

# UNPUBLISHED OPINIONS AND NO CITATION RULES IN THE TRIAL COURTS

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## INTRODUCTION

Appellate judges and commentators have been engaged in an increasingly pointed debate over the practice of designating some appellate opinions as *not* to be published and the effects of prohibiting or restricting reliance on unpublished opinions in litigation. The debate has intensified because “unpublished” opinions—that is, opinions not included in the official or unofficial reports—are often readily available through online databases, such as judicial websites, private providers such as Westlaw and LEXIS, and public alternatives such as Findlaw. The simple fact is that “no citation” rules often unfairly compromise counsel’s ability to effectively represent a client, whether at trial or on appeal.

Much of the debate over publication and citation restrictions has focused on the position espoused by the late Eighth Circuit Judge, Richard S. Arnold, in his published essay, *Unpublished Opinions: A Comment*,<sup>1</sup> and later in the panel

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\* Professor of Law, University of Arkansas at Little Rock School of Law; founding editor, *The Journal of Appellate Practice and Process*. Copyright, 2004, by the Author. This Article draws heavily on the research of Melissa Serfass and Jessie Cranford, Professors of Law Librarianship at the University of Arkansas at Little Rock School of Law originally published in *The Journal: Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001) and their article updating their original research, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 6 J. APP. PRAC. & PROCESS 349 (2005) and two articles published in *The Journal* by Professor 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 (2002), and *No Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 471 (2003). These works reflect major research efforts beyond the scope of this article and the author respectfully defers to them with respect to the current status of publication and citation rules in the United States. The focus of this article is directed to the less certain status, in fact, of unpublished opinions and enforcement of no citation rules in those jurisdictions limiting reliance on unpublished opinions. The author assumes responsibility for any errors in interpretation of the data provided by Professors Barnett, Serfass and Cranford. I would also like to thank Professors Theresa Beiner and Erica Beecher-Monas; Terri for reading and commenting on an earlier draft of this article, and Erica for several years of collegiality and friendship while on the UALR faculty as she begins her new career at Wayne State in the fall of 2005.

decision he wrote in *Anastasoff v. United States*.<sup>2</sup> In his essay, Judge Arnold questioned whether a prohibition on citing unpublished opinions could be reconciled with the judicial power conferred on the federal courts by Article III of the Constitution.<sup>3</sup> His opinion for the panel in *Anastasoff* used his Article III argument as a basis for the decision, but the en banc Eighth Circuit vacated the panel's decision as moot, leaving the ultimate disposition of this issue in the Eighth Circuit unresolved.<sup>4</sup>

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

2. 223 F.3d 898, *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc).

3. Arnold, *supra* note 1, at 226. Article III of the United States Constitution provides, in pertinent part:

Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

...

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. II, §§ 1–2.

4. 235 F.3d 1054, *vacating* 223 F.3d 898.

The continuing attention paid to publication<sup>5</sup> and no citation rules<sup>6</sup> demonstrates the philosophical and practical importance attached to decisions by appellate courts that essentially rank their work product in terms of importance in future litigation. But the debate has virtually ignored another important constituency—trial judges and trial lawyers—that may be impacted by operation of the no citation rules and the practice of not designating some opinions for publication. Both trial judges and trial lawyers must make important decisions in the course of litigation based on assessments of the current and future state of the law. Unlike appellate counsel and judges, both of whom typically have time to reflect on the accuracy of appellate decisionmaking, trial lawyers and courts often have less opportunity for reflection,<sup>7</sup> particularly when issues arise in the context of jury trials.<sup>8</sup>

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5. See, e.g., *Anastasoff, Unpublished Opinions and “No Citation” Rules*, 3 J. APP. PRAC. & PROCESS 169–451 (2001) (including eleven essays and articles addressing the issues of publication and prohibitions on citation of unpublished opinions). The initial debate is cogently summed up by Professor Stephen R. Barnett in his essay, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*. 4 J. APP. PRAC. & PROCESS 1 (2002). Professor Barnett noted that recent developments included a formal recommendation from the ABA House of Delegates condemning rules in some federal circuits prohibiting citation to unpublished opinions; the development of the *Federal Appendix* by West Publishing Company as a formal vehicle for publication of unpublished opinions; abandonment of citation limitation by the United States Court of Appeals for the D.C. Circuit; and the adoption of a new rule by the Texas Supreme Court eliminating the no citation restriction from previously unpublished opinions. *Id.* at 2–7 nn.4, 6, 11, 29. Professor Barnett has updated the continuing discussion in a recent issue of the Journal. Stephen R. Barnett, *No Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 471 (2003) [hereinafter Barnett, *Battlefield Report*].

6. The judicial and academic debate following Judge Arnold’s dual attack on no citation proscriptions has been substantial, including discussion in direct response by a panel of the Ninth Circuit. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (rejecting Article III theory for elimination of no citation rules); see also Alex Kosinki & Stephen Reinhardt, *Please Don’t Cite This!: Why We Don’t Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, 43. On the state level, an extensive discussion of publication practice and no citation rules was advanced by Justice Acoba of the Hawaii Supreme Court as Appendix A in his concurrence in *State v. Uyesugi*. 60 P.3d 843, 874–82 (Haw. 2002). Justice Acoba noted:

Justice Ramil and I have agreed and will continue to agree to any recommendation by any of the other justices to publish a case even if the majority will not adhere to such a policy. We do so because we support and respect the opinion of any one of our colleagues that a decision warrants publication and that the views raised in the opinion should be disseminated.

*Id.* at 875–76.

7. This does not suggest that trial court decisions are “immunized” for purposes of judicial review, and the abuse of discretion doctrine should not imply that legal errors made by trial courts are not subject to correction through reversal on appeal. See, e.g., *Vaughn v. State*, 962 P.2d 149, 151–53 (Wyo. 1998) (explaining doctrine of abuse of discretion and its proper application in review of trial court decisions based on totality of circumstances test, rather than simply deciding that the trial court did not err in denying

## I. THE LEGAL LANDSCAPE OF CITATION/NO CITATION RULES

Jurisdictions are split on the question of whether unpublished opinions may be cited by parties or other court panels as precedent or persuasive authority when similar issues arise. This Article addresses the use of unpublished decisions at the trial court level.

### A. *The Changing Landscape of Citation/No citation Rules in the States*

Virtually all jurisdictions have addressed the use of unpublished opinions by judicial opinion, by statute,<sup>9</sup> or by rule. If there is a discernible trend in the approaches taken by courts toward the use of no citation rules, it is in the direction of relaxation of citation prohibitions at both the state and federal levels. Professors Serfass and Cranford, in their survey of publication and citation rules, report that over the past four years, the First Circuit and the D.C. Circuit, Alaska, Iowa, Kansas, North Carolina, Ohio, Texas, Utah, and West Virginia have all liberalized their rules to permit attorneys to cite unpublished opinions, either as precedential or persuasive authority.<sup>10</sup>

In many jurisdictions, however, the proscription against use of unpublished opinions remains firm. For example, the Kentucky Supreme Court has expressed the rule in simple and direct terms: “Unpublished opinions shall not be cited or used as authority in any other case in any court of this state.”<sup>11</sup> The Florida Supreme Court articulated a similar approach by published opinion: per curiam affirmances without written opinion have no precedential value and should not be cited.<sup>12</sup> In some jurisdictions, the rationale underlying the prohibition is clearly articulated. For example, in formal rulemaking the Wisconsin Supreme Court

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continuance in probation revocation proceeding to permit adjudication on underlying charged offense).

8. See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 55–56 (2000) (noting Professor Maurice Rosenberg’s observation that one reason for conferring discretion on the trial court is its “superiority” in being on the spot”); see also, e.g., *State v. Lloyd*, 345 N.W.2d 240, 246 (Minn. 1984) (holding that on appeal, a ruling on the admissibility of prior criminal convictions for purposes of impeachment is upheld if the trial court’s ruling is within that court’s substantial range of discretion).

9. See MINN. STAT. § 480A.08 3(b), (c) (1996) (providing unpublished opinions “must not be cited as precedent, except as law of the case, res judicata or collateral estoppel” and that “[u]npublished opinions of the court of appeals are not precedential.”). See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. Ct. App. 1993) (“The legislature has unequivocally provided that unpublished opinions are not precedential.”).

10. Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 6 J. APP. PRAC. & PROCESS 349, 349 (2005) (updating their original 2001 research); see also Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

11. KY. R. CIV. P. 76.28(4)(c).

12. *Dep’t of Legal Affairs v. Dist. Ct. of App.*, Fifth Cir., 434 So. 2d 310, 312 (Fla. 1983). The court’s directive reflects an important distinction between dispositions that offer a supporting rationale—an opinion—and summary orders that do not include an explanation for the appellate court’s determination.

rejected a motion by the State Bar of Wisconsin to permit citation to unpublished opinions for “persuasive and informational purposes.”<sup>13</sup> The court noted that allowing practitioners to rely on unpublished opinions would compound the burdens and costs of legal research necessary for effective client representation.<sup>14</sup> The court concluded that the potential prejudice caused by disparate access to unpublished opinions warranted their exclusion at the trial court level. The court explained:

[I]f citation of unpublished opinions were permitted for persuasive and informational purposes, the inequality between persons knowing of unpublished opinions and those who did not would exist well before a matter reached the courts. Indeed, it would be present at the outset of legal representation, even in matters never intended to be litigated.<sup>15</sup>

The court also feared that trial courts would “unwittingly give unpublished opinions more weight than that to which they are entitled, merely because they express the reasoning of an appellate tribunal on the same or similar issue.”<sup>16</sup> This observation is important because it suggests a misuse of unpublished opinions that should not be possible if, indeed, these opinions are truly without value as precedent.<sup>17</sup>

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13. *In re Amendment of Section (Rule) 809.23(3), Stats.*, 456 N.W.2d 783, 783 (Wis. 1990). California also prohibits reliance on unpublished opinions in the state’s courts. *In re John D.*, 178 Cal. Rptr. 278, 280 (Ct. App. 1981) (“There is no question that the citing of unpublished Court of Appeal opinions is contrary to rule 977.”). The appellant argued that he was denied a fair hearing because of the trial court’s reliance on an unpublished court of appeals opinion. *Id.* at 279. The court concluded that the trial court’s reliance on the depublished opinion had been “inadvertent yet erroneous,” resulting in no prejudice to the appellant because the trial court’s ruling was correct. *Id.* at 281. This opinion was also ordered “depublished” on February 24, 1982, pursuant to Cal. Rules of Court, Rule 976. The California rule has been subject to review over the past few years. *See* J. CLARK KELSO & JOSHUA WEINSTEIN, APPELLATE PROCESS TASK FORCE, A WHITE PAPER ON UNPUBLISHED OPINIONS OF THE COURT OF APPEAL (2001), at <http://www.courtinfo.ca.gov/reference/documents/unpub.pdf>. (last visited Nov. 26, 2004). The Task Force recommended that “[u]npublished opinions should be posted on the Judicial Council’s Web site for a reasonable period of time (e.g., 60 days), but the general proscription against citation of unpublished opinions (i.e., rule 977) should remain in place without change.” *Id.* at 4.

14. *In re Amendment of Section 809.23(3)* at 784. “This additional burden on the practitioner, with a concomitant increase in fees to the client, would not be alleviated by the availability of services printing the unpublished appellate opinions or their inclusion in automated legal research tools or availability at law libraries. All law offices are not created equal: differences in geographical location, client base and economic resources create an inequality in the ability of a practitioner, whether a lawyer practicing alone in a small town or one practicing in a 35-member firm in a large metropolis, to easily and affordably conduct the research needed for adequate client representation.” *Id.*

15. *Id.* at 783.

16. *Id.* at 784.

17. Justice Abrahamson dissented. *Id.* at 78 (Abrahamson, J., dissenting). He argued that many unpublished opinions are not, in fact, without legal significance and may be important in advancing new propositions of law or offering guidance on novel applications of existing law. *Id.* at 787 (Abrahamson, J., dissenting) (citing WALTHER,

The New Mexico citation prohibition includes a rationale similar to Wisconsin's. The rule states: "An order, decision, or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court."<sup>18</sup> Although New Mexico and Wisconsin seek to further the same equitable policy, New Mexico's no citation rule appears less restrictive. Because of the ambiguity in the term "precedent," a court could interpret the statute to prohibit the use of unpublished opinions as binding or controlling precedent, while permitting reliance on unpublished opinions for "persuasive value."<sup>19</sup> In *State v. Gonzales*, the court failed to enforce the prohibition and effectively permitted counsel to rely on an unpublished opinion while suggesting that the better approach would be to advance the reasoning in the unpublished opinion without attributing it to its source.<sup>20</sup> Similarly, Alaska, when considering a citation to an unpublished concurrence that arguably violated Alaska's rule,<sup>21</sup> declined to impose sanctions because counsel did not rely on the prior decision as binding precedent, but merely as "authority."<sup>22</sup> New Hampshire's rule addresses this by prohibiting citation to summary unpublished dispositions as precedent or authority.<sup>23</sup>

A survey of state court rules indicates that no citation rules, when applied to unpublished opinions, typically apply to all courts in that jurisdiction, including trial courts.<sup>24</sup> The rules may be explicit, like Tennessee's rules governing the

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GROVE AND HEFFERMAN, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN 17-4 (1986) and Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 JUDICATURE 307 (1990)). See generally Mia Sefarbi & Kira Zaporski, *Citing Unpublished Opinions in Wisconsin State and Federal Tribunals*, WISC. LAW., Nov. 2004, available at [www.wisbar.org/wislawmag/2004/11/Sefarbi.html](http://www.wisbar.org/wislawmag/2004/11/Sefarbi.html) (last visited Nov. 26, 2004) (updating the continuing issue of citation of unpublished opinions in Wisconsin courts).

18. N.M. R. APP. P. 12-405(C) (emphasis added). Other courts have expressed a similar concern that unpublished opinions are not equally accessible to all parties. See *Steiner Corp. v. Auditing Div. of Utah State Tax Comm'n*, 979 P.2d 357, 362 n.9 (Ut. 1999) ("A primary purpose of rule 4-508 is to assure that all persons have access to court decisions that state the law. Only a very limited group of people have access to unpublished decisions. Clearly Steiner, as a party to the district court decision, had access to and knowledge of that decision."). Utah has changed its policy to permit citation to unpublished opinions. See *infra* note 33 and accompanying text.

19. See *State v. Gonzales*, 794 P.2d 361, 370-71 (N.M. Ct. App. 1990).

20. *Id.*

21. ALASKA R. APP. P. 214(d) ("Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state.").

22. *McCoy v. State*, 80 P.3d 751, 753 (Alaska Ct. App. 2002), *republished from* 59 P.3d 747 (Alaska Ct. App. 2002). The court concluded:

*McCoy's* attorney did not claim or imply that our unpublished decision in *Westerlin* resolved the issue of statutory interpretation presented in *McCoy's* case or that it restricted the scope of Judge Brown's decision-making authority on this issue. Thus, the defense attorney did not violate Appellate Rule 214(d) by bringing *Westerlin* to Judge Brown's attention.

*Id.*

23. N.H. SUP. CT. R. 25(5).

24. See Serfass & Cranford, *supra* note 10, at 358-94.

citation of unpublished opinions,<sup>25</sup> or quite general, like the Montana Supreme Court's Internal Operating Rule prohibiting citation of "noncitable" opinions.<sup>26</sup>

No citation rules may limit or bar the application of unpublished opinions to *other* parties, cases, and controversies, but these rules do not impair the binding effects that unpublished decisions have on the original litigants. Therefore, these rules generally allow the use of unpublished opinions for *res judicata*, the law of the case doctrine, collateral estoppel, procedural bar, and double jeopardy.<sup>27</sup>

Not all jurisdictions proscribe reliance on unpublished decisions. New York has not addressed the issue by rule or judicial opinion but appears to take a lenient stance on the issue.<sup>28</sup> Delaware<sup>29</sup> and Michigan<sup>30</sup> both allow reliance on

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25. TENN. R. SUP. CT. 4(F)(1)–(2). The rule provides:

(F)(1) If an application for permission to appeal is hereafter denied by this Court with a "Not for Citation" designation, the opinion of the intermediate appellate court has no precedential value.

(2) An opinion so designated shall not be published in any official reporter nor cited by any judge in any trial or appellate court decision, or by any litigant in any brief, or other material presented to any court, except when the opinion is the basis for a claim of *res judicata*, collateral estoppel, law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant.

(3) From and after the effective date of this Rule, the precedential and citation value applicable to intermediate appellate court decisions designated "Not for Citation," shall also apply to intermediate appellate court decisions which have previously been designated, "Denied, Concurring in Results Only" (DCRO), or "Denied, Not for Publication," (DNP).

(G) If no application for permission to appeal is filed, or if an application is filed but dismissed as untimely, publication of the intermediate appellate court opinion shall proceed in accordance with either Court of Appeals Rule 11 or Court of Criminal Appeals Rule 19.

(H)(1) An unpublished opinion shall be considered controlling authority between the parties to the case when relevant under the doctrines of the law of the case, *res judicata*, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant. Unless designated "Not For Citation," "DCRO" or "DNP" pursuant to subsection (F) of this Rule, *unpublished opinions for all other purposes shall be considered persuasive authority*. Unpublished opinions of the Special Workers' Compensation Appeals Panel shall likewise be considered persuasive authority.

*Id.* (emphasis added).

26. MONT. SUP. CT. INTERNAL OP. R. § I(3)(C).

27. *See, e.g.*, ALA. R. APP. P 53(d), 54(d).

28. *Serfass & Cranford, supra* note 10, at 380 n.27. One New York court has pointed out that unreported decisions may be "entitled to respectful consideration, [but] are not binding [as] precedent upon this court." *Eaton v. Chahal*, 553 N.Y.S.2d 642, 646 (1990).

29. DEL. SUP. CT. R. 14(b)(vi)(4).

30. MICH. CT. R. 7.215(C) (noting an unpublished opinion is "not binding precedent").

unpublished opinions but require disclosure to opposing counsel before using them in court. In Ohio, “[a]ll court of appeals opinions issued after [May 2002] may be cited as legal authority and weighted as deemed appropriate by the courts.”<sup>31</sup>

The Utah Supreme Court struck down a no citation rule, holding that all decisions of the court of appeals are binding upon lower courts and may be relied upon by parties to the extent that they “are useful, authoritative[,] and persuasive[.]”<sup>32</sup> Utah has procedural rules that may help determine how unpublished decisions can be used. The rules of appellate procedure<sup>33</sup> and criminal procedure both permit attorneys to cite unpublished opinions, with the former expressly authorizing their citation as precedent.<sup>34</sup> But the rules of appellate procedure also recognize a class of decisions resulting from expedited appeals in which the decision is not treated as precedent.<sup>35</sup> The rules suggest applying standards for characterizing cases similar to those that differentiate cases meriting publication from those that do not.<sup>36</sup> Despite the rules to assist in characterization, appellate courts may erroneously designate valuable court opinions as non-precedential expedited appeals. However, any harm caused by misdesignation could be mitigated as long as these expedited appeals retain their persuasive value.

The Oklahoma rule applicable in criminal cases addresses the use of unpublished opinions in perhaps the most pragmatic fashion, providing that “[i]n all instances, an unpublished opinion is not binding on this Court. However, parties may cite and bring to the Court’s attention the unpublished opinions of this Court provided counsel states that no published case would serve as well the purpose for which counsel cites it . . . .”<sup>37</sup> This approach realistically addresses the prospect that an unpublished opinion will actually prove to be the best expression

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31. OHIO SUP. CT. R. 4. The prior language of the rule had provided “in other situations, such opinions shall be considered persuasive authority.” OHIO SUP. CT. R. 2(G).

32. Grand County v. Rogers, 44 P.3d 734, 738 (Utah 2002). Under the prior rule, prohibiting citation, Utah courts refused to consider unpublished opinions as having precedential value. See State v. Gambrell, 814 P.2d 1136, 1139 n.3 (Utah Ct. App. 1991) (“The State improperly directs us to our unpublished decision in *Elwood v. Holden*, Case No. 890609-CA (Utah App. March 21, 1990). Unpublished decisions have no precedential value and cannot be cited or used except for the purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel. UTAH CODE OF JUDICIAL ADMINISTRATION R4-605.”).

33. UTAH R. APP. P. 30(f) (providing “[u]npublished decisions may be cited”).

34. UTAH R. CRIM. P. 37 (providing “[u]npublished decisions may be cited as precedent”).

35. UTAH R. APP. P. 31(f) (providing that “[a]ppeals decided under this rule will not stand as precedent, but, in other respects, will have the same force and effect as other decisions of the court”).

36. UTAH R. APP. P. 31(b), (d). Types of cases qualifying for expedited decision without opinion include appeals involving uncomplicated factual issues primarily based on documents; summary judgments; dismissals for failure to state a claim or lack of jurisdiction; and cases based on uncomplicated issues of law. Subsection (d) provides that an expedited appeal will not be granted when a case raises a substantial constitutional issue, an issue of significant public interest, an issue of first impression, or a complicated issue of fact or law. *Id.*

37. OKLA. CT. CRIM. APP. R. 3.5(C)(3).



of a rule or application of a rule in a particular factual context, even though the issuing panel did not foresee its significance at the time of decision.<sup>38</sup> The applicable Iowa rule similarly permits citation to an unpublished opinion, while requiring counsel to perform a diligent search and disclose any “subsequent disposition of the unpublished opinion.”<sup>39</sup>

Professor Stephen Barnett’s review of the emerging trend in no citation rules suggests that absolute prohibition—excepting for purposes of *res judicata*, collateral estoppel, or law of the case doctrines—remains intact in only twenty-five jurisdictions.<sup>40</sup> Barnett concludes that four states do not have any rules prohibiting citations to unpublished opinions,<sup>41</sup> five expressly permit its use as precedent,<sup>42</sup> and twelve more adopt the position that the opinions may be cited for their persuasive value.<sup>43</sup> He also concludes that five states appear to be “on the fence” at present.<sup>44</sup>

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38. Similarly, the applicable Kansas rule provides: Unpublished opinions “are not favored for citation. But unpublished memorandum opinions may be cited if they have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court and they would assist the court in its disposition.” KAN. SUP. CT. R. 7.04(f)(2)(ii).

39. IOWA CT. R. APP. P. 6.14(5)(b). The rule provides:

An unpublished opinion of the Iowa appellate courts or of any other appellate court may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority. A copy of the unpublished opinion shall be attached to the brief and shall be accompanied by a certification that counsel has conducted a diligent search for, and fully disclosed, any subsequent disposition of the unpublished opinion. For purposes of these rules, an “unpublished” opinion means an opinion the text of which is not included or designated for inclusion in the National Reporter System. When citing an unpublished appellate opinion, a party shall include, when available, an electronic citation indicating where the opinion may be readily accessed on line.

*Id.*

The Iowa court noted the change in the rule from a former absolute prohibition in *State v. Averhoff*, No. 01-194, 2002 WL 100573, at \*2 (Iowa Ct. App. Jan. 28, 2002) (“The State also argues the district court erred in relying on an unpublished decision of our court. We note that Iowa Rule of Appellate Procedure 14(e) was recently amended to allow the citation of unpublished decisions. Because we reverse the district court’s ruling on other grounds, we need not address this argument.”).

40. Barnett, *Battlefield Report*, *supra* note 5, at 484–86.

41. *Id.* at 481 (identifying Connecticut, Mississippi, New York, and North Dakota).

42. *Id.* at 481 (identifying Delaware, Ohio, Texas, Utah, and West Virginia). *See also* Serfass & Cranford, *supra* note 10.

43. *Id.* (identifying Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).

44. *Id.* at 481, 483. At the time of his article, published in 2003, Professor Barnett concluded that Hawaii, Illinois, Maine, Oklahoma and Oregon were considering modification of citation prohibitions and too close to call in terms of the likelihood of change being adopted. *Id.* Professors Serfass and Cranford, in their 2005 survey, note that both Hawaii and Illinois have tabled proposals for change at the present time. Serfass & Cranford, *supra* note 10, at 349–50 nn.2, 5.

Absent a proscription on the use of unpublished decisions, it appears that trial counsel and trial courts can hardly be precluded from attempting to rely on unpublished opinions in support of arguments or rulings. Even when the jurisdiction expressly rejects the use of unpublished decisions, counsel is placed in an awkward position when such a decision supports the client's position.<sup>45</sup> Once counsel knows of the existence of a favorable decision on point, the restraint required for compliance with the no citation rule may be unreasonable.<sup>46</sup>

In a thorough and thoughtful discussion of the continuing problem, the Alaska Court of Appeals, in *McCoy v. State*<sup>47</sup>, interpreted its rule to permit the use of unpublished opinions as persuasive authority. On rehearing, Judge Mannheimer surveyed the status of no citation rules among the circuits and states and noted the problems leading to relaxation of the prohibition.<sup>48</sup> He observed that the court itself in *John v. State* had been forced to "address (and reverse) a twelve-year old unpublished opinion" that the court "had forgotten about."<sup>49</sup> He further noted that courts in Mississippi,<sup>50</sup> Alabama,<sup>51</sup> Georgia,<sup>52</sup> and Missouri<sup>53</sup> had permitted citation to unpublished decisions or those courts had discussed their rationales without expressly ruling on their precedential value. Judge Mannheimer found that policies favoring no citation rules are subject to widespread reconsideration, particularly in light of criticism that the practice may result in "inconsistent or even irreconcilable decisions."<sup>54</sup> The Alaska court concluded that its appellate rules were designed to promote reading and discussion of unpublished opinions<sup>55</sup>

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45. For example, the Kentucky Court of Appeals addressed the problem of unauthorized citation to unpublished decisions in *Yocom v. Justice*, noting that the trial court had relied on an unpublished decision of the state supreme court and that counsel had attached a copy of the memorandum opinion as an Appendix to its formal pleadings. 569 S.W.2d 678, 678-79 (Ky. Ct. App. 1977). The court declined to order the pleading struck and permitted refile in conformity with the publication rule, but noted the widespread practice of relying on unpublished opinions. It used the opinion to warn counsel that in the future, non-conforming pleadings would be struck with leave to refile denied. *Id.*

46. Some courts recognize the inherent conflict facing counsel. *See, e.g., Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) ("We concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done.").

47. 80 P.3d 757 (Alaska Ct. App. 2003).

48. *Id.* at 759-63.

49. *Id.* at 758 (discussing *John v. State*, 35 P.3d 53, 65 (Alaska Ct. App. 2001)). The "forgotten" unpublished decision was *Wilson v. State*, Memorandum Opinion No. 1893 (October 11, 1989).

50. *McBride v. Jones*, 803 So. 2d 1168, 1171 (Miss. 2002) (McRae, J., dissenting).

51. *Whitt v. State*, 827 So. 2d 869, 877 n.2 (Ala. Crim. App. 2002).

52. *Hammond v. State*, 398 S.E.2d 168, 174 (Ga. 1990).

53. *State v. Gonzales*, 63 S.W.3d 317, 319 (Mo. Ct. App. 2001).

54. *McCoy*, 80 P.3d at 763.

55. *Id.* at 763-64 (reconciling no citation rule, ALASKA APP. R. 214, with Alaska Court of Appeals Standing Order 3, Para. 6 that provided for distribution of all unpublished decision of Court of Appeals to state trial judges and to members of the public, upon request).

and that counsel should be permitted to cite those opinions for their persuasive value, although not as controlling precedent.<sup>56</sup>

***B. The Federal Landscape***

On the federal level, the majority of the circuits now permit citation to unpublished opinions.<sup>57</sup> The post-*Anastasoff* controversy over the proper uses of unpublished opinions and citation prohibitions ultimately led to a proposed revision of Federal Rule of Appellate Procedure Rule 32.1.<sup>58</sup> The proposed revision would permit the use of unpublished opinions:

(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.<sup>59</sup>

The proposed rule would provide a uniform approach to reliance on unpublished opinions, while not necessarily requiring uniformity in terms of weight to be accorded those decisions. Professor Barnett argues that the language of the proposed revision is imprecise and subject to conflicting interpretations, but suggests that some latitude in the way in which unpublished opinions are treated is justified in light of the fact that the panel issuing the opinion itself has determined that the disposition did not warrant “publication.” He notes, to the point, “[u]npublished opinions are different from published ones.”<sup>60</sup>

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56. *Id.* at 764.

57. Barnett, *Battlefield Report*, *supra* note 5, at 474–76. (“The circuits permitting citation are the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits. Those still forbidding citation are the Second, Seventh, Ninth, and Federal Circuits. Nine of thirteen is a substantial majority; citability of unpublished opinions thus comes close to being the norm in the federal circuits today.” (citations omitted)). For a summary of provisions governing citation of unpublished decisions in the federal circuit courts of appeals, see Table 1 in Serfass & Cranford, *supra* note 10, at 351–57.

58. See generally Barnett, *Battlefield Report*, *supra* note 5, at 487–89 (offering a history of the proposed revision); Anne Coyle, Note, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 *FORDHAM L. REV.* 2471, 2590–91 (2004) (arguing for adoption of proposed rule).

59. See Memorandum from Judge Samuel A. Alito Jr., Chair, Advisory Comm. on App. Rules, to Judge Anthony A. Scirica, Chair, Standing Comm. on Rules of Pract. & Proc. 28–29 (May 22, 2003) at <http://www.uscourts.gov/rules/app0803.pdf>.

60. Barnett, *Battlefield Report*, *supra* note 5, at 496.

Perhaps reflecting on the intense debate<sup>61</sup> over “nationalization” of an approach recognizing unpublished opinions as generally “citable,” the Committee on Rules of Practice and Procedure took no action on the proposed amended Rule 32.1. Instead, the Committee referred the matter to the Advisory Committee on Appellate Rules for additional review.<sup>62</sup>

As the extended discussion of the current state of no citation rules in *McCoy* suggests, the existence of such rules presents problems for both appellate courts and counsel practicing before them. Moreover, the trend toward permitting citation to unpublished opinions for their precedential or persuasive value suggests nothing less than that ethical concerns involving research and disclosure must now be considered in light of the changing landscape of acceptable citation and argument practice. The ethical issues posed by this situation are not always easily resolved using the Model Rules of Professional Responsibility.

## II. APPLICATION OF ETHICAL RULES AND CONCEPTS TO THE USE OF UNPUBLISHED AUTHORITY

For practitioners, the national trend toward permitting citation to unpublished decisions is less theoretical and more practical. Counsel must be alert to changes in jurisdiction policy, of course, because a shift toward liberalization or restriction of citation implicitly indicates not only a change in practice, but also a change in the jurisdiction’s attitude toward its case law. For trial judges and counsel, the two almost necessarily merge because liberalization or abandonment of no citation rules opens the door to using all available appellate opinions in the trial court. However, until all distinctions between published and unpublished opinions are abandoned, counsel must be concerned with two different ethical dilemmas that may arise in representing their clients.

The first problem involves the specific dictates of the Rules of Professional Responsibility within the jurisdiction, while the second problem involves the need to protect the client’s interests when unpublished authority offers the greatest potential support for the client’s position.

### A. *Application of Ethical Rules to Citation of Unpublished Authority*

#### 1. *Counsel’s Duty Not to Cite Unpublished Authority*

When a jurisdiction has declared its unpublished opinions unavailable for use in litigation, counsel’s ethical duty appears clear—do not violate the

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61. E.g., Tony Mauro, *Green Light to Cite Unpublished Opinions*, LEGAL TIMES April 19, 2004 (noting “barrage of opposition from hundreds of federal judges and lawyers”), available at [www.law.com](http://www.law.com). (last visited Dec. 16, 2004); Press Release, Admin. Office of the U.S. Courts, Congress/Courts Study Use of Unpublished Opinions (June 27, 2002), available at [www.uscourts.gov/Press\\_Releases/unpub.html](http://www.uscourts.gov/Press_Releases/unpub.html) (last visited Dec. 14, 2004) (quoting United States District Judge Samuel Alito testimony before a congressional committee noting that “difficult issues” require study of use of unpublished opinions on “several levels”).

62. U.S. COURTS, ADVISORY RULES COMMITTEE ACTIONS FALL 2004, at <http://www.uscourts.gov/rules/index.html> (last visited Nov. 16, 2004).

controlling rule within the jurisdiction. Violations of ethical rules may result in official sanction. Problems arise when counsel has knowledge of an unpublished decision that supports the client's position, particularly in the absence of a published decision. The court may directly sanction counsel for relying on the unpublished opinion<sup>63</sup> or require counsel to refile without referencing the unpublished decisions.<sup>64</sup>

Sanctioning counsel for relying on an unpublished opinion is a harsh penalty to impose on counsel for seeking to inform the court of another court's view of an issue, rather than for attempting to misuse authority or misrepresent a fact to the court. In *Lam v. Ngo*,<sup>65</sup> the California Court of Appeals addressed the sanction a lower court imposed on an attorney who cited an unpublished federal district court opinion in a state court pleading in violation of California's Rule 977, which prohibits attorneys from citing unpublished opinions.<sup>66</sup> The appellate court first noted that counsel's punishment was ironic because the rule had been amended to restrict citation only with regard to unpublished state court opinions, whereas here the attorney cited an unpublished federal district court opinion.<sup>67</sup> The court also observed that the opinion was eventually published in the Federal Supplement. Finally, the court stressed that the prohibition had been imposed to "relieve" counsel of the duty to research and cite unpublished opinions because of the burden resulting from having to read additional cases.<sup>68</sup> The problem with assigning blame to counsel may well lie in determining exactly what motivated counsel to cite the prohibited authority, especially if the no citation rule is not sufficiently precise, as the Alaska court's handling of *McCoy v. State* suggests.<sup>69</sup> There, the McCoy court concluded that counsel had not argued that the prior

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63. See, e.g., *Mann v. Hobbick*, No. 49233-1-I, 2002 WL 1402546, at \*3 (Wash. Ct. App. July 1, 2002) (fining counsel for violating no citation rule, WASH. APP. R. 10.4(h)); *Dwyer v. J.I. Kislak Mortgage Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000) (imposing five-hundred dollars in sanctions against counsel for citing and discussing "at length" an unpublished opinion issued by same appellate court). But when a Washington attorney cited an unpublished opinion from another jurisdiction, the appellate court declined to sanction because of ambiguity in the no citation rule suggesting that only unpublished opinions of the Washington Court of Appeals could not be cited. *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 608-09 (Wash. Ct. App. 2002). A similar anomaly was noted by Judge Arnold in his essay *Unpublished Opinions*, and by Judge Mannheimer in *McCoy*. Appellate courts also may elect not to sanction counsel, other than by mentioning the impropriety. See *Swanigan v. State*, No. CACR 02-1093, 2003 WL 21278011, at \*2 (Ark. Ct. App. June 4, 2003) (observing that counsel submitted "as precedent, an unpublished Arkansas Court of Appeals case," and noting "[C]itation to unpublished opinions is prohibited by Ark. Sup. Ct. R. 5-2(d) (2002)").

64. See *Yocom v. Justice*, 569 S.W.2d 678, 678-79 (Ky. Ct. App. 1977).

65. 111 Cal.Rptr. 582, 588-89 (Cal Ct. App. 2001).

66. *Id.* at 589 n.5.

67. *Id.* (stating that the opinion "wasn't 'unpublished' after all, though it had existed only in cyberspace at the time of the hearing on the preliminary injunction").

68. *Id.* ("The irony here is that footnote 34 was written to *relieve* courts and counsel from having to worry about the continuously growing legions of unpublished cases, *not* to add another trap for the unwary practitioner." (emphasis original)).

69. *McCoy v. State*, 80 P.3d 751, 753 (Alaska Ct. App. 2002), *republished from* 59 P.3d 747 (Alaska Ct. App. 2002).

unpublished opinion was binding precedent, but merely advanced it as supporting argument.<sup>70</sup>

The ethical quandary faced by counsel having access to a favorable unpublished opinion is not hypothetical. Consider the situation created by the Texas Court of Appeals decision not to publish its per curiam reversal in *Flanigan v. State*.<sup>71</sup> The court addressed a number of ineffective assistance claims directed at trial counsel in the direct appeal, a somewhat unusual circumstance because these claims are typically raised in post-conviction proceedings.<sup>72</sup> But the appellant had raised numerous claims of ineffectiveness in his motion for new trial, supported with affidavits from trial counsel, and another attorney offered an expert opinion on trial counsel's performance.<sup>73</sup>

While the *Flanigan* court rejected most of the claims of deficient performance, it was convinced that two merited relief. Trial counsel had failed to request a limiting instruction on the jury's consideration of evidence that the defendant and codefendant used crack cocaine before committing the aggravated robbery of which Flanigan was convicted. The court noted that Texas law required such an instruction<sup>74</sup> and concluded that counsel's failure to request the limiting instruction undermined confidence in the verdict.<sup>75</sup> Because the published opinion relied on by the *Flanigan* court is generally available for citation by counsel, the disposition of this point in the unpublished per curiam opinion is not particularly significant.

But the appellate court also concluded that in this closely contested trial, counsel's error in making his directed verdict motion in the presence of the jury also constituted deficient performance requiring reversal.<sup>76</sup> The court noted the likely tendency of jurors to consider the trial court's denial of the motion challenging sufficiency of the evidence as an improper comment on its weight by the trial judge.<sup>77</sup> The per curiam opinion cites no Texas authority on this point.<sup>78</sup> This unpublished decision may essentially become the most important appellate opinion on the ineffectiveness claim when trial counsel commits the same error. Yet the unpublished opinion in *Flanigan* cannot be properly relied on in future litigation because Texas continues to prohibit citation to unpublished opinions in criminal cases.<sup>79</sup>

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70. *Id.*

71. No. 09-97-474CR, 1999 WL 498184 (Tex. Crim. App. July 14, 1999).

72. *See Massaro v. United States*, 583 U.S. 500, 504 (2003) (noting the desirability of raising ineffective assistance claims in post-conviction proceedings which will typically permit the development of a full record).

73. *Flanigan*, 1999 WL 498184, at \*2.

74. *Id.* at \*6 (citing *Rankin v. State*, 974 S.W.2d 707, 711 (Tex. Crim. App. 1996)).

75. *Id.* at \*7.

76. *Id.* at \*6. Counsel stated in his affidavit that he "did not think about having the jury removed." *Id.*

77. *Id.* at \*8.

78. *Id.*

79. TEX. R. APP. P. 47.2(b), 77.3.

*2. No Citation Rules and Competent Counsel*

The *Flanigan* situation presents a dilemma for counsel who may need to rely on its holding but cannot because the court of appeals decided not to publish the opinion. Counsel in this situation must sacrifice the interests of the client in order to comply with the rule of practice.<sup>80</sup> For many lawyers, and perhaps many trial courts, the rule should give way to the opportunity to support an argument with the only authority that may be available.

Two provisions in the Model Rules of Professional Responsibility demonstrate the problem when counsel is required to comply with a no citation directive. First, the most general command in the ethical rules instructs counsel to represent the client competently.<sup>81</sup> Arguably, counsel cannot represent a client competently by ignoring a controlling court rule and citing “uncitable” opinions. But this view is simplistic because it ignores the likelihood that the client’s interest might well be furthered by disclosure to the trial or appellate court of decisions that would support the client’s position. The client in such a situation has no interest in the suppression of the unpublished opinion. The no citation rule may serve the interests of the judicial system or the courts, but it does not further the interest of the individual client. Instead, the decision to employ a particular procedural or evidentiary rule must be predicated on the general interests of the judicial system in furthering the goal of fairness. Implicit in that decision is the recognition that some individual litigants will end up in a disfavored position as a result of the application of the rule, while others may benefit. This is perhaps a cost of any system dependent upon generally applicable rules. While one can argue that courts need generally applicable rules, it is difficult to blindly accept this trade-off when clients are forced to endure the costs, tensions, and possible negative results of litigation because the courts have placed a favorable expression of law out of counsel’s reach.

Even more compelling than the argument that counsel prohibited from relying on unpublished opinions may be compromised in terms of offering competent representation is the more specific ethical rule requiring counsel to avoid advancing non-meritorious or frivolous claims or arguments. Rule 3.1 provides, in pertinent part that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is

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80. Of course, counsel will always be limited by the operation of procedural or evidential rules in representing the client. But with regard to those rules restricting the use of unpublished opinions, the limitation is hardly based on any overarching need to control the course of the proceedings in order to achieve a just result. Instead, the prohibitions exist principally to serve the interests of appellate judges concerned with the volume of litigation and limited resources that require some cases to be dealt with in summary fashion. This addresses the heart of Judge Arnold’s argument that the courts cannot arbitrarily create a body of law that is accessible but unusable in the primary context for which appellate opinions are created, the resolution of legal questions arising in the course of litigation.

81. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003) (providing that competent representation requires the “legal knowledge, skill, thoroughness and preparation necessary for the representation”).

not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>82</sup>

Suppose a lawyer arguing a novel position or application of existing rule of law to the trial court finds that the only supporting authority in the jurisdiction is an unpublished opinion.<sup>83</sup> For example, a Texas lawyer arguing an ineffective assistance claim based on trial counsel’s failure to have the jury removed prior to arguing the directed verdict motion would find no Texas case other than *Flanigan* supporting the point. Yet counsel would be precluded from relying on *Flanigan* because it was not designated for publication. In order to demonstrate the good faith basis for the claim that trial counsel’s error constituted ineffective representation, counsel should at least be permitted to alert the court to *Flanigan*. Otherwise, the lawyer will almost certainly fail in her primary duty to the client: to represent the client competently. If compliance with the rule prohibiting citation to unpublished opinions results in trial error detrimental to the client’s interests, compliance with the no citation rule creates an actual conflict with the duty to represent the client’s interests competently.<sup>84</sup>

### ***B. Counsel’s Duty to Research and Disclose Unpublished Authority***

In evaluating the duty to research and disclose unpublished authority, the most obvious starting point must be the approach taken toward unpublished decisions by the appellate courts in the particular jurisdiction. Assuming that unpublished decisions are not lesser authority because of their designation as not for publication, the same ethical obligations appear to apply to counsel’s duty to research and disclose unpublished as well as published opinions. Thus, counsel would presumably be expected to disclose unpublished authority, following the Model Rule formulation: “A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”<sup>85</sup> In fact, in terms of the unpublished opinion, counsel’s disclosure duty may be more significant precisely because opposing counsel does not have ready access to the unpublished opinion.<sup>86</sup> Because counsel cannot readily search unpublished

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82. MODEL RULES OF PROF’L CONDUCT R. 3.1.

83. For instance, courts often reject arguments not supported by authority or refuse to review them on appeal. *See Buckley v. State*, 76 S.W.3d 825, 833 n.3 (Ark. 2002); *Hollis v. State*, 55 S.W.3d 756, 758 (Ark. 2001).

84. The Eighth Circuit’s local rule governing citation of unpublished opinions provides a logical remedy for this situation. While discouraging reliance on unpublished opinions, the rule also recognizes the situation in which there is no published opinion on point: “Parties may also cite an unpublished opinion of this if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .” U.S. CT. OF APP. 8TH CIR. R. 28A(i).

85. MODEL R. OF PROF. CONDUCT R. 3.3(a)(3).

86. *Cf. Rural Water System No. 1 v. City of Sioux Center*, 967 F.Supp. 1483, 1498 n.2 (N.D. Iowa 1997) (noting counsel’s access to a newly issued published decision as central to the court’s criticism of counsel’s failure to cite applicable, but non-controlling, authority). In *Rural Water System*, the court noted that counsel had represented a party in the case not discussed in its motion for summary judgment. The court explained its views



opinions in many jurisdictions, particularly those pre-dating online research, unpublished opinions may effectively constitute a “lost” body of law known exclusively to institutional litigants whose repeated litigation of issues may produce a catalogued body of these decisions.<sup>87</sup> An attorney general’s office or an

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on counsel’s ethical obligation to apprise the court and opposing parties of contrary authority:

It is hardly the issue that the rules of professional conduct require only the disclosure of *controlling* authority, see, e.g., C.P.R. DR 7- 106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court’s view, the rules of professional conduct establish the “floor” or “minimum” standards for professional conduct, not the “ceiling”; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1’s counsel’s omission of the Scioto Water decision from RWS # 1’s opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1’s position. RWS # 1’s counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1’s position. *This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate “hard ball.” At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1’s position simply because it is adverse.*

Although the impact of RWS # 1’s counsel’s omission, as a practical matter, is slight, that is again hardly the issue. The issue, as the court sees it, is one of professionalism. Similarly, hardly the issue is RWS # 1’s counsel’s rather self-serving assertion, when RWS # 1’s briefing eventually addressed the Scioto Water decision, that that decision should somehow be discounted, because it is “on appeal.” The decision of the Sixth Circuit Court of Appeals is not “on appeal”; rather, a petition for certiorari has been filed with, but not yet granted by, the Supreme Court. See 65 U.S.L.W. 3666 (Mar. 18, 1997) (No. 96-1498). This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo.1995) (en banc). RWS # 1’s counsel should have brought the Scioto Water decision to this court’s attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

*Id.* (emphasis added).

87. See, e.g., Charles G. Mills, *Anastasoff v. United States and Appeals in Veterans’ Cases*, 3 J. APP. PRAC. & PROCESS 419, 422–23 (2001) (explaining the

insurance defense firm representing clients in an ongoing and substantial number of cases will likely have greater access to unpublished opinions than the solo criminal practitioner or a plaintiff's attorney. If the larger office has taken the opportunity to index these unpublished opinions, it will have created its own database of judicial action, which may prove useful in fashioning future arguments or in evaluating trends among appellate judges in the jurisdiction. Of course, these offices have a duty of disclosure to opposing counsel of both published and unpublished contrary authority in those jurisdictions in which the publication status does not affect its use as precedent.<sup>88</sup>

If the jurisdiction precludes citation to unpublished authority, trial counsel's duty to disclose adverse authority depends on whether the jurisdiction specifically precludes the use of unpublished opinions in trial courts as well as in appellate litigation. If so, then neither side will likely be disadvantaged by the no citation prohibition. But if counsel is not prohibited from relying on unpublished opinions to support arguments before the trial court, then the potential disadvantage to a party or counsel not having access to the full body of unpublished decisions would seem to require a duty to disclose adverse authority. This suggestion may be complicated by an additional factor. Suppose counsel simply decides not to rely on favorable, unpublished opinions because there is a conflict in the law of the unpublished opinions that would logically require disclosure of the adverse expressions on the issue by the appellate courts. Does counsel's decision not to venture into the body of unpublished decisions serve to avoid a duty to disclose unpublished, unfavorable opinions on the issue before the trial court?

In assessing the ethical duties that may arise for trial counsel, the most important consideration may actually be the receptivity of trial judges to unpublished opinions as supporting authority. But an equally important consideration is whether counsel should risk failing to research or use unpublished opinions if either the trial or appellate court will consider these potential sources of authority in ruling. Declining to use these prior decisions in the absence of a rule prohibiting their use might subject counsel to meritorious claims of negligence. And in theory, the practice also would arguably constitute an ethical violation by depriving the client of competent representation.<sup>89</sup>

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government's advantage in knowledge of unpublished opinions in veteran's benefits appeals).

88. This situation is not purely hypothetical, as the court's opinion in *Yellow Book of NY L.P. v. DiMilia*, showed, when the court observed:

The plaintiff, by dint of its status as one of the most frequent collection plaintiffs in Nassau County, is in a unique position of access to a multitude of decisions concerning it, and—whether volitionally or due to a faulty indexing system—has in the past presented to the court only those of the multitude which were resolved in its favor, and not those resolved against it.

729 N.Y.S.2d 286, 288 (Civ. Ct. 2001).

89. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

*C. Ethical Directives, No Citation Rules, and Constitutional Considerations*

Even when the jurisdiction has clearly prohibited the use of unpublished opinions as authority, the duty to represent the client effectively may pose a conflict for ethically-conscious counsel. Additionally, the issue of competent representation may have constitutional implications in the operation of no citation rules. If counsel is restrained in her reliance on an unpublished opinion that would support an argument on behalf of the client, her compliance with the rule may compromise the client's ability to receive a favorable determination at trial or on appeal.

In *Weatherford v. State*,<sup>90</sup> an Arkansas criminal defendant convicted of manufacturing methamphetamine challenged the jurisdiction's prohibition on citing unpublished opinions in his direct appeal, arguing that the circumstantial evidence was insufficient to sustain his conviction. The police had executed a search warrant at Weatherford's residence based on information supplied by a confidential informant.<sup>91</sup> The defendant was not at his residence at the time of the search, and the search uncovered no evidence of manufacturing in process, no methamphetamine, and no other drugs, cash, scales, records of transactions, or weapons. The search did produce a number of items associated with the manufacturing process that were otherwise lawful, including two items containing methamphetamine residue. This physical evidence provided the basis for the expert opinion offered by the State's chemist that manufacturing had taken place in Weatherford's mobile home, although the expert could offer no specific time when the "cooking" of the drug had occurred. The evidence also showed that Weatherford had shared his residence with a nephew, Ray, in the weeks before the search and that he had ordered the nephew to leave the day before the warrant was obtained because Ray had failed to get a job. Ray had moved in with Weatherford after being released from jail because his uncle offered to help him "get back on his feet."

On appeal, Weatherford relied on Arkansas circumstantial evidence law to argue that the State's evidence failed both to demonstrate that he had manufactured methamphetamine and to disprove the reasonable hypothesis that someone other than him, such as the nephew, could have been responsible for the contraband seized at his home.<sup>92</sup> In support of his insufficiency argument, Weatherford sought to rely on unpublished opinions of the Arkansas Court of Appeals. His argument was based, in part, on the presence of factors in other cases

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90. 101 S.W.3d 227 (Ark. 2003).

91. The Arkansas Supreme Court's opinion addressed the legal issues presented by Weatherford's motion for leave to cite unpublished opinions of the court of appeals. The facts were developed in the subsequent opinion issued by the court of appeals. *Weatherford v. State*, No. CACR02-415, 2003 WL 22451729, at \*1-2 (Ark. Ct. App. Oct. 29, 2003)

92. See *Smith v. State*, 988 S.W.3d 492 (Ark. 1999) (requiring prosecution's evidence to "exclude every other reasonable hypothesis consistent with [accused's] innocence"). Moreover, in a joint occupancy of premises case—where two or more persons inhabit the same residence—the prosecution must offer evidence affirmatively linking the accused to the contraband seized in the residence. *Parette v. State*, 786 S.W.2d 817, 822 (Ark. 1990) (State must prove that the accused exercised care, control and management over the contraband and knew, in fact, that it was contraband).

that resulted in affirmance, factors that were not present in his own case.<sup>93</sup> He also argued that the appellate court had reversed similarly weak circumstantial evidence cases for insufficiency.<sup>94</sup>

Because opinions resolving sufficiency attacks address factually distinguishable scenarios and often do not require new statements of law that would warrant publication, Weatherford argued that he should be permitted to rely on unpublished decisions in this area. He specifically relied on the federal and state constitutional guarantees to due process and effective assistance of counsel in support of his argument for an exception to the state's no citation rule<sup>95</sup> under these circumstances. The Arkansas Court of Appeals certified the question to the state supreme court,<sup>96</sup> which rejected all arguments in its published opinion and remanded the case to the court of appeals for decision on the merits.<sup>97</sup> That court affirmed, perhaps ironically, in an unpublished opinion.<sup>98</sup>

Following affirmance in the state courts, the United States Supreme Court denied certiorari.<sup>99</sup> Because the Court has yet to consider the federal constitutional claims raised in *Weatherford*, counsel may well consider asserting similar arguments in other cases when court rules prevent reliance on unpublished opinions in support of arguments at trial or on appeal.

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93. See *Strom v. State*, CACR00-137, 2001 WL 167822, at \*3 (Ark. Ct. App. Feb. 21, 2001) (explaining defendant had discussed manufacturing methamphetamine and asked another individual to "cook up some dope" for him, then proceeded to manufacture himself when other individual refused); *Bolton v. State*, No. CACR00-881, 2001 WL 577062, at \*3 (Ark. Ct. App. May 30, 2001) (affirming court based on evidence that the defendant actually possessed methamphetamine); *Dodson v. State*, No. CACR00-1160, 2001 WL 6153330, \*3 (Ark. Ct. App. June 6, 2001) (noting defendant's wife testified that he had "cooked" methamphetamine in a laboratory located in a trailer defendant had rented and evidence established his joint occupancy of trailer);

94. See *Porter v. State*, No. CACR 00-627, 2001 WL 56444, \*3 (Ark. Ct. App. Jan. 24, 2001) (defendant not present in residence when searched, no drugs recovered and no evidence he had control over or knowledge of contraband); *Zajac v. State*, No. CACR98-1236, 1999 WL 436283, \*2 (Ark. Ct. App. June 23, 1999) (noting lack of fingerprint evidence that would have established affirmative link between defendant and contraband).

95. ARK. SUP. CT. R. 5-2(d) (providing that unpublished opinions of the court of appeals are not to be published in the Arkansas Reports and "shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case)."). The rule does not expressly limit reliance on unpublished opinions issued by the supreme court, in contrast. *Id.*

96. *Weatherford v. State*, 101 S.W.3d 227, 228 (Ark. 2003). The Supreme Court asserted jurisdiction based on the certification of the case by the court of appeals pursuant to Ark. Sup. Ct. R. 1-2(b)(6). *Id.*

97. *Id.*, 101 S.W.3d at 228–35.

98. *Weatherford v. State*, No. CACR02-415, 2003 WL 22451729 (Ark. Ct. App. Oct. 29, 2003).

99. *Weatherford v. Arkansas*, 124 S.Ct. 2187 (2004) (mem.).

*1. The Due Process Claim*

Weatherford's due process claim was predicated on the argument that inconsistent application of state law is impermissible under the Fourteenth Amendment, and the prohibition on using unpublished opinions threatened an inconsistent application of state law in his case.<sup>100</sup> Because Arkansas rules prevented Weatherford from using unpublished court of appeals opinions to discuss evidentiary sufficiency claims in methamphetamine manufacturing prosecutions, review of his challenge could not be undertaken by the court with a clear view of what constitutes sufficient evidence in that context. Federal due process requires that a state criminal conviction be based on evidence sufficient to prove each element of the offense charged.<sup>101</sup> Weatherford argued that unless he could fully argue relevant decisions addressing the sufficiency of circumstantial evidence adduced in manufacturing cases, he could not be assured of a proper application of state law by the reviewing court.<sup>102</sup>

The Supreme Court has not addressed the due process problem in rules prohibiting citation to unpublished opinions that may result in the inconsistent application of law in factually similar cases. In fashioning his due process claim to the court, Weatherford could not point to any Supreme Court authority directly on point. Instead, he analogized to the Supreme Court's decisions in *Fiore v. White*<sup>103</sup> to support his approach. In *Fiore*, the Court had considered the proper application of state law in resolving sufficiency challenges brought on appeal by codefendants convicted of violating Pennsylvania's law prohibiting the operation of a hazardous waste facility without a permit.<sup>104</sup> On direct appeal, the evidentiary insufficiency challenges resulted in opposite dispositions.<sup>105</sup> *Fiore*'s conviction was affirmed<sup>106</sup> while his codefendant, Scarpone's, was reversed for insufficiency,<sup>107</sup> barring his

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100. See U.S. CONST. amend. XIV. See also 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, 211–15 (2001) (arguing that due process protection requires recognition of precedential value of unpublished opinions); 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, 700–07 (2001) (same).

101. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

102. Petition for Writ of Certiorari at 7–15, 124 S.Ct. 2187 (2004) (copy on file with Author).

103. *Fiore v. White (Fiore I)*, 528 U.S. 23 (1999) (*Fiore I*). The Supreme Court revisited the *Fiore* case in 2001. *Fiore v. White (Fiore II)*, 531 U.S. 225 (2001) (*Fiore II*).

104. *Fiore I*, 528 U.S. at 24–25.

105. The Court noted that *Fiore* appealed his conviction to the Pennsylvania Superior Court, an intermediate appellate court, while Scarpone, his co-defendant, appealed his conviction to the Pennsylvania Commonwealth Court, an intermediate appellate court having jurisdiction over regulatory criminal cases. *Fiore I*, 528 U.S. at 26–27.

106. *Commonwealth v. Fiore*, 563 A.2d 183 (Pa. Super. Ct. 1989). The state supreme court thereafter denied his application for leave to appeal to review the affirmance by the intermediate court. *Fiore I*, 528 U.S. at 26.

107. *Scarpone v. Commonwealth*, 596 A.2d 892, 895 (Pa. Commw. Ct. 1991) *aff'd*, *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993).

reprosecution.<sup>108</sup> The resulting decisions demonstrated an inconsistent application of law for the two co-defendants.

Fiore sought state post-conviction relief after his direct appeal was concluded, citing the later decision reversing Scarpone's appeal.<sup>109</sup> The Pennsylvania Superior Court denied relief, based in part on the fact that Fiore's appeal had been concluded before the state supreme court's ruling was issued in Scarpone's case.<sup>110</sup> Fiore then petitioned for federal habeas relief, initially obtaining relief from the district court.<sup>111</sup>

The Third Circuit Court of Appeals reversed the order granting relief,<sup>112</sup> relying on the Supreme Court's prior decision in *Wainwright v. Stone*.<sup>113</sup> The circuit court observed that "[w]hile the Court has concluded that some federal constitutional decisions should apply retroactively (citations omitted), *it has made clear that state courts are under no constitutional obligation to apply their own criminal decisions retroactively.*"<sup>114</sup>

Yet despite the holding of *Wainwright v. Stone*, the Supreme Court's treatment of the "inconsistent application of state law" argument in the *Fiore* litigation must cast doubt on the continuing viability of that holding.

The Supreme Court, in its first opinion issued in the *Fiore* litigation, certified to the Pennsylvania Supreme Court the question of whether the decision in *Scarpone* constituted a new rule or new construction of state law, or was consistent with prior state law.<sup>115</sup> The state court's holding that *Scarpone* did not reflect a new rule of law<sup>116</sup> led to the reversal of the Third Circuit's decision by the Court in *Fiore II*.<sup>117</sup> Because the state court explained that it had not announced a "new rule" in construing the statute in *Scarpone*, the Court was able to avoid the question of whether federal due process requires retroactive application of a new construction of a state statute to cases already final at the time the new rule is announced.<sup>118</sup> Thus, the Court dealt with the insufficiency/inconsistency argument

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108. A reversal for insufficient evidence constitutes an acquittal barring retrial. *Greene v. Massey*, 437 U.S. 19 (1978).

109. *Fiore I*, 528 U.S. at 27.

110. *Commonwealth v. Fiore*, 665 A.2d at 1193.

111. *Fiore I*, 528 U.S. at 28.

112. *Fiore v. White*, 149 F.3d 221, 223 (3rd Cir. 1998).

113. 414 U.S. 21, 23–24 (1973).

114. *Fiore*, 149 F.3d at 224 (emphasis added). The circuit court also rejected Fiore's reliance on *Davis v. United States*, 417 U.S. 333, 346–47 (1974), in which the Court recognized a federal defendant's right to claim the benefit of a subsequent circuit decision inconsistent with the decisions rendered in his case in a post-conviction action brought pursuant to 28 U.S.C. § 2255. The Third Circuit distinguished *Davis*, however, because the holding there did not rest on constitutional grounds. 149 F.2d at 226.

115. *Fiore I*, 528 U.S. at 29.

116. *Fiore v. White*, 757 A.2d 842, 848–49 (Pa. 2000).

117. *Fiore II*, 531 U.S. at 228–29.

118. The Court's rather complex formulation for retroactivity of its constitutional criminal procedure interpretations provides that "new rules" are generally not retroactive except as to cases in which error has been properly preserved and that are pending on direct review at the time a new rule is announced. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

in straightforward fashion, holding that the prosecution's failure to prove an essential element of the case—Fiore's failure to possess the required permit—required reversal of the conviction.<sup>119</sup>

Weatherford argued that *Fiore II* required state courts to apply state law consistently, at least with respect to the determination of what evidence is sufficient to support convictions for criminal offenses. If *Fiore II* did not require resolution of the conflict in applying state law in the two Pennsylvania prosecutions, thus implicating the federal due process guarantee, the United States Supreme Court would have lacked jurisdiction to intervene on Fiore's behalf.<sup>120</sup> Consequently, Weatherford's reliance by analogy on the *Fiore* litigation was based on the simple notion that consistent application of state law is an essential component of federal due process.

*Fiore's* significance lies in the link between consistent application of state law and federal due process, precisely the proposition rejected in *Wainwright v. Stone*. To the extent that *Fiore II* required consistent application of state criminal law, the opinion casts doubt on the continuing viability of *Wainwright v. Stone*, which held that the constitution does not require states to apply their criminal laws retroactively. Were the problem of inconsistency simply treated as an abstract matter, the continuing viability of *Wainwright* might not implicate due process values. But the problem is not abstract, as *Fiore* demonstrates. The Court's disposition of the claims raised in *Fiore I* and *II* hints at the link but fails to reach the point of explicitly overruling *Wainwright*.

The inability of Weatherford to argue the relative evidentiary strengths of cases requiring reversal or supporting affirmance on sufficiency challenges arguably compromised his expectation for a fair application of Arkansas law. The inconsistency in application of state law also is not purely theoretical. In a subsequent methamphetamine manufacture case, *Cooper v. State*,<sup>121</sup> a different panel of the Arkansas Court of Appeals reversed a conviction based upon failure to prove an affirmative link between the accused and contraband in a joint occupancy context. Police discovered a methamphetamine laboratory in a locked basement of the house in which Cooper was arrested. The drug was being processed at the time of the search. The police seized precursor chemicals, paraphernalia, and large quantities of the finished product. Cooper was convicted, but the appellate court reversed because there was no evidence that Cooper had a key to the basement

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Apart from two rarely applied exceptions, new rules of constitutional criminal procedure are otherwise not retroactive. *Teague v. Lane*, 489 U.S. 288 (1989). The Pennsylvania Supreme Court's conclusion that *Scarpone* correctly reflected existing law and did not announce a new rule avoided consideration of the *Teague* "new rule" doctrine in *Fiore's* case.

119. *Fiore II*, 531 U.S. at 228–29.

120. Had there been no due process violation occasioned by conflicting interpretations of state law, the decisions of the state courts on matters of state law would not have provided a basis for the exercise of the Court's certiorari jurisdiction. *Michigan v. Long*, 463 U.S. 1032 (1983) (finding a violation of state law insufficient for federal court jurisdiction); *Wainwright v. Goode*, 464 U.S. 78 (1983) (same).

121. 141 S.W.3d 7 (Ark. Ct. App. 2004).

and, thus, no affirmative link despite the fact that he actually possessed a small quantity of methamphetamine at the time of his arrest in the residence.<sup>122</sup>

The difficulty in reconciling *Cooper*<sup>123</sup> with *Weatherford*<sup>124</sup> illustrates the problem posed by rules that restrict attorneys from incorporating opinions not designated for publication in their arguments. *Cooper* simply applied Arkansas joint occupancy and affirmative link evidence principles to facts arguably stronger in demonstrating the defendant's culpability than those present in *Weatherford*, yet different panels of the same court reached contrary results about the accused's guilt in these cases. This suggests a due process violation under *Fiore*, although not nearly as pristine because *Fiore* involved codefendants whose appeals reached different results on the same set of facts.

The unresolved question is whether such inconsistencies can fairly be hidden or suppressed by the application of no citation rules consistent with due process. The denial of certiorari in *Weatherford* permitted the Supreme Court to avoid resolution of the due process issue in criminal appeals. Neither has the Court addressed the issue in the context of civil cases, although commentators have noted that the Court has denied certiorari at least twice in cases involving challenges to the Seventh Circuit's no citation rule.<sup>125</sup>

## 2. *Effective Assistance of Counsel*

The second federal constitutional claim raised by *Weatherford* in his petition for certiorari to the United States Supreme Court was predicated on the guarantee of effective assistance of counsel.<sup>126</sup> This theory is applicable only to restrictions on the use of unpublished opinions in criminal cases as a matter of Sixth Amendment law. Typically, ineffectiveness claims arise either in the context of defective representation<sup>127</sup> or as a result of improper representation because of conflicting interests.<sup>128</sup> A third type of ineffectiveness claim arises when counsel's

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122. *Id.* at 9–11.

123. *Id.*

124. No. CACR02-415, 2003 WL 22451729 (Ark. Ct. App. Oct. 29, 2003).

125. See 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, 1180 n.74 (1978) (referring to denials of certiorari in *Do-Right Auto Sales v. U.S. Court of Appeals for Seventh Circuit*, 429 U.S. 917 (1976) and *Bowder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1978)). See also *In re Rules of U.S. Court of Appeals for Tenth Circuit*, Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, J., dissenting) (citing Seventh Circuit cases).

126. See U.S. CONST. amend. VI.

127. *Strickland v. Washington*, 466 U.S. 668 (1984) (defining Sixth Amendment violation in terms of defective performance of counsel that presents reasonable likelihood of adverse effect to defendant).

128. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (finding where conflict was undisclosed prior to trial, defendant establishes ineffectiveness claim only upon showing that the conflict adversely affected representation).



performance is impaired by the operation of a rule or ruling that compromises counsel's ability to provide effective representation.<sup>129</sup>

Weatherford relied on this third category of ineffective assistance, which was recognized in *Brooks v. Tennessee*.<sup>130</sup> There, the Court held that the operation of a Tennessee procedural rule requiring that the accused testify first in the defense case, if at all, compromised defense counsel's ability to evaluate the defense case before advising the accused regarding his decision to testify or remain silent. The Court recognized that as a matter of professional judgment counsel might want to call the accused later, after evaluating the strength of its case. The Court observed that "[t]he accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense."<sup>131</sup>

Weatherford argued in his direct appeal that the no citation rule effectively tied counsel's hands by prohibiting arguments based upon unpublished opinions showing that the evidence was insufficient at his trial. The Arkansas Supreme Court, however, upheld the no citation rule, concluding that it "in no way restricts counsel from setting forth the facts of his own case and demonstrating that they do not rise to the level of sufficient evidence."<sup>132</sup> The problem with this analysis is, of course, that the primary method to argue evidentiary insufficiency is to demonstrate other instances in which a court held comparable evidence insufficient or in which a court has affirmed based on qualitatively or quantitatively greater evidence.

Both constitutional claims raised in the *Weatherford* litigation focused on counsel's ability to argue unpublished opinions on appeal. The same principles apply to the restriction on trial counsel's reliance on unpublished opinions, particularly with regard to arguing a motion for directed verdict in a criminal case.

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129. The Court has applied the Sixth Amendment guarantee of effective assistance to both the trial and appellate stages of litigation. In *Penson v. Ohio*, the Court observed:

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.

488 U.S. 75, 85 (1988).

130. 406 U.S. 605 (1972). Other instances of rules or rulings operating to impair counsel's performance are found in *United States v. Gedes*, 425 U.S. 80, 91 (1976) (stating trial court's order for counsel not to consult with client during recess between client's direct and cross-examination violated Sixth Amendment right to effective assistance) and *Herring v. New York*, 422 U.S. 853, 863–65 (1975) (stating that New York law permitting trial court to dispense with closing argument in bench trial violates Sixth Amendment effective assistance guarantee). Other decisions suggest a similar analysis. For instance, the prohibition on impeaching one's witness was found to violate due process by infringing on the right to fair trial in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

131. *Brooks*, 406 U.S. at 612–13. The state supreme court rejected Weatherford's reliance on *Brooks*, holding that the decision actually primarily implicated the accused's Fifth Amendment "right to choose whether or not to testify at trial." *Weatherford v. State*, 101 S.W.3d 227, 235 (Ark. 2003).

132. *Weatherford*, 101 S.W.3d at 235.

And the due process argument that courts must apply precedent consistently to arrive at fair decisions has currency in civil, as well as criminal, cases. The press for changes in no citation policy may ultimately lead the Supreme Court to consider the constitutional implications of policies that limit reliance on unpublished but available decisions.

Moreover, counsel should consider looking to state constitutional protections to support citing unpublished opinions. While the Arkansas Supreme Court rejected Weatherford's state constitutional due process<sup>133</sup> and effective assistance arguments,<sup>134</sup> similar arguments may prove successful in other states. For instance, in *Grand County v. Rogers*,<sup>135</sup> the Utah Supreme Court relied on a state constitutional provision<sup>136</sup> vesting the judicial power in that court to abrogate a no citation rule. The court held:

When the court of appeals renders a decision on an issue that decision is automatically part of the law of this state, unless and until contravened by this court, the legislature, or the people through the processes authorized for the making of new law. For this reason, decisions of the court of appeals expressed in a memorandum decision or in an opinion, are equally binding upon lower courts of this State, and may be cited to the degree that they are useful, authoritatively and persuasively.<sup>137</sup>

Although the *Grand County* court did not expressly rest its decision on the proposition that the state constitution prohibits no citation rules, it achieved the same result by indirectly attacking the promulgation of the rule by an entity other than the state supreme court. Counsel constrained by a similar prohibition should consider the option of creatively attacking the no citation rule when necessary to fully represent the interests of the client.

### III. TRIAL COURT RELIANCE ON UNPUBLISHED DECISIONS

In jurisdictions that do not prohibit citing unpublished opinions as authority, reliance on these decisions by trial counsel is not ethically constrained. Trial courts should not refuse to consider unpublished decisions in ruling on matters before them, even though the weight to be given an unpublished decision may be less than a published decision in accord with the custom or rule of the jurisdiction. An intermediate Texas appellate court, in characterizing the limitations imposed by the no citation rule, observed:

By stating that unpublished opinions may be cited but have no precedential value, we perceive the intent of the rule to be that a court has no obligation to follow such opinions. The effect of the rule is to afford parties more flexibility in pointing out such opinions and the reasoning employed in them rather than simply arguing, without reference, that same reasoning. However, the court

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133. *Id.* at 234.

134. *Id.* at 227.

135. 44 P.3d 734 (Utah 2002).

136. UTAH CONST. art. VIII, § 4.

137. *Rogers*, 44 P.3d at 738.

to whom an unpublished opinion is cited has no obligation to follow the opinion or to specifically distinguish such opinion. They may be cited merely as an aid in developing reasoning that may be employed by the reviewing court be it similar or different. *Even so, we do not view Rule 47.7, or the former rule, as justifying unreasoned consistency on the part of an appellate court.*<sup>138</sup>

This approach recognizes the wisdom of permitting trial courts to consider unpublished opinions to predict the likely disposition of the issue if it is argued on appeal. However, the duty to disclose adverse unpublished authority in jurisdictions permitting citation to unpublished opinions would also appear certain.

In jurisdictions in which unpublished opinions may not be cited as authority, trial courts may nevertheless have an interest in considering these opinions in ruling on issues presented in the pre-trial and trial process.<sup>139</sup> Trial courts ignoring no citation rules in attempting to make correct judgments demonstrates the importance of rules governing, and sometimes allowing, the citation of unpublished opinions. While unpublished opinions may, by rule or tradition, lack the precedential authority accorded published decisions, unless the issuing courts have simply ruled incorrectly,<sup>140</sup> these opinions should be considered correct in their expressions of law or application of law to facts.

Of course, the problem is that courts may err in their decisions. Courts seldom candidly admit that their unpublished opinions may, in fact, be erroneous. If they did, there would likely be a more rational basis for holding that such decisions are not available for citation as precedent. In *Goodlet v. State*, a Kentucky court rejected a claim that an affirmance in a criminal case should be vacated based upon a subsequent contrary decision.<sup>141</sup> But the court also noted:

Indeed, it is difficult, if not impossible, to even identify the inconsistent resolution of issues as neither appellate court has any internal index of unpublished cases or any mechanism to retrieve cases according to the legal issues involved. Certainly, the vast majority of cases in this Court and those heard as a matter of right by the Kentucky Supreme Court are resolved in unpublished opinions. *Goodlet is absolutely correct that the same issue under*

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138. Carrillo v. State, 98 S.W.3d 789, 794 (Tex. Ct. App. 2003) (emphasis added) (citing to TEX. R. APP. P. 47 that provides, in pertinent part that unpublished opinions “have no precedential value but may be cited with the notation, ‘(not designated for publication)’”) The prior rule had expressly prohibited citation to unpublished opinions “by counsel or by a court.” *Id.* at 793, n.3 (distinguishing the language of the former rule, TEX. R. APP. P. 47.7).

139. The difficulty may lie in determining when a trial court has incorrectly considered an unpublished opinion. Unless the trial court expressly relies upon the case, an appellate court is likely to conclude that the complaining party has not suffered prejudice from the discussion of the case in the court below. See *Merrill Lynch v. McCollum*, 666 S.W.2d 604, 610 (Tex. Ct. App. 1984).

140. 825 S.W.2d 290 (Ky. Ct. App. 1992).

141. *Id.*

*similar facts can be decided in entirely different ways with no one being the wiser.*<sup>142</sup>

Even assuming that appellate courts seldom err, this possibility exists, and the ability to refer to an unpublished opinion as evidence of the correct expression of law would appear important in a limited number of cases.

The trial court's predicament is reflected in the sequence of decisions rendered by the Fifth Circuit in suits against the Dallas Area Rapid Transit Authority. In an unpublished opinion, the circuit court concluded that the authority was immune from suit as an entity of the State of Texas, and upheld the district court's dismissal of the action.<sup>143</sup> Within a year, a former employee brought a discrimination action against the authority. This time, the circuit court reached a different conclusion on the immunity question, effectively overruling the previously unpublished opinion of the same court.<sup>144</sup> The changing posture of the court prompted Judge Smith, in dissent,<sup>145</sup> to point out the frustration likely faced by counsel for the authority who might reasonably have assumed that the client's Eleventh Amendment immunity had been established in the prior litigation, only to find that a later panel would disagree. Moreover, he noted the frustration of the lower courts in relying on the prior panel determination.<sup>146</sup>

In a jurisdiction in which reference to unpublished opinions is not permitted, the problem of enforcement of the rule arises, particularly when the trial court's decision would otherwise be correct. If the trial court relies on an unpublished opinion in its decisionmaking, the appellate court may be faced with enforcing the rule against both the trial court and the prevailing litigant. In *Commonwealth v. Brezan*,<sup>147</sup> the Pennsylvania appellate court reversed the grant of a new trial by a trial court based upon its review of the record; apparently, the trial court had relied solely on an unpublished memorandum opinion.<sup>148</sup> But a problem may arise in determining precisely when a trial court has improperly relied on an unpublished opinion as "precedent" or "authority," leading the appellate court to

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142. *Id.* at 292 (emphasis added).

143. *Anderson v. Dallas Area Rapid Transit*, 180 F.3d 265 (5th Cir. 1999) (per curiam) (table); see Strongman, *supra* note 100, at 212–13 (discussing DART litigation in light of due process argument against no citation rules).

144. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (5th Cir. 2001).

145. *Williams v. Dallas Area Rapid Transit*, 260 F.3d 260, 261–63 (5th Cir. 2001) (Smith, J., dissenting).

146. *Id.* at 261. Judge Smith questioned the continuing viability of citation prohibition in light of the widespread availability of opinions that would formerly not have been readily accessible in light of non-publication determinations. *Id.*

147. 614 A.2d 252 (Pa. Super. 1992).

148. *Id.* at 253–54. The court distinguished prior decisions in which trial court rulings relying on unpublished opinions were upheld. However, in both *Major v. Major*, 518 A.2d 1267 (Pa. 1986), and *Melendez v. Penn. Assigned Claims Plan*, 557 A.2d 767 (Pa. 1989), the trial court decision could be predicated on grounds or authority independent of the unpublished opinion. And in other cases in which unpublished opinions had been considered, other authority existed to support the trial court ruling. *Brezan*, 614 A.2d at 247–48.

conclude that no violation occurred.<sup>149</sup> And if the trial court's ruling was otherwise correct, one may question the wisdom of punishing a litigant for relying on a substantively correct, if procedurally flawed, decision by that court.

The following scenarios suggest acceptable uses of unpublished opinions for purposes of trial court decisionmaking.

#### **A. Consistent Principle of Law Applied by Appellate Courts**

A trial court may justifiably be persuaded by an unpublished appellate opinion when the opinion itself clearly identifies a rule or principle of law so basic that it virtually forecloses any inconsistent ruling at the trial court level.<sup>150</sup> Typically, the unpublished opinion appears in a series of unpublished opinions that have expressed the rule or principle originally expressed in a published opinion of some distant vintage. In such a case, the trial court's reliance on the more recent unpublished opinion is appropriate in rejecting an argument that the established rule or principle should be overruled or disregarded.

#### **B. Inconsistent Expressions of Interpretation or Application of Law**

In contrast to the situation in which an unpublished opinion discloses a consistent interpretation or application of a rule or principle of law, unpublished opinions often reflect a lack of consistency.<sup>151</sup> This may result because a rule or principle is actually unsettled, or more likely, because the proper interpretation or application is inextricably linked to complex factual issues. This is most likely to

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149. *E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc., v. McCollum*, 666 S.W.2d 604, 610 (Tex. App. 1984) ("In the case before us, although unreported (and not to be reported) case authority was cited, we find no evidence that the trial court in any way based its decision or even considered the unreported cases cited.")

150. In addressing an evidentiary sufficiency challenge in *McBride v. Commonwealth*, 484 S.E.2d 165 (Va. App. 1997), the appellate court referred to an unpublished decision of the state supreme court in *Johnson v. Commonwealth*, Record No. 940606 (Va. October 21, 1994). The court disposed of the claim that the circumstantial evidence was insufficient, stating that "[t]he affirmance in *Johnson* clearly stands for the proposition that circumstantial evidence, such as an assailant's statement that he possesses a firearm, can be sufficient evidence to prove beyond a reasonable doubt that an accused indeed possessed a firearm."

151. For example, in the unpublished opinion in *Perez v. Johnson*, the panel held that the petitioner's opposition to the motion for summary judgment filed by the State in this federal habeas action was insufficient in failing to point with precision to evidence in the record demonstrating a material issue of fact. No. 96-20135, slip op. at 2-3 (5th Cir. July 31, 1997). The petitioner argued that in light of the brevity of the record on appeal, the panel's disposition was in direct conflict with numerous Fifth Circuit cases that hold that, at least where a summary judgment record is not voluminous, a district court must consider the record as a whole, *even evidence upon which the nonmoving party failed to rely*. *Morgan v. United States*, 937 F.2d 281, 283 (5th Cir. 1991) (citing, *e.g.*, *Higgenbotham v. Ochsner Foundation Hospital*, 607 F.2d 653 (5th Cir. 1979)) (emphasis added); *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 845-46 (5th Cir. 1983) (same); *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) (same). Petitioner's second petition for rehearing, pointing directly to this apparent conflict in decisions, was denied, however.

occur with respect to rulings committed to the trial court's discretion that are reversible only for abuse of discretion. Thus, the issue previously considered may have been disposed of simply by notation that the trial court is vested with discretion to make the ruling on the issue before the court. Nevertheless, the prior determination may be valuable because of the similarity or dissimilarity to the precise issue in the case that is currently before the trial court.<sup>152</sup> Because the application of such discretion is essentially not subject to rigid guidelines, the trial court's intuitive assessment of the proper application of its discretion is most often controlling in the ultimate disposition of the claim or case.

### C. Expression on the Merits of Unpreserved Claims or Issues

A potentially valuable insight into the thinking of an appellate court may be disclosed in an unpublished opinion when the court identifies an issue that has not been properly preserved for appellate review at the trial court level.<sup>153</sup> The identification of the issue may afford both trial counsel and the trial court an appreciation for the potential significance of a similar preserved claim simply because the appellate court has noted it in its unpreserved context in the prior case.<sup>154</sup> Or the court may provide more information, indicating its probable ruling

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152. For example, in *Carrillo v. State*, the trial court noted that the holding in an unpublished opinion offered in support of the defendant's motion to suppress was based on distinguishable facts, such that the search warrant would likely be upheld on appeal if the appellate court were to "apply that same reasoning" used by the court in the prior, unpublished decision. *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. Ct. App. 2003). On appeal, the same appellate court did hold that the two cases were factually distinguishable. *Id.*

153. In *State v. Hochrein*, the court observed that "[n]either party raises the issue of whether Wisconsin recognizes a motion to dismiss for lack of personal jurisdiction based on no probable cause to stop. However, we may decide a constitutional question when, as here, justice compels a decision and the facts are uncontested." 452 N.W.2d 587, 587 (Wis. Ct. App. 1989). The court then held that an unlawful arrest does not deprive the trial court of jurisdiction over the defendant. *Id.*

154. For example, in *State v. Butler*, the issue concerned a failure of preservation of error that resulted in rejection of the criminal defendant's claim that he was entitled to rely on a post-traumatic stress disorder defense based on his prior military action in Vietnam. No. 95 CA 68, 1996 WL 354926, at \*1 (Ohio Ct. App. June 28, 1996). The defendant attempted to raise his claim in an initial action for post-conviction relief; however, the court dismissed based on its conclusion that the defendant could have raised the issue on direct appeal, and, having failed to do so, had abandoned the claim. *Id.* at \*2. In a second petition, Butler claimed that counsel had been ineffective in failing to investigate and raise the issue and preserve error for appellate review. *Id.* In response to the second petition, the appellate court observed that "Butler argues that his counsel was ineffective because he did not present evidence at trial that Butler suffered from post-traumatic stress disorder. *We appear to have invited this argument* in our November 4, 1993, Decision and Entry in *State v. Butler*, Clark App. No. 2634." *Id.* at \*2 (emphasis added). Here, the appellate court's reference to having "invited" the argument advanced in the second petition for post-conviction relief reflects the alternative way in which the claim could have been presented under state law. The reference in an unpublished opinion might be particularly important in educating counsel in other cases of the proper way to assert similar claims, yet the fact that both dispositions were unpublished might well deprive other litigants and their counsel of the value of the explanation given.

had the issue been properly preserved. In the latter case, the unpublished opinion may give the trial court a sense of direction as to how the issue should be decided in the first instance. In the former, the appellate court's reference to the unpreserved issue at least signals its potential importance.

In each of these hypothetical situations, the trial court's reliance on an unpublished opinion is designed to reach a correct result on the merits. The court thus looks to any expression on the issue or claim by an appellate court in a prior proceeding, even though the appellate court did not decide the issue in a published opinion serving as precedent, or in fact, decide it at all. If the trial court correctly interprets the prior opinion or opinions, its ruling will more likely be correct, resulting in affirmance on appeal or, alternatively, a more clearly developed resolution of the issue once the parties have fully litigated it at trial.

Of course, proponents of no citation rules may not find trial court reliance on unpublished decisions to reach correct decisions persuasive. In *In re Donald R.*,<sup>155</sup> for instance, the Illinois appellate court criticized trial court reliance on unpublished opinions for guidance in decisionmaking:

We appreciate the fact that trial judges do not like to be reversed by the appellate court. *Nonetheless, the fear of reversal does not justify reliance on an unpublished order.* The rationale should be obvious. How does an attorney represent his client when the trial court bases its decision on "authority" of which the trial attorneys are totally unaware or on which, even if they are aware, they cannot rely? The bar and the public have some serious and sometimes legitimate concerns over abuses and injustices, either real or perceived, associated with disposing of cases by unpublished orders. Based on trial court records we have reviewed, we are troubled by the increasing frequency of trial courts relying on unpublished Rule 23 orders and therefore take this opportunity to condemn the practice.<sup>156</sup>

The Illinois court points to a problem created by the use of unpublished opinions and orders in the disposition of cases.<sup>157</sup> But it is a problem not resolved

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155. 796 N.E.2d 670 (Ill. Ct. App. 2003).

156. *Id.* at 676 (emphasis added). The court continued:

[W]e feel it important here to note that the trial judge erred when he stated he was bound in this case by a previous unpublished order from another case. We do so because we are seeing this with some regularity. There is nothing ambiguous about Supreme Court Rule 23(e), which provides that an unpublished order of the appellate court is not precedential. 166 Ill.2d R. 23(e). It is error for a trial court to rely on an unpublished order of the appellate court other than in those cases involving double jeopardy, res judicata, collateral estoppel, or law of the case.

*Id.*

157. Illinois is now in the process of reconsidering its no citation rule. In February 2003, The Illinois Supreme Court appointed a committee to study its no-citation rule. *See* Barnett, *Battlefield Report*, *supra* note 5, at 480 n.46. The court is expected to take action on

by secrecy. Trial judges may “fear” reversal, but perhaps for the very laudable reason that they struggle to make correct decisions. And that is precisely what furthers the goal of justice, at least theoretically in our system—the process by which trial courts make correct decisions because they understand the proper rules of law and their application. Instead of opting for secrecy, the court might better have understood the desire of trial judges and attorneys to have access to the law so that clients can be properly advised and cases properly decided. Rather than limiting or restricting access to the reasoning of the appellate courts, a preferable policy would be to opt for disclosure.

Accuracy in trial court decisionmaking is desirable because it promotes fairness in the litigation process. When issues are contested in the trial court, the role of counsel as advocate for the disposition favoring the client becomes critical. Disparity in ability, intuition, preparation, and resources may all serve to compromise counsel’s performance. To a significant extent, a true “leveling of the field,” in terms of counsel’s abilities, can never be ensured. But when the field is skewed because of disparity in resources, there is a justification for engaging in some leveling through rules governing the litigation process. In the past, the disparity in access to unpublished opinions has influenced many courts to adopt rules prohibiting reliance on these opinions.

The prohibition on use of unpublished opinions artificially compromises counsel’s ability to represent the client. In order to ensure a more level playing field, the adoption of a rule that both permits reliance on prior judicial expressions on an issue and ensures that all parties will have access to these expressions would advance the quality of representation and accuracy of decisionmaking. This is particularly true at the trial court level precisely because the judicial thinking that goes into creation of an unpublished opinion may well be beyond the scope of the trial judge’s reference, while appellate judges who have participated in decisionmaking resulting in unpublished opinions are more likely aware of what their courts have done.

The solution to the problem of disparity of access, or even lack of thoroughness on the part of counsel that might account for an incorrect or unfair decision by the trial court, lies in a policy of disclosure that guarantees access to the bases upon which the trial court will make its decisions. Disclosure requirements typically serve these different and very important interests in the litigation process. Thus, for example, some jurisdictions have adopted mandatory disclosure of information in the pre-trial process.<sup>158</sup> This approach may actually penalize parties who retain counsel superior in terms of natural abilities or diligence in some instances, yet promotes other important interests, such as avoiding unfair dispositions and furthering the settlement process.

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a proposal to permit unpublished opinions to be cited as persuasive authority in 2005. *See* Serfass & Cranford, *supra* note 10, at 349–50 n.5 and accompanying text.

158. *E.g.*, Colorado rules provide for a mandatory “Trial Management Order” requiring the parties to identify specific information relating to their claims and defenses, proposed witnesses and anticipated evidence supporting those claims or defenses, a detailed list of exhibits, and provide information for inclusion in juror notebooks no later than thirty days prior to a scheduled trial date. COLO. R. CIV. P. 16(f)(3).



Lack of access to unpublished opinions can compromise fairness in the litigation process. In order to assure that the disparity does not jeopardize the integrity of the process, the trial court should impose some limitations on the use of unpublished decisions. The limitations should afford notice that an unpublished decision will be offered as authority; permit reasonable opportunity for responsive research and briefing; and authorize interlocutory appeal on the motion of either party or the trial court, *sua sponte*,<sup>159</sup> when good cause demonstrates the need for immediate resolution of the issue before the trial court. Consistent rules liberalizing the use of unpublished opinions will lead to more predictability in trial and appellate proceedings and increase overall fairness throughout the litigation process. Adoption of a formal rule would ensure that the use of unpublished opinions would operate uniformly within the jurisdiction's trial courts. The comprehensive procedural scheme might include the following proposed rules and provisions.

#### **IV. A PROPOSED RULE THAT WOULD ALLOW ATTORNEYS TO RELY ON UNPUBLISHED OPINIONS AT THE TRIAL COURT LEVEL**

Appellate courts or state legislatures addressing the continuing debate over prohibition to citation to opinions not designated for publication should consider the implications of any policy initiative that changes the rules of practice in the jurisdiction. Adoption of a policy favoring citation to all opinions issued by the appellate courts will necessarily include implications for appellate courts accustomed to using the publication decision as a means of deemphasizing dispositions in significant numbers of cases. Consequently, the determination that such a move is either necessary or desirable should rest on consideration of potential consequences for judges, counsel and litigants in future cases. The rules proposed here address a number of concerns likely to arise in any jurisdiction contemplating a change in citation policy.

##### **RULE XX: RELIANCE ON UNPUBLISHED APPELLATE OPINIONS IN THE TRIAL COURT**

(a) A party may rely on an unpublished opinion or opinions issued by an appellate court of this jurisdiction in conformity with the requirements of this rule.

(b) When a party seeks to rely on an unpublished opinion or opinions of an appellate court as authority supporting a position advocated before the trial court, the party must disclose the unpublished opinion or opinions to the trial court and opposing party when briefing a motion or objection, or at such time as appropriate during the proceedings. The party relying on such opinion or opinions shall file a supporting brief bearing counsel's signature explaining the relevance of the unpublished opinion or opinions and containing counsel's affirmation that there is no known published opinion controlling the disposition of the issue.

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159. See, e.g., ILL. COMP. STAT. ANN. 110A, ¶ 308 (2005) (permitting the trial court to seek an interlocutory appeal on its "own motion or motion of any party").

(c) When a party is served with notice of opposing party's intent to rely on an unpublished opinion or opinions in support of a position taken before the trial court, that party shall be afforded an adequate opportunity to research and brief the issue in light of supporting unpublished decisions advanced by opposing counsel.

*Comment.* This rule is designed to set forth the parameters of counsel's duties in raising an issue relying on unpublished decisions, or when counsel intends to rely on unpublished opinions in support of a claim, motion, or objection. The goal of the rule is not only to promote accuracy in the trial court's decisionmaking, but also to avoid unfair prejudice in the use of unpublished decisions based on disparity of resources among the parties. The rule contemplates mandatory disclosure of contrary authority and sufficient opportunity for research and counter-briefing to avoid domination of the proceedings by a party having substantially greater resources or failing to faithfully apprise the trial court of the true state of law upon which it is relying.<sup>160</sup>

#### RULE XXI. INTERLOCUTORY APPEAL

(a) When, on motion of either party, or on its own motion, the trial court is of the opinion that the unpublished opinion or opinions relied upon by a party or the parties raises an important issue regarding a controlling principle or rule of law that will expedite disposition of the issue prior to final resolution of the case, the trial court may certify the issue to the appellate court for interlocutory appeal.<sup>161</sup> In certifying the issue for interlocutory appeal, the trial court must:

(1) Identify precisely the issue before the court;

(2) Make findings of fact regarding those facts essential to disposition of the legal issue in the case; and

(3) Identify the unpublished opinion, or opinions, which the trial court has found to bear on the proper disposition of the issue.

(b) When the trial court's decision to certify an issue for interlocutory appeal is based on a perceived conflict between two or

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160. Some state rules already provide for disclosure as an express predicate to reliance. *See, e.g.*, U.S. CT. OF APP. 8TH CIR. R. 28A(i); DEL. SUP. CT. R. 14(b)(vi)(4); MICH. CT. R. 7.215(C);.

161. For example, in considering whether a discovery order was appealable, the Illinois court distinguished between discovery issues regarding scope of discovery and questions of law regarding particular discovery, noting: "Questions of law are reviewable under Rule 308, whereas discovery orders are not." *Szczeblewski v. Gossett*, 795 N.E.2d 368, 369 (Ill. Ct. App. 2003). The court permitted the appeal in reviewing the proper use of requests for admissions and a party's duty to "avail himself of the knowledge of his attorneys or agents before admitting, denying or making a claim of insufficient knowledge to admit or deny a request to admit." *Id.* at 371.

more unpublished decisions of the appellate courts, the trial court shall identify with specificity the decisions found to be in conflict and order that the record on appeal include copies of the unpublished opinions relied upon in making the conflict decision. The trial court shall also indicate in its order certifying the question that no published decisions have been located controlling the disposition of the question or issue presented.

(c) When the trial court's decision to certify an issue for interlocutory appeal is based upon a perceived conflict between a published opinion of the appellate court and more recent unpublished decision or decisions of the appellate courts casting doubt on the continuing viability of the published precedent, the trial court shall state with specificity in its order the grounds demonstrating good cause for immediate challenge to the published precedent as a result of subsequent, unpublished decisions. The following grounds may demonstrate such good cause:

(1) That the published precedent is of sufficient age that it has generally been abandoned in substance in other jurisdictions, but has not been directly called into question before the highest court of this jurisdiction.

(2) That subsequent unpublished decisions of the intermediate court or courts of appeals have uniformly questioned the continuing viability of the published precedent, while deferring to the rule as precedent.

(3) That subsequent unpublished decisions of the supreme court have questioned the continuing viability of the published decision, as controlling precedent, but have not expressly overruled the prior rule for a specific procedural reason, such as failure of a party to properly preserve error; a finding that the error predicated on the published decision would have been harmless and not required reversal; or that relief had been granted on another claim presented not requiring the court to reach the question presented.

*Comment.* The provisions of Rule xxi are designed to ensure that interlocutory appeal is reserved for conflicts implicated by unpublished opinions of sufficient significance that they justify departing from the usual rules of finality. Recognizing that interests of judicial economy and costs of litigation to the parties may compromise the values of the litigation system, the use of interlocutory appeals may help to avoid incorrect decisions in the trial court and thus prevent the need for reversal and retrial, or may prevent negotiated settlements premised on incorrect assessments of the law. Interlocutory appeal should not be used by parties seeking to delay the course of litigation, or by trial courts anticipating that the process will result in parties being forced into settlement, avoiding the time involved in litigation.

Subsection (a) requires a detailed explanation of the issue and source of conflict forming the basis for the interlocutory appeal.<sup>162</sup> This is designed to ensure that the appeal is narrowly limited to the question or issue of law and not to afford the litigants an opportunity to argue the case on the merits or expand the appeal to include other issues once the appeal is certified and accepted by the appellate court.<sup>163</sup> Where the trial court fails to properly define the issue for review, dismissal is appropriate.<sup>164</sup>

Subsection (b) requires the trial court to ensure that the unpublished decisions are readily available to the appellate court upon docketing the appeal and provides a mechanism for inducing the trial court and parties to determine that no published decision controlling the disposition in the jurisdiction has been overlooked or ignored in the process.

Subsection (c) addresses those situations in which the trial court concludes that more recent, unpublished decisions of an appellate court have substantially eroded the continuing authority of an older, published decision that serves as precedent in deciding a claim, issue, or question before the trial court. This provision should discourage trial courts from proceeding with certification based upon simple disagreement with existing precedent, while setting forth grounds showing good cause for certifying a question or issue when appropriate.

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162. The Illinois interlocutory appeal rule provides:

When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

ILL COMP. STAT. ANN. 110A, ¶ 308. *See also* ALA. R. APP. PROC. 5(a) (providing "[t]he trial judge must include in the certification a statement of the controlling question of law")

163. The Supreme Court of Alabama has observed that the interlocutory appeal process contemplated by its appellate rule 5 specifically requires the trial court to identify the controlling issue of law to preclude review on a permissive appeal "beyond the questions stated by the trial court," noting that any such expansion would "usurp the responsibility entrusted to the trial court by Rule 5(a)." *BE & K, Inc. v. Baker*, 875 So. 2d 1185, 1188–89 (Ala. 2003) (construing ALA. R. APP. P. 5.).

164. *See, e.g., Mason v. Water Resources International*, 694 P.2d 388, 389 (Haw. 1985) (where trial court's certification of interlocutory appeal failed to identify the trial court's basis for concluding that interlocutory appeal would result in more speedy termination of litigation, the order failed to demonstrate the propriety of interlocutory appeal, as required by statute, HAWAII REV. STAT. § 641-1(b)).

**RULE XXII. JURISDICTION OF THE APPELLATE COURTS ON  
INTERLOCUTORY APPEAL**

(a) An interlocutory appeal based solely on a perceived conflict in the prior decisions of the court of appeals shall be taken to the court of appeals.

(b) An interlocutory appeal taken pursuant to the provisions of Rule xxi shall be taken to the supreme court. The court of appeals shall have no jurisdiction to overrule a published opinion of the supreme court, but unpublished decisions of the court of appeals in conflict with a published opinion of the supreme court shall demonstrate good cause for certifying the question to the supreme court for interlocutory appeal.

*Comment.* The jurisdiction of the appellate courts is defined in this section. In a jurisdiction having no intermediate appellate court, the rule would be modified to refer only to the interlocutory appellate process in the supreme court.

Subsection (b) notes the typical rule that an intermediate appellate court is bound by decisions of the supreme court, but recognizes that unpublished opinions of the intermediate court may legitimately call into question the continuing viability of a decision of the highest court in the jurisdiction.

**RULE XXIII. ACTION TAKEN ON CERTIFICATION MOTION**

(a) Whenever a trial court shall certify an issue for interlocutory appeal to the supreme court or court of appeals, as provided for in the preceding rules, the responding court shall enter its order granting or denying interlocutory appeal as expeditiously as feasible.

(b) When the interlocutory appeal is granted by either the supreme court or court of appeals, the appeal shall proceed on the record as in other interlocutory appeals permitted by law in this jurisdiction. All formal proceedings in the trial court shall be stayed pending disposition of the interlocutory appeal.

(c) When the interlocutory appeal is denied, the order denying interlocutory appeal shall be returned to the trial court immediately, which shall proceed with disposition of the case forthwith.

(d) No motion on the merits of the grant or denial of interlocutory appeal shall be entertained by the appellate courts except on a motion to dismiss interlocutory appeal filed in or granted by the court of appeals when that court lacks jurisdiction over the interlocutory appeal, as provided for in these rules. In the event the supreme court finds that a motion to dismiss an application for interlocutory appeal or order granting interlocutory appeal by the court of appeals has not been brought by a party in

good faith, the supreme court may order sanctions against the party moving to dismiss the interlocutory appeal.

*Comment.* Rule xxiii addresses the process for disposition of the claim, issue or question certified by the trial court based upon an unpublished opinion or opinions issued by the appellate court.

Subsection (a) provides for expeditious consideration of the trial court's certification request.

Subsection (b) directs that the interlocutory appeal should follow pre-existing interlocutory appeal processes already in place. If no previously established interlocutory appeal process exists to guide the appellate courts and parties in the litigation process, a specific procedure should be created, although reference to general appellate process noted in subsection (b) may be adequate to address this alternative situation.

Subsections (c) and (d) address the need to avoid unnecessary delay in the litigation process that may result when interlocutory appeals are improvidently sought or granted by appellate courts.<sup>165</sup> Subsection (c) directs the trial court to proceed forthwith by returning the case to the docket when its certification order is rejected by the appellate courts. Subsection (d) provides for sanctions in limited circumstances when a party seeks interlocutory review on frivolous grounds or for purposes of delay or harassment.

#### **RULE XXIV. DISPOSITION OF THE INTERLOCUTORY APPEAL ON THE MERITS**

(a) A disposition on the certified question entered by the court of appeals shall be reviewable in the supreme court on petition for review. The supreme court may grant the petition and review the disposition on the merits; vacate the disposition of the court of appeals and remand for further proceedings in that court; or vacate the disposition of the court of appeals and remand the case to the trial court for further proceedings.

(b) A disposition entered by the supreme court on interlocutory appeal shall be deemed the law of the case on the precise legal issue presented by the interlocutory appeal. A disposition entered by the court of appeals on the question presented by the interlocutory appeal and not previously reviewed by the supreme court shall be reviewable by the supreme court on discretionary review of an opinion issued by the court of appeals in the direct appeal of the entire case on the merits.

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165. As the Hawai'i Supreme Court observed in *Mason v. Water Resources International*, increasing appellate caseloads demands that courts limit appeals from non-final orders in order to maintain current dockets and dispose of appeals in timely fashion. 694 P.2d at 389.

*Comment.* The provisions of Rule xxiv define the jurisdictional authority of the court of appeals and supreme court when a decision on the merits of the interlocutory appeal has been reached. Subsection (a) permits a party to seek immediate review in the supreme court of an adverse decision on the interlocutory appeal.

Subsection (b) permits the party to reurge the issue on petition for discretionary review if the supreme court previously refused to review the court of appeals' decision on the merits. Failure to seek immediate review of an adverse ruling of the court of appeals would appear to bar later review in the supreme court. However, foreclosing review by rule may not be appropriate since the court of appeals decision may be subject to additional review in light of the full record of trial, altering the accuracy of its ruling on the legal issue when initially presented. Thus, either party may be aggrieved by application of the court of appeals ruling when applied on the record of trial and arguably, should be afforded the option of challenging that disposition in light of a more complete record. This would require a party not challenging an adverse decision of the intermediate court by seeking immediate review in the supreme court to fully explain why that court's ruling was incorrect or prejudicially applied when relied upon by the trial court in its disposition of the claim, issue or question during the course of the subsequent proceedings in that court.

### CONCLUSIONS

The proposed rules are designed to bring uniformity to the use of unpublished opinions in trial courts. Attorneys will almost certainly be tempted to use whatever authority supports their clients' positions in the trial process, even when court opinions may be formally excluded from argument by rule. Arguably, an attorney's duty to represent the client competently may require counsel to make a good faith search of unpublished opinions to find support for a position when there is no controlling precedent in the jurisdiction; the courts have effectively undermined existing precedent by other developments within the jurisdiction's own case law; when developments in other jurisdictions have undermined precedent; or when an unpublished opinion calls into question a formerly "settled rule" in the jurisdiction. Whether counsel is ethically bound to disclose known, but contrary, unpublished authority having no formal precedential value would appear to depend on the proper construction to be given to the application of Model Rule 3.3 to such situations. The proper allocation of any burden might depend on counsel's attempt to use unpublished opinions in support of a claim or issue.

The use of unpublished opinions is likely to grow, especially in light of courts' increasing caseloads and decisions. Unpublished opinions may have precedential value depending upon the position taken by the jurisdiction's appellate courts, or ultimately, by a decision of the United States Supreme Court. The Supreme Court could follow Judge Arnold's Article III reasoning with regard to federal decisions and hold that federal courts may not disregard unpublished opinions as non-precedential and may not limit their citation in subsequent litigation. Or it could hold that the Due Process Clause of the Fifth Amendment

requires recognition of all prior dispositions as having precedential value in federal court proceedings without extending that protection to state court matters. Alternatively, the Court might extend this approach to hold that either the Fourteenth Amendment Due Process Clause precludes no citation rules in state proceedings, or that the Sixth Amendment right to effective assistance of counsel requires courts to consider unpublished decisions relied upon by federal and state defendants only in the context of criminal prosecutions.<sup>166</sup>

The issue of publication, as opposed to citation policies, is clouded by the online “publication” of decisions that previously would not have been released in reporter advance sheets. Courts and online databases disseminate unpublished decisions, making them readily available but adding costs to the litigation process. No citation rules may fall nationally under a consensus that courts should not exclude these decisions from the “law” upon which litigants may rely. Absent a definitive constitutional ruling on their availability, jurisdictions will remain relatively free to fashion their own rules defining the role of all decisions as precedent.

To the extent that non-publication is undermined by the fact that courts now routinely post their decisions on judicial websites, regardless of their designation as for or not for publication, this does not ensure ready access unless the court also provides an engine for searching the opinions. Counsel may have access to an unpublished decision by the style or number of the case, but may have no means to find relevant decisions. Further, making unpublished decisions available in online databases, whether on judicial websites or online providers, will never provide an exhaustive or comprehensive database unless these sources include all unpublished opinions. To the extent that they do not, there is likely to be real uncertainty as to whether counsel can ascertain what the appellate courts have held in their unpublished dispositions. If courts do abandon no citation rules but continue to issue unpublished opinions, it is likely that they will employ rating schemes with respect to the precedential value given to such opinions, distinguishing between published decisions serving as binding precedent, controlling precedent, or precedent, and those usable only as persuasive authority. This will require counsel to judge the comparative significance of some precedents established through publication and contrary holdings having only persuasive value as a result of their status as being unpublished, even though they are being generally disseminated.

Trial judges are rightfully interested in correctly ruling on issues raised in the course of litigation and in avoiding reversal on appeal. They can hardly be expected to ignore appellate opinions that explain rules or principles, particularly when characterized by well-reasoned or factually similar contexts. Thus, trial judges will be tempted to look at the authorities submitted by counsel in support of their positions. Only express prohibitions on the use of unpublished decisions would lead trial courts to refuse to review these expressions of higher courts on an issue. And counsel can hardly be expected to ignore what would prove controlling, persuasive, or favorable authority if the appellate court had designated its opinion

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166. See *Weatherford v. State*, 101 S.W.3d 227 (Ark. 2003); *supra* notes 91–135 and accompanying text.



for publication. Consequently, a new regime for the use of these sources of precedent may prove significant for ensuring fairness in the pre-trial, trial, and settlement processes. The problems posed by the digital dissemination of case law, effectively blurring the distinction between published and unpublished opinions, necessitates clear and uniform rules that permit attorneys to cite unpublished opinions when the integrity of the justice system demands. The rule proposed in this Article would effect such a change and increase consistency and predictability in trial and appellate proceedings.