-14, 2004, Meeting of Advisory Committee on Appellate Rules, Washington, D.C., at 8, *available at* <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (last visited Feb. 27, 2005).

²⁵⁰ *See supra* note 55 (describing the history and mission of the Federal Judicial Center).

²⁵¹ *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 13 (September 2004), *available at* <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

²⁵² *Id.*

²⁵³ *Id.*

unpublished opinions. What the Standing Committee must be suggesting instead is further consideration of the effects of prohibiting federal courts of appeals from restricting citation of unpublished *state court* opinions. The rule as proposed does not single out federal unpublished opinions, nor should it. When a federal court of appeals considers a question of state law in a diversity case, all pertinent legal authority, whether published or not, should be citable to the appellate court as well as to the district court that considered the state law question in the first instance.²⁵⁴

The Standing Committee's report to the Judicial Conference emphasized that "its action was neutral and should not be understood to express disapproval of the proposal."²⁵⁵ Nevertheless, the Committee's inaction speaks louder than its words. Although the Standing Committee expressed support for the proposed new rule at its January 2004 meeting, its most recent failure to approve the proposed new rule demonstrates its capitulation to controversy.²⁵⁶ The Standing Committee's decision to withhold approval of proposed Rule 32.1 means that an indefinite number of years will elapse before the ethical dilemmas posed by no-citation rules can be resolved. Notwithstanding the Committee's weak attempt to clarify its intent, its failure to approve Rule 32.1 has exactly the same effect as a decision not to approve it. The ethical dilemmas for the federal bar posed by restrictive citation rules thus continue, with no end in sight.

IX. THE E-GOVERNMENT ACT OF 2002

Even if "unpublished" decisions issued by the federal appellate courts ever once existed, any remaining vestige of that misnomer ended abruptly on December 17, 2004. On that date, the E-Government Act of 2002²⁵⁷ (Act) took effect. The Act requires all federal circuits to

²⁵⁴ See *supra* text accompanying notes 196-98 (discussing federal courts' lawmaking role with respect to state law issues).

²⁵⁵ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 13 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005).

²⁵⁶ See *id.* "In an effort to reach a greater consensus among the courts, and in deference to the circuits that oppose the proposed rule, the [Standing] Committee decided to defer approving the proposed new rule in favor of . . . an empirical study." *Id.*

²⁵⁷ Pub. L. No. 107-347, § 205(f), 116 Stat. 2899, 2915 (2002). The Act provides that not later than two years after Dec. 17, 2002, the effective date of Title II, §§ 201-16, 116 Stat. 2910, the websites required by section 205(a) shall be established. Each website must contain certain information, or links to websites providing the information, specifically including: "(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format." Pub. L. 107-347, § 205(f) (emphasis added). In

electronically publish, on their respective websites, every written opinion issued after the effective date of the Act, whether or not the decision has been designated for publication in the official reporter.²⁵⁸ Thus, any remaining arguments that “unpublished” opinions are not accessible to litigants at little or no cost have been rendered moot as a matter of law.²⁵⁹

The pertinent language of the Act reads as follows:

(a) INDIVIDUAL COURT WEBSITES. -- The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

.....

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

.....

(b) MAINTENANCE OF DATA ONLINE.--

.....

addition, the Act requires that all written opinions issued after December 17, 2004, the effective date of section 205, must remain available online. *Id.* § 205(b)(2).

²⁵⁸ *See id.* § 205(f).

²⁵⁹ Elizabeth J. Pawlak, a Washington, D.C. patent attorney, put it bluntly in her prepared testimony on proposed FED. R. APP. P. 32.1: “[A]ny reference to dispositions that have been designated ‘unpublished’ or ‘not for publication’ in Subdivision (a) of the Rule makes a mockery of Section 205 of the e-Government Act of 2002.” Supplemental Remarks of Elizabeth J. Pawlak, Public Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules, Judicial Conference of the United States (April 13, 2004), *available at* http://www.secretjustice.org/pdf_files/Comments/Pawlak_statement.pdf (last visited Feb. 27, 2005); *see also* Pearson, *supra* note 22, at 129.

Congress recently passed a law that requires all federal appellate courts to make unpublished decisions available over the Internet. In addition, in 2001 West Publishing Company introduced the Federal Appendix, a “published reporter of unpublished opinions,” further weakening concerns of unequal access to unpublished decisions are weakened. If all litigants now have reasonable access to unpublished decisions, the no-citation rule is not necessary to prevent unfairness.

Id. (footnotes and citations omitted).

(2) CLOSED CASES.-- Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

TIME REQUIREMENTS.-- Not later than 2 years after the effective date of this title [Pub.L. 107-347, Title II, §§ 201 to 216, Dec. 17, 2002, 116 Stat. 2910] the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date.²⁶⁰

Thus, Congress has mandated that all opinions issued by the federal courts of appeals on or after December 17, 2004, shall be available indefinitely online, in text-searchable format.²⁶¹ The key language in the Act requires that public access to opinions must be provided on the courts' websites "regardless of whether such opinions are to be published in the official court reporter."²⁶² By extending the E-Government Act of 2002 to the courts, Congress has effectively trumped the efforts of the federal judiciary to keep under wraps eighty percent of the opinions issued by federal courts of appeals.

It has been predicted that the increasing availability of government information on public domain websites will lead to "the presumption of knowledge of their contents . . . and the expectation of lawyers' higher skill and ability to use these sites for research."²⁶³ The general public, for the first time in history, has a feasible means of direct access to government information "at a level previously found only among the most skilled legal researchers."²⁶⁴ Indeed, as one state appellate court has acknowledged, "[W]e see no reason why a government Internet site should not be considered as much an official government document as any printed pamphlet or other materials. Internet sites are available to the general public, as much or more than a document or book in a law library."²⁶⁵

²⁶⁰ E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913-15.

²⁶¹ *Id.* § 205(a)(5), (b)(2), 116 Stat. 2899, 2913.

²⁶² *Id.* § 205(a)(5), 116 Stat. 2899, 2913.

²⁶³ MacLachlan, *supra* note 45, at 644.

²⁶⁴ *Id.* at 645.

²⁶⁵ *Id.* (quoting Nat'l Info. Servs., Inc. v. Gottsegen, 737 So. 2d 909, 916 n.1 (La. Ct. App. 1999) (taking judicial notice of an index of interest rate changes posted on a federal government website)). On several occasions, federal courts of appeals have also taken judicial notice of factual information available to the public on government websites. *See*

Assuming that federal appellate courts will similarly acknowledge the availability of their own opinions on government websites, the ethical implications for attorneys give one pause. For example, attorneys will be deemed to have constructive knowledge of opinions posted on the federal courts' own websites, just as they are presently deemed to have constructive notice of precedential decisions. Thus, one of the necessary elements of the duty to disclose adverse legal authority ("known to the attorney") will have been met. The ABA Model Rules of Professional Conduct require an attorney to disclose authority in the controlling jurisdiction *known to the attorney* to be directly adverse to his client's position.²⁶⁶

If threatened with sanctions for failing to cite adverse unpublished legal authority that is accessible on a court of appeals website, an attorney would be left to argue either (1) that he or she had no actual knowledge of the opinion even though it was posted on a government website in accordance with federal statute; (2) that the unpublished opinion cannot be considered "authority"; or (3) that he or she did not interpret the opinion to be "directly adverse" to the client's position. No longer can an attorney defend the imposition of sanctions on the basis that the "unpublished" opinion itself is not meaningfully and equally accessible to the litigants.

X. THE CONTINUING FICTION OF "UNPUBLISHED" OPINIONS: A REPRISE

Federal circuit local rules that prohibit attorneys from citing the great majority of the court's decisions effectively impose a gag order on the federal bar.²⁶⁷ The effect of these rules is to threaten appellate counsel with sanctions simply for advising the court what the state of the law is in that circuit – consistent with Jeremy Bentham's notion of what the cases actually decide, whether or not the decisions are published in

Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 432 & n.45 (2002) (citing cases from the Second, Fourth, Ninth, Tenth, and Eleventh Circuits).

²⁶⁶ See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2002).

²⁶⁷ See Testimony of William T. Hangley, American College of Trial Lawyers, Transcript of 2004 Advisory Committee Hearing, *supra* note 68, at 223-24 (suggesting that the fact that the authoring tribunal does not want to show less than its very best work is "a paltry excuse for gagging trial lawyers and their clients"); see William T. Hangley, Prepared Testimony on Behalf of the American College of Trial Lawyers with Respect to Proposed FED. R. APP. P. 32.1, submitted to the Advisory Committee on Appellate Rules (April 13, 2004), at 4, available at http://www.nonpublication.com/Hangley_testimony.pdf (last visited Feb. 27, 2005) ("[T]hat the rulemaking tribunal does not want to risk being embarrassed by one of its less-than-optimally vetted holdings . . . is a paltry excuse for gagging lawyers and their clients.").

reporters with the court's sanction.²⁶⁸ In the words of Oliver Wendell Holmes, Jr., the law is what the courts "do in fact."²⁶⁹ To suggest otherwise by insisting that judicial lawmaking is embodied only in opinions the judges themselves endorse as "precedential" is to maintain a legal fiction²⁷⁰ of the worst kind.²⁷¹

In truth, "unpublished" opinions have never existed, except in the rare instances when a written decision is filed under seal to protect the privacy of the litigants. In at least some circuits, copies of written decisions are distributed not only to counsel of record, but also to district judges, circuit judges, subscribers, and law libraries.²⁷² Copies of all opinions, whether or not designated for "publication" or "precedential"

²⁶⁸ See *supra* notes 26-29 and accompanying text.

²⁶⁹ See *supra* note 2 and accompanying text.

²⁷⁰ "Legal fiction" is defined as: "[a]n assumption that something is true even though it may be untrue, made esp[ecially] in judicial reasoning to alter how a legal rule operates; specif[ically], a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object" BLACK'S LAW DICTIONARY 913 (8th ed. 2004). "Legal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion." *Id.* (quoting Morris R. Cohen, LAW AND THE SOCIAL ORDER 126 (1933)).

²⁷¹ In discussing the use of "forced falsehoods" in the law, Jeremy Bentham wrote:

To what a state of debility and depravation must the understanding of that man have been brought down, who can really persuade himself that a lawyer's fiction is anything better than a lie of the very worst sort—that the whole mass taken together, or any one particle of it, was ever of any the smallest use to justice!

Fiction may be applied to a good purpose, as well as to a bad one; in giving support to a useful rule or institution, as well as to a pernicious one. The virtues of a useful institution will not be destroyed by any lie or lies that may have accompanied the establishment of it; but can they receive any increase? The virtues of a useful medicine will not be destroyed by pronouncing an incantation over it before it is taken; but will they be increased?

Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice! Necessary indeed; but too necessary; but how came it so, and who made it so?

As well might the father of a family make it a rule never to let his children have their breakfast till they had uttered, each of them, a certain number of lies, curses, and profane oaths; and then exclaim, "You see, my dear children, how necessary lying, cursing, and swearing are to human sustenance!"

Jeremy Bentham, THE THEORY OF FICTIONS 149-50 app. A, *reprinted in* C.K. Ogden, BENTHAM'S THEORY OF FICTIONS (1932).

²⁷² *Stienstra, supra* note 8, at 15-21, 41, 51-59 & Tables 5, 6; *see Weaver, supra* note 46, at 480.

status, have always been available upon request, for a nominal fee, from the office of the clerk of the circuit court.²⁷³

When a court prohibits attorneys in subsequent appeals from even acknowledging the existence of eighty percent or more of the written decisions issued by that court,²⁷⁴ something is very wrong with our judicial process. On the one hand, attorneys practicing in every jurisdiction have an ethical duty of candor to the court.²⁷⁵ At minimum, the duty of candor requires an attorney to advise the court about “authority in the controlling jurisdiction” that is directly adverse to the attorney’s position, at least if opposing counsel does not cite it first.²⁷⁶ Further, an attorney owes an ethical duty to the client to provide competent representation.²⁷⁷

In stark contradiction to the ethical rules governing all appellate counsel, no-citation rules preclude attorneys from citing what may be the best authorities supporting the client’s cause, simply because the panel that authored the decision believed at the time that it had no precedential value. Arbitrary and inconsistent local rules that bar attorneys from citing what they believe to be the most cogent authorities, solely because they have been designated as nonprecedential by the issuing panel, send all the wrong messages to appellate counsel and their clients.

The rationale underlying the earliest “no-citation” rules, that “unpublished” opinions were not fairly accessible by all litigants, has long since disintegrated into cyberspace. Internet technology now allows virtually anyone access to every circuit court opinion, at nominal or no cost. By enacting the E-Government Act of 2002 and extending it to the federal courts of appeals, Congress has exercised its statutory authority to regulate judicial procedure regarding public access to written decisions.²⁷⁸ If truth be told, local circuit rules precluding citation of “unpublished opinions” are an anachronism. If ever the federal circuits in fact issued bona fide “unpublished opinions,” they no longer do so as a matter of law in 2005.²⁷⁹

²⁷³ *E.g.*, Arnold, *supra* note 122, at 219-20. “All opinions are public, in the sense that they are available to the public. Anyone may walk in off the street, pay the appropriate fee, and get a copy of any opinion or order of a court of appeals.” *Id.* at 220.

²⁷⁴ “What is most remarkable about the current regime is not that unpublished opinions are not treated as binding precedent, but that later panels can treat them as though they never existed.” *Unpublished Judicial Opinions*, *supra* note 60, at 49 (prepared statement of Arthur D. Hellman).

²⁷⁵ *See supra* notes 216-27 and accompanying text.

²⁷⁶ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2002).

²⁷⁷ MODEL RULES OF PROF’L CONDUCT R. 1.3 (2002).

²⁷⁸ *See* 28 U.S.C.A. § 2072 (2005).

²⁷⁹ *See id.*

If the Judicial Conference fails to adopt proposed Rule 32.1 or something comparable within a reasonable time, the United States Supreme Court should exercise its statutory power²⁸⁰ to adopt a uniform rule applicable to all federal circuits. If the Supreme Court fails to act, Congress should enact legislation²⁸¹ compelling the federal courts at minimum to permit citation of unpublished opinions, subject to each circuit court's decision regarding the persuasive or precedential weight the unpublished opinion warrants in deciding the pending case.²⁸²

XI. CONCLUSION

The conflicting local rules of the federal circuits regarding the citation of unpublished decisions raise puzzling questions about whether federal courts of appeals have a right to prevent attorneys and litigants from referencing opinions that the courts have no practical ability to keep out of the public eye. Moreover, with the lapse of time, together with dramatic innovations in communication technology, the practice of issuing "unpublished" opinions has become an anachronism²⁸³ – a legal

²⁸⁰ See 28 U.S.C.A. § 2072(a), (b) (2005).

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Id.

²⁸¹ Congress has the authority to reject, modify, or defer any rules prescribed by the federal judiciary. See *Legislation Affecting the Federal Rules of Practice and Procedure*, 108th Congress (Dec. 1, 2004) available at <http://www.uscourts.gov/rules/legislation108.pdf>, at 1 n.1 (last visited Feb. 27, 2005). For example, H.R. 700, introduced on February 11, 2003 by Representative Paul, would add a new Rule 49 to the Federal Rules of Appellate Procedure. Rule 49(a) would require courts of appeals to issue written opinions in certain categories of cases, including diversity cases in which the amount in controversy exceeds \$ 100,000. Rule 49(b) would permit any party to a direct appeal to request issuance of a written opinion. See *id.* at 15; see also Pearson, *supra* note 22, at 1294-95. "The coverage of this proposal [H.R. 700] is peculiar, but its provisions reflect both an understanding of the importance of opinions in a system of precedent and a desire for openness and accountability in the federal courts." *Id.* See generally Sloan, *supra* note 24, at 734-38 (discussing congressional authority to regulate federal court procedure).

²⁸² See Sloan, *supra* note 24, at 766. "The courts' unwillingness to change the practice [of issuing non-precedential opinions] . . . makes a national rule or procedural statute an appropriate vehicle for addressing the issue. Whether this will happen remains to be seen. If it does, the Constitution will not stand in the way." *Id.*

²⁸³ Even Judge Kozinski concedes the point:

[T]he term "unpublished" is an anachronism, dating back to the days when failing to designate a disposition for inclusion in a national reporter meant that it would not be published at all, and therefore unavailable to most

fiction that has long outlived the rationale that may have originally justified it. The grand “nonpublication” experiment the Judicial Conference devised thirty years ago has not accomplished its purpose of stemming the workload of the circuit courts. If anything, the empirical data suggests the opposite.

It is time for the Judicial Conference to acknowledge that technological developments have undermined the reasoning that at one time arguably legitimized no-citation rules. Congress has spoken loudly and clearly by enacting the E-Government Act of 2002, which renders moot the outmoded nonpublication plans first adopted by the federal circuits in the 1970s. The Judicial Conference has proposed adoption of new appellate rules in direct response to the Act and its recent amendments.²⁸⁴ In doing so, the federal judiciary has tacitly conceded Congress’s constitutional power to mandate public access to judicial opinions, no matter how they may be classified by the issuing courts.

The Judicial Conference must accept its statutory responsibility to set things right. If the Judicial Conference fails to act, the United States Supreme Court should exercise its plenary power, conferred by Congress, to unilaterally adopt uniform rules permitting citation of all circuit court opinions, regardless of how local rules may classify them.²⁸⁵ If the Supreme Court refuses to act within a reasonable period of time, Congress ultimately has the constitutional power to step into the void.²⁸⁶ If it must, Congress can and should craft a statutory solution to a

members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West’s Federal Appendix.

Unpublished Judicial Opinions, *supra* note 60, at 11-12 (prepared statement of Alex Kozinski).

²⁸⁴ See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 34 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). “Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court is to prescribe rules in accordance with the Rules Enabling Act governing the privacy and security concerns arising from public access to electronic case files.” *Id.*

²⁸⁵ See *supra* note 280 and accompanying text.

²⁸⁶ “[T]he exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress.’” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874)); see Sloan, *supra* note 24, at 766.

complex problem that the Judicial Conference unilaterally created²⁸⁷ but apparently lacks the gumption to correct.

In the final analysis, the dire predictions advanced by opponents of a uniform federal rule are simply unpersuasive. Further, to continue to insist on maintaining different citation rules for “published” as opposed to “unpublished” dispositions fails to acknowledge that as a practical matter, the federal circuits have *never* controlled the public dissemination of their decisions. Since their establishment in the late nineteenth century, federal courts of appeals have always been subject to pressure from West Publishing Company, which until recently held a virtual monopoly on the for-profit publication of federal circuit court decisions.

Although the issuing panel, or sometimes the authoring judge, decides in each instance whether an opinion should be “designated for publication,” until recently, the commercial publishers have controlled public access, not the courts.²⁸⁸ One dramatic illustration is the initiation

²⁸⁷ *Unpublished Judicial Opinions*, *supra* note 60, at 7 (prepared statement of Samuel A. Alito, Jr.).

As part of its “unpublished-opinions” policy, the Judicial Conference has deliberately promoted experimentation by giving the respective courts of appeals local discretion in this area. Whether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer. The federal judiciary is actively engaged in studying the experiences of the courts and all the implications regarding the appropriate use of “unpublished” opinions.

Id.

Congress has never endorsed the federal circuit courts’ nonpublication and no-citation rules. Reynolds & Richman, *supra* note 44, at 1205 & n.185 (1978). Because the Judicial Conference did not implement the scheme under the authority of the Rules Enabling Act, Congress had no opportunity to accept, amend, or veto the “major change in the operation of the circuit courts” created by the widespread adoption of limited publication/no-citation rules. *Id.*; *see also* Caron v. United States, 183 F. Supp. 2d 149, 158 n.7 (D. Mass. 2001) (Young, C.J.) (“[N]ationally uniform rules adopted pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-72, take precedence over any locally adopted rule[.]”)

²⁸⁸ *See* Mills, *supra* note 6, at 440.

[I]n the decades preceding the age of digital information, the unpublished opinion was a phenomenon of only minor significance within legal research. By the end of the 19th century, the universe of published case law had become a well-defined and orderly system, embodied in the handsome editions that made up West Publishing Company’s National Reporter System. West’s case reporters set a standard that was universally accepted. Virtually all published legal writing, irrespective of publisher, was geared to the West cites. Opinions falling outside this system were not only disfavored by courts and judges, they were also, as a practical matter, by and large inaccessible to researchers. The legal profession, aided and abetted by West, kept tight control of the shape of the research universe.

Id.; *see also* Nichols, Jr., *supra* note 22.

West had the cause of limiting proliferation of opinions very much at heart and the business reasons for this were and are obvious. The bloating of the

in 2001 of a new West reporter, the Federal Appendix, which publishes bound volumes of federal circuit court opinions that have not been “designated for publication” by the issuing panels. The fact that this new reporter service followed *Anastasoff* by only a few months is likely not a mere coincidence. For a major publisher to commit the resources to establish a new reporter service to publish “unpublished” circuit decisions is strong evidence that the legal community values access to those decisions, whether or not they may be cited for their persuasive or precedential value.²⁸⁹

For the federal appellate courts to continue to assume that they control public access by designating only a small minority of their opinions for “publication” is simply unrealistic. As a practical matter, all vestiges of any distinction between opinions “designated for publication” and those that are not, at least in terms of public access, are gone forever. All decisions issued by federal courts of appeals, whether “designated for publication” or not, are more readily accessible to the practicing bar and litigants now than ever before. In fact, all written decisions issued by federal appellate courts have always been accessible to the public to a greater or lesser degree, and all should be citable to the very court that issued those decisions.²⁹⁰

The issue addressed by this article is whether a federal appellate court may preclude an attorney from simply *citing* an unpublished opinion to a panel of the same tribunal, for whatever weight the panel may deem it worthy. Why a litigant may ethically cite a Shakespearean sonnet,²⁹¹ a nursery rhyme²⁹² or even a fairy tale²⁹³ to a circuit panel, but

current volumes of Federal Reporter and their rabbit-like multiplication on library shelves are, in fact, a menace to the market for the Federal Reporter. To complete the picture, however, it is only fair to say that West revealed a special antipathy towards opinions dealing with subject matters West felt were not of interest to the majority of its customers

Id. at 912-13; see Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM U.L. REV. 909 (1986); see Pether, *supra* note 21, at 1532 (noting the “problems posed for judicial ethics by the effective entrusting of the publication of the law of the land to duopolized commercial interests”).

²⁸⁹ Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 12 (September 2004), available at <http://www.uscourts.gov/rules/jc09-2004/JCReport.pdf> (last visited Feb. 27, 2005). “It is more likely that the publication of all “unpublished” opinions by West and other publishers plays a greater role in a judge’s decision to spend more time on drafting an opinion than the possibility that it might be cited.” *Id.*

²⁹⁰ This article does not address the controversial issue whether a particular federal court may constitutionally designate certain of its own opinions as “nonprecedential.”

²⁹¹ “[T]he relationship between an employer and an employee, characterized by reciprocal obligations and duties, is, like them, subject to time’s ‘wreckful siege of battering days.’” *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 132 (2d Cir. 2000)

not a written decision issued by another panel of the same court, is an irony that simply defies rational explanation.²⁹⁴

(quoting William Shakespeare, Sonnet LXV, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* (W.J. Craig ed. 1928)); *see also* *County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989), which quoted from Shakespeare in a dispute over fees charged for sewage disposal, including sludge-hauling:

Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote, in Sonnet CXI, “O, for my sake do you with Fortune chide, The guilty goddess of my harmful deeds, That did not better for my life provide, Than public means, which public manners breeds. Thence comes it that my name receives a brand; And almost thence my nature is subdu’d To what it works in, like the dyer’s hand”

Id. at 843 n.3 (quoting Shakespeare).

²⁹² “Like Humpty Dumpty, a jury verdict once broken is difficult to put together again.” *Fabri v. United Techs. Int’l, Inc.*, 387 F.3d 109, 116 (2d Cir. 2004). In an employment discrimination case alleging that the plaintiff’s superiors directed “epithets and demeaning invective” at him, the Second Circuit’s opinion began, “There is a nursery rhyme that teaches ‘sticks and stones may break my bones, but names will never hurt me.’” *Mandell v. County of Suffolk*, 316 F.3d 368, 373 (2d Cir. 2003).

²⁹³ Circuit judges have been known to cite well-known fairy tales. *See Roberts v. Universal Underwriters Ins. Co.*, 334 F.3d 505, 513 (6th Cir. 2003) (Batchelder, J., concurring) (quoting Lewis Carroll, *THROUGH THE LOOKING GLASS* 186 (Penguin Books ed. 1998) (conversation between Alice and Humpty Dumpty)); *see supra* note 24 (quoting conversation).

²⁹⁴ “[L]awyers must be free to cite noncircuit-binding opinions when they consider them persuasive, just as they are free to cite fiction, doggerel, beer commercials and stand-up comics when they consider these ‘precedence-persuasive.’” Testimony of William T. Hangle, Transcript of 2004 Advisory Committee Hearing, *supra* note 68, at 212; *see also id.* at 221 (“For a court to blind itself in advance to the persuasive power of its own reasoning . . . makes no sense.”); *id.* at 222 (“Stated as an abstract proposition, a rule that lawyers can’t cite judicial statements they consider persuasive or criticize the ones they consider erroneous is just unthinkable.”); Letter from Judge Frank H. Easterbrook, Seventh Circuit Court of Appeals, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Feb. 13, 2004) (supporting proposed FED. R. APP. P. 32.1), *available at* http://www.secretjustice.org/pdf_files/Comments/03-AP-367.pdf (last visited Feb. 27, 2005).

When the institution of unpublished opinions was created, these documents were unavailable to most lawyers. Local rules forbade citation in order to avoid the advantage that institutional litigants, such as the Department of Justice, otherwise could obtain. Today they are published on Westlaw, Lexis, and the Federal Appendix. Under recent legislation every circuit must post them online in searchable form. The original justification for not citing these documents no longer applies. Nor is it possible to justify a non-citation rule by reference to the difficulty in handling the greater volume of dispositions; computers build indexes on the fly and have made obsolete the old key number system that had been swamped by too many opinions. It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to “revised and extended remarks” inserted into the Congressional Record to op-ed pieces in local newspapers; why should the “unpublished” judicial orders be the only matter off limits to citation and argument? It implies that judges have something to hide.

In the final analysis, adoption of a federal rule permitting citation of all opinions, whether or not deemed precedential by the issuing court's local rules, is simply the right thing to do. In the eloquent words of Judge Edward R. Becker, United States Court of Appeals for the Third Circuit:

[T]he strongest reasons for the national rule are . . . our duty to the bar and the public, our respect for the bar and the litigants, responsibility, accountability, all of which [are] undergirded and informed by what I view as the unreasonableness of saying to lawyers that you can't cite what we've written. In my view, Rule 32.1, for these reasons which go to the core of our professional responsibility, they have a right, and that's why I endorse the rule.²⁹⁵

It could not have been said any better.

Id. at 1-2.

²⁹⁵ Testimony of Judge Edward R. Becker, Transcript of 2004 Advisory Committee Hearing, *supra* note 68, at 246-47.

APPENDIX I

Circuit	Opinion Publication Criteria	Citation Rules for "Unpublished" Opinions	Not Citable as Precedent	Citation Disfavored
First	1st Cir. R. 36(a) - (b)	1st Cir. R. 32.3, 36(c)	X	X
Second	2d Cir. R. § 0.23	2d Cir. R. § 0.23	X	X
Third	3d Cir. IOP 5.1-5.3	3d Cir. R. 36.0		
Fourth	4th Cir. R. 36(a)	4th Cir. R. 36(c)	4th Cir. R. 36(c) - Unless relevant to material issue and no other 4th Cir. Opinion would serve as well	X (both in circuit and district courts)
Fifth	5th Cir. R. 47.5.1 - 5.2	5th Cir. R. 47.5.3 (opinions issued before 1-1-96) - 47.5.4 (opinions issued on or after 1-1-96)	X (Only if issued on or after 1-1-96)	X (Only if issued before 1-1-96)
Sixth	6th Cir. R. 206(a) - (b)	6th Cir. R. 36-disposition of the case may be made in open court following oral argument	6th Cir. R. 206(c) - Only reported panel opinions are binding on subsequent panels	X 6th Cir. R. 28(g) (both in circuit and district courts)
Seventh	7th Cir. R. 53(a) - (d)	7th Cir. R. 53(e)	X	X (in any federal court within the circuit)
Eighth	8th Cir. IOP Rules IV(B)	8th Cir. R. 28A(i)	X	X
Ninth	9th Cir. R. 36-2, 36-5	9th Cir. R. 36-3	X	X
Tenth	10th Cir. R. 36.1 - 36.2	10th Cir. R. 36.3	X	X
Eleventh	11th Cir. Rule 36-1 - 36-2; 11th Cir. IOP 2, 5, 6	11th Cir. R. 36.2; 11th Cir. IOP 6	X	X 11th Cir. IOP 7 (eff. 12-1-2004) - The court generally will not cite unpublished opinions except in related cases.
Federal	Fed. Cir. R. 47.6	Fed. Cir. R. 47.6(b)	X	X
D.C.	D.C. Cir. R. 36(a)	D.C. Cir. R. 28(c)(1) - (3) - Unpublished decisions may be cited if issued on or after Jan 1, 2002. A panel's decision not to publish suggests it has no precedential value.	D.C. Cir. R. 28(c)(1)(A) - Only if issued prior to Jan. 1, 2002	D.C. Cir. R. 28(c)(1)(A) - Only if issued prior to Jan. 1, 2002

Citable in Related Cases	Citable for Persuasive Value	Citable as Binding Precedent	Restrictions on Citing Other Courts' Unpublished Opinions	Motion to Publish
X	X		1st Cir. R. 32.3(b)	1st Cir. R 36(b)(2)(D)
X				
X	X	X 3d Cir. IOP 5.7 The court by tradition does not cite as authority		
X	X		Citation restrictions on 4th Circuit opinions only	4th Cir. R. 36(b) -- Counsel may move for publication of an unpublished opinion, citing reasons. If granted, the unpublished opinion will be published without change in result.
X	X	X (Only if issued before 1-1-96)		5th Cir. R. 47.5.2 - Any party may request reconsideration of decision not to publish
X	X			
X			7th Cir. R. 53(e) - No unpublished opinion of any court may be cited in Seventh Circuit if citation is prohibited in rendering court	7th Cir. R. 53(d)(3). Any person may request publication of a decision by unpublished order, but the requesting party must state why publication is consistent with 7th Cir. R. 53(c)(1)
X	X Opinions of 8th Circuit		8th Cir. R. 28A(i) - Any unpublished opinion may be cited in a related case, but otherwise only 8th Circuit unpublished opinions may be cited for persuasive value	8th Circuit Internal Operating Rules IV(B) - Counsel may request, by motion, that an unpublished decision be published
X	9th Cir. R. 36-3(b)(ii)-(iii) May be cited for factual purposes, such as to show sanctionable conduct, notice, entitlement to attorney's fees			9th Cir. R. 36-4 - May be requested by letter, stating concisely the reasons for publication, addressed to clerk within 60 days of issuance; 9th Cir. R. 40-2 - order to publish extends time to file petition for rehearing.
X	X			
X	X		11th Cir. IOP 6 (12-1-2004) - The court will not give an unpublished opinion of another circuit more weight than the issuing circuit would give it under its own rules	11th Cir. R. 36-3, 11th Cir. IOP 6 - At any time before issuance of mandate, by unanimous vote of authoring panel, either sua sponte or by motion of a party.
X				Fed. Cir. R. 47.6(c) - any person may request publication within 60 days from issuance, but other parties to pending cases with a stake in the decision must have an opportunity to respond. If granted, the opinion revised. Practice Notes: Improper for brief to refer to publication request before court takes action.
X		X D.C. Cir. R. 28(c)(1)(B) - Only if issued on or after Jan. 1, 2002 (except sealed opinions)	D.C. Cir. R. 28(c)(2) - Unpublished appellate and district court decisions may be cited in related cases; otherwise appellate opinions only as permitted by issuing court and no unpublished district court opinion may be cited.	D.C. Cir. R. 36(d) - Any person may file motion within 30 days of judgment or within 30 days of action on petition for rehearing. Motions to publish are not favored and are granted only for compelling reasons.

APPENDIX II

Circuit	Ethical Rules
First	1st Cir. R. 46(c); 1st Cir. IOP II(B); Rules of Attorney Disciplinary Enforcement for the First Circuit
Second	2d Cir. R. 46(f)-(g), (h)(2)
Third	3d Cir. App. Rules of Attorney Disciplinary Enforcement, R. 2 - Grounds for Discipline
Fourth	4th Cir. R. 46(g)
Fifth	5th Cir. R. 46.2 - In addition to Fed. R. App. P. 46(b), an admitted attorney may be suspended if appropriate law licensing authority withdraws or suspends attorney's license or the license lapses.
Sixth	6th Cir. R. 46(b) - Attorney Discipline - Disciplinary matters that involve members of the bar of this Court shall be governed by FRAP 46 and this rule.
Seventh	7th Cir. App. Standards for Professional Conduct Within the Seventh Federal Judicial Circuit
Eighth	8th Cir. App. Operating Procedures II(E) -A member of the bar is subject to suspension or disbarment for improper conduct and may be disciplined for failure to comply with the Federal Rules of Appellate Procedure or Eighth Circuit Rules. See FRAP 46(c).
Ninth	Fed. R. App. P. 46 - 9th Cir. Advisory Committee Note Regarding Sanctions
Tenth	10th Cir. R. 46.6 - Discipline of counsel or parties; 10th Cir. Addendum III
Eleventh	11th Cir. R. Addendum 8 - Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit, R. 1 - Standards for Professional Conduct
Federal	Fed. Cir. R. 46(f); Fed. Cir. App. Attorney Discipline Rules 1-11 (effective July 15, 1997)
D.C.	Rules of D.C. Cir. App. Disciplinary Enforcement for the United States Court of Appeals for the District of Columbia Circuit, R. 1 - Standards for Professional Conduct