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Keeping Up with your Sister Court: Unpublished Memorandums, No-Citation Rules, and the Superior Court of Pennsylvania

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Keeping Up with your Sister Court: Unpublished Memorandums, No- Citation Rules, and the Superior Court of Pennsylvania

Logan Hetherington*

ABSTRACT

As Pennsylvania's intermediate appellate court of general jurisdiction, the Pennsylvania Superior Court decides thousands of cases each year. The vast majority of those cases are disposed of via unpublished memorandums. These unpublished memorandums are designated as non-precedential and may not be cited by parties before the Superior Court. As a result, litigants and their counsel may not even persuasively cite an unpublished memorandum in briefs or other papers submitted to the Court. Thus, if counsel finds an unpublished memorandum deciding the identical issue of the case at hand and counsel is before the Superior Court judge who authored that opinion, counsel is still unable to cite that unpublished memorandum, even though counsel can freely cite sources such as Mark Twain or Howard Stern. However, the Commonwealth Court, Pennsylvania's other intermediate appellate court, has recently amended its procedures to allow for persuasive citation to its unpublished memorandums. This development has led to recent controversy and calls for change in the Superior Court's procedures.

This Comment will first examine the history of the debate over unpublished judicial opinions and their precedential value on the federal level. This Comment will then explore the debate regarding use of unpublished opinions in the Commonwealth of Pennsylvania. Next, this Comment will analyze the various arguments in support of the use of unpublished decisions and will examine these arguments in the context of Pennsylvania's court system. Lastly, this

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Comment will recommend that the Superior Court adopt the approach recently taken by Pennsylvania's other intermediate appellate court, the Commonwealth Court, and allow persuasive citation to unpublished memorandums. Such a change would not only benefit litigants and counsel, but it would also aid the Superior Court and enhance public confidence in the judiciary.

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I. INTRODUCTION

New lawyers admitted to the bar in Pennsylvania have learned a lot. First, they spent considerable time and money educating themselves and earning an undergraduate degree.¹ Next, they doubled down with their time and money to obtain a law degree from an “accredited law school.”² Then, they devoted more time and money to their legal education by studying for the Pennsylvania bar examination.³ Not to mention, they also had to meet unspecified standards for character and fitness.⁴

When one peruses the bar examination subjects, one finds a litany of the same subjects he or she learned in law school.⁵ However, one does not find, and therefore does not need to study, Pennsylvania appellate procedure.⁶ Consequently, a new lawyer would most likely have no idea of Pennsylvania’s unique situation regarding unpublished memorandums.⁷

In 2015, the Superior Court of Pennsylvania filed 4,946 opinions.⁸ Only 274 of those opinions were filed as published.⁹ The remaining opinions were filed as unpublished memorandums.¹⁰ Thus, roughly five percent of the Superior Court’s opinions were published in 2015.¹¹ Although this may not seem too important, the significance becomes apparent when looking closer at the Superior Court’s internal operating procedures.¹² Since 1992, the Superior Court has limited citation to only its published opinions.¹³ This practice stands in contrast to the current practice in federal courts,¹⁴ and more relevant, the Commonwealth Court of Pennsylvania.¹⁵

This Comment will analyze the utility of the rules limiting citation to so-called “unpublished” judicial opinions, specifically as

1. PA. B.A.R. 203(a)(1) (2016).

2. PA. B.A.R. 203(a)(2)(ii).

3. PA. B.A.R. 203(b)(1).

4. PA. B.A.R. 203(b)(2).

5. *See Bar Exam Tests and Subjects Tested*, PA. BOARD OF LAW EXAMINERS, http://www.pabarexam.org/bar_exam_information/testsubjects.htm (last visited Mar. 4, 2017).

6. *See id.*

7. *See infra* Part II.B.

8. *2015 Caseload Statistics of the Unified Judicial System of Pennsylvania*, ADMIN. OFF. OF PA. CTS., <http://media-downloads.pacourts.us/2015Reportcompressed.pdf?cb=4182111> (last visited Nov. 21, 2016).

9. *Id.*

10. *See id.*

11. *See id.* (274 out of 4,946 equals roughly .055 or 5.5 percent).

12. *See* PA. SUPER. CT. I.O.P. § 65.37 (2016).

13. *Id.*

14. *See infra* Part II.A.3.

15. *See infra* Part II.B.2.

these rules apply to the Superior Court of Pennsylvania.¹⁶ Part II of this Comment will discuss the origin of the debate over unpublished judicial opinions and the current situation on the federal level,¹⁷ before focusing on the situation in Pennsylvania.¹⁸ Part III will analyze the various arguments in support of limiting citation to unpublished decisions¹⁹ and then examine the applicability (or inapplicability) of these arguments to Pennsylvania's judicial system.²⁰

Part III will also propose that the Superior Court adopt a new procedure in accordance with its sister court, the Commonwealth Court of Pennsylvania.²¹ The new procedure would allow for persuasive citation to the Superior Court's unpublished memorandums.²² Finally, Part IV will briefly summarize the issues and observations discussed throughout this Comment.²³

II. BACKGROUND

A. *Debate on the Federal Level*

1. *Limiting the Publication of Cases*

In response to the proliferation of the number of cases being adjudicated in federal courts in the early 1960s, the Judicial Conference of the United States²⁴ passed a resolution which directed federal courts to limit their publication of opinions to only those with "precedential" value.²⁵ By 1973, the Federal Judicial Center²⁶ also

16. See *infra* Parts III.A–B.

17. See *infra* Part II.A.

18. See *infra* Part II.B.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

21. See *infra* Part III.C.

22. See *infra* Part III.

23. See *infra* Part IV.

24. The Judicial Conference of the United States serves as the policy-making organization for all federal courts. See *About the Judicial Conference*, ADMIN. OFF. OF THE U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited Oct. 7, 2016). The Conference is required to meet at least once annually, and its members include the Chief Justice of the United States (acting as presiding officer), the chief judge of each federal circuit, the chief Judge of the Court of International Trade, and one district judge from each federal circuit. *Id.*

25. Chief Justice Earl Warren, *Report of the Proceedings of the Judicial Conference of the United States*, ADMIN. OFF. OF THE U.S. CTS., 11 (Mar. 16–17, 1964), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1964-03.pdf> ("That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.").

advocated for federal appellate courts to limit their publication to only certain cases which met the suggested “standard for publication.”²⁷ Furthermore, the Judicial Center recommended that all opinions not chosen for publication “shall not be cited as precedent by any court or in any brief or other materials presented to any court.”²⁸

As a result, nearly every federal circuit adopted local rules that followed the advice of the Judicial Center by restricting the publication of decisions and preventing citation to those opinions.²⁹ From around 1980 to 2000, not only did the caseload of federal appellate courts grow at an alarmingly fast rate, but the number of cases disposed of via unpublished opinions grew exponentially.³⁰ However, the dispute over unpublished opinions did not take center stage in appellate practice circles until the Eighth Circuit declared that federal court rules designating unpublished opinions as non-precedential were unconstitutional.³¹

2. *The Anastasoff-Massanari Saga*

The debate over the constitutionality of unpublished opinions designated as non-precedential arose in *Anastasoff v. United States*³² through a fairly mundane issue regarding the appellant’s overpayment of federal income taxes.³³ The appellant claimed that although the Eighth Circuit Court of Appeals had previously heard the exact issue appellant raised and found contrary to her claim, the

26. The Federal Judicial Center was established by Congress in 1967 at the urging of the Federal Judicial Conference. See *About the Federal Judicial Center*, FED. JUDICIAL CTR., <http://www.fjc.gov/> (last visited Oct. 7, 2016). It serves as “the research and education agency of the federal judicial system.” *Id.*

27. NAT’L CTR. FOR STATE CTS., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 22 (1973), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/33> (introducing a model rule restricting publication to any opinion which “establishes a new rule or law or alters or modifies an existing rule,” “involves a legal issue of continuing public interest,” “criticizes existing law,” or “resolves an apparent conflict of authority”).

28. *Id.* at 23.

29. See J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SE-
TON HALL CIR. REV. 27, 38–39 (2005) (describing this development during the 1970s).

30. See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C.L. REV. 185, 192–93 (2007) (illustrating in “Table #1: The Dramatic Increase in Federal Court of Appeals Unpublished Opinions”).

31. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

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

33. *Id.*

court was not bound by that ruling because it was decided with an unpublished opinion and, thus, lacked precedential value.³⁴ In an opinion authored by Judge Richard Arnold, the Eighth Circuit rejected the appellant's assertion that the prior unpublished opinion was non-binding and held that the circuit appellate rule³⁵ that branded unpublished opinions as non-precedential was unconstitutional.³⁶

In his opinion, Judge Arnold engaged in a discussion of the doctrine of precedent and concluded that it has historically been an integral component of the common law system and judicial autonomy.³⁷ He cited the works and opinions of Sir William Blackstone,³⁸ Sir Edward Coke,³⁹ Alexander Hamilton,⁴⁰ James Madison,⁴¹ and Joseph Story⁴² to bolster his averment that "the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III."⁴³ This conclusion rests on the presumption that the practice of labeling only certain opinions as precedential amounts to judicial legislating because it permits judges to issue opinions that have no binding effect on later decisions.⁴⁴

Judge Arnold also addressed some of the arguments advanced by those in favor of non-precedential opinions.⁴⁵ He clarified that the court was not commenting on the value of unpublished opinions and their utility in appellate courts, but merely on the notion that

34. *Id.*

35. 8TH CIR. R. 28A(i) (2000) (providing at the time of the court's opinion in *Anastasoff*, 223 F.3d 898, that "[u]npublished opinions are not precedent and parties generally should not cite them").

36. *Anastasoff*, 223 F.3d at 899 ("We hold that the portion of [8TH CIR. R. 28A(i)] that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'").

37. *See id.* at 900 ("In sum, the doctrine of precedent was not merely well-established; it was the historic method of judicial decision-making, and well-regarded as a bulwark of judicial independence in past struggles for liberty.").

38. *Id.* at 900–01 (citing various volumes of SIR WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765)).

39. *Id.* at 901 (citing various volumes of SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1642)).

40. *Id.* at 902 (citing THE FEDERALIST NOS. 78, 81 (Alexander Hamilton)).

41. *Id.* (citing Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 390–93 (Marvin Meyers ed., rev. ed. 1981); Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977)).

42. *Id.* at 903–04 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833)).

43. *Id.* at 903.

44. *See id.* at 904 (stating that this practice exceeds the judicial power).

45. *See id.*

unpublished opinions have no precedential effect.⁴⁶ He also illuminated the fact that, although an opinion may be labeled as unpublished, it is still available to litigants because all court opinions are available online or at the clerk's office.⁴⁷ Judge Arnold's colleague, Judge Heaney, concurred with the opinion and specifically commended Judge Arnold for his discussion of the precedential consequence of unpublished opinions.⁴⁸ However, not everyone agreed with Judge Arnold's declarations.⁴⁹

A year after *Anastasoff*, the Ninth Circuit Court of Appeals issued an opinion in *Hart v. Massanari*⁵⁰ which criticized Judge Arnold's reasoning and conclusions.⁵¹ In *Massanari*, counsel for the appellant cited an unpublished opinion in his brief, and the court ordered him to show cause as to why he violated the Ninth Circuit rule prohibiting citation of unpublished "dispositions."⁵² Counsel responded that the circuit rule prohibiting citation to unpublished dispositions may be unconstitutional based on the Eighth Circuit's discussion in *Anastasoff*.⁵³ In an opinion by Judge Alex Kozinski, the Ninth Circuit Court of Appeals wrote explicitly to confront what it deemed "the mistaken impression" that the circuit rule was unconstitutional and to "lay these speculations to rest."⁵⁴

Judge Kozinski disputed Judge Arnold's constitutional analysis and concluded that the term "judicial power," as used in Article III of the Constitution,⁵⁵ does not in itself set limitations upon the judiciary.⁵⁶ In direct contrast to Judge Arnold's historical examination, Judge Kozinski averred that the Framers would have no issue with

46. *Anastasoff*, 223 F.3d at 904 ("The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not.").

47. *Id.* ("So far as we are aware, every opinion and every order of any court in this country, at least any appellate court, is available to the public.").

48. *See id.* at 905 (Heaney, J., concurring).

49. It is crucial to note that because Judge Arnold's opinion was subsequently vacated as moot, it did not stand and holds no precedential value today. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (vacating *Anastasoff*, 223 F.3d 898 as moot because the appellant taxpayer subsequently received the reimbursement for overpaid taxes which she originally sought).

50. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

51. *See id.* at 1180 ("Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.").

52. *Id.* at 1158 (reciting 9TH CIR. R. 36-3 which states, "[u]npublished dispositions and orders of this Court are not binding precedent . . ." and ". . . may not be cited to or by the courts of this circuit . . .").

53. *Id.*

54. *Id.*

55. *See* U.S. CONST. art. III, §§ 1–2.

56. *Massanari*, 266 F.3d at 1161.

court rules designating opinions as unpublished and non-precedential.⁵⁷ He specifically noted that English common law judges did not necessarily consider earlier case dispositions to be binding authority.⁵⁸ Moreover, Judge Kozinski quoted Sir William Blackstone for the proposition that judicial opinions are not law unless correctly decided,⁵⁹ and he also noted that the current view of binding precedent was a recent development.⁶⁰

Judge Kozinski then proceeded to lay out specific reasons supporting no-citation rules and non-precedential opinions.⁶¹ First, he discussed how published opinions serve as binding authority and lead to mandatory conclusions in those courts bound by that authority.⁶² He also asserted that the concept of binding authority “deprives the law of flexibility and adaptability,” and, as a result, may give “undue weight” to some decisions.⁶³ Furthermore, he acknowledged a need and desire to uphold the integrity of circuit boundaries and conjectured that Judge Arnold’s view, which recognized every decision as precedential, may conflict with or destroy those boundaries.⁶⁴ Indeed, Judge Kozinski feared that too much precedent may not only lead to confusion and conflict,⁶⁵ but also unnecessary expenditure of court resources.⁶⁶ While Judge Kozinski’s concerns are certainly not unfounded,⁶⁷ their application to the Pennsylvania judicial system⁶⁸ requires a much different analysis.

57. *See id.* at 1163.

58. *Id.* at 1165.

59. *Id.* (citing 1 BLACKSTONE, COMMENTARIES *70–71 (1765)).

60. *See id.* at 1168 (“As the concept of law changed and a more comprehensive reporting system began to take hold, it became possible for judicial decisions to serve as binding authority.”).

61. *See id.* at 1171–78.

62. *Id.* at 1171–72.

63. *Id.* at 1175.

64. *See id.* at 1175–76 (arguing that strict adherence to the doctrine of precedent would lead to a situation where one circuit “would have no authority to disagree” with a ruling of another circuit that is “directly on point”).

65. *See id.* at 1179.

66. *See Massanari*, 266 F.3d at 1176–78.

67. *See, e.g., Anika C. Stucky, Comment, Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 407 (2006) (declaring that “when used in accordance with proper publication standards and citation rules, unpublished opinions play an indispensable role in both the federal and state judicial systems by providing more efficiency in overburdened systems without compromising the tradition of precedent that is central to such systems.”).

68. The formal name for the Pennsylvania court system is “The Unified Judicial System of Pennsylvania.” *See* PA. CONST. art. V, § 1.

3. *Federal Practice Today*

The debate over citation to unpublished opinions culminated on the federal level with the passage of Federal Rule of Appellate Procedure 32.1.⁶⁹ The rule expressly allows for citation to unpublished opinions issued after January 1, 2007 in federal courts.⁷⁰ However, the rule does not address the precedential value of unpublished opinions.⁷¹ Consequently, federal courts typically continue issuing unpublished opinions as non-precedential, but still consider them as persuasive authority.⁷²

For example, in the Third Circuit, decisions are classified as either precedential or non-precedential.⁷³ The non-precedential opinions represent the Third Circuit's version of unpublished opinions.⁷⁴ These opinions are not binding authority and, by tradition, the court will not cite to them.⁷⁵ Nonetheless, Federal Rule of Appellate Procedure 32.1 provides uniformity for all federal jurisdictions by allowing counsel to persuasively cite unpublished or non-precedential opinions.⁷⁶ This uniformity is missing in Pennsylvania state appellate courts.

B. Unpublished Opinions in Pennsylvania

1. *History of the Doctrine of Precedent and Unpublished Opinions*

A critic of Judge Arnold's opinion in *Anastasoff*, historian and law professor R. Ben Brown, investigated the history of the doctrine of precedent in Pennsylvania.⁷⁷ He found that, in 1807, the Pennsylvania legislature gave the judiciary the power to determine which English statutes were part of Pennsylvania's common law.⁷⁸ Brown also noted that in 1808, a federal judge ignored precedent from the Pennsylvania Supreme Court and conducted his own ex-

69. FED. R. APP. P. 32.1.

70. *Id.*

71. *See id.*

72. *See, e.g.,* Walton v. Gomez (In re Estate of Booker), 745 F.3d 405, 425 n.27 (10th Cir. 2014) (citing 10TH CIR. R. 32.1 for the proposition that, "Unpublished opinions are not precedential, but may be cited for their persuasive value.").

73. 3RD CIR. I.O.P. 5.1.

74. *See* 3RD CIR. I.O.P. 5.3 (declaring that non-precedential opinions are not posted on the court's website).

75. 3RD CIR. I.O.P. 5.7.

76. FED. R. APP. P. 32.1.

77. R. Ben Brown, *Judging in the Early Days of the Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 365–70 (2001).

78. *See id.* at 365–66.

amination of Pennsylvania common law principles.⁷⁹ Therefore, Brown claimed that early Pennsylvania legal history rebutted Judge Arnold's analysis, which emphasized that the doctrine of precedent was firmly rooted in early America.⁸⁰ Indeed, another critic of the *Anastasoff* opinion built upon this history of the doctrine of precedent to point out the vulnerability of Judge Arnold's constitutional separation of powers argument.⁸¹

This early muddling of the common law and precedent in Pennsylvania made sense because the state transitioned from an English colony and developed its own independent judiciary.⁸² As Pennsylvania's legal system developed in the early nineteenth century, the population of the state grew rapidly.⁸³ Not surprisingly, Pennsylvania's sole appellate court, the Pennsylvania Supreme Court, experienced rising caseloads.⁸⁴ In response to the Supreme Court's growing docket, the legislature established the Pennsylvania Superior Court in 1895.⁸⁵ The Superior Court remained as the state's only intermediate appellate court until the Commonwealth Court was established in 1968.⁸⁶ While the Superior Court handles the majority of appeals from Pennsylvania's trial courts, both civil and criminal, the Commonwealth Court "is primarily responsible for matters involving state and local governments and regulatory agencies."⁸⁷

79. *See id.* at 366–67 (citing *Magill v. Brown*, 16 F. Cas. 408, 425 (C.C.E.D. Pa. 1833)).

80. *Id.* at 367. Brown noted that:

Thus, the course of reception of the common law in Pennsylvania refutes Judge Arnold's narrow vision of American judges willingly following prior precedents. Instead, the story is a much more textured one of the relationship between the legislature, the state judiciary, and even the federal judiciary in choosing which precedents should be followed and which should be ignored.

Id.

81. *See Stucky, supra* note 67, at 428.

82. *See History*, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, <http://www.pacourts.us/learn/history> (last visited Oct. 9, 2016) (chronicling the development of Pennsylvania's judicial system).

83. In 1800, the population of Pennsylvania was 434,373. *Population of the United States and Counties of the United States: 1790-1990*, U.S. DEPT. OF COM., BUREAU OF THE CENSUS (Richard L. Forstall ed. 1996). By 1850, the population had grown to 2,311,786, and by 1900, the population was a staggering 6,302,115. *Id.* The current population of Pennsylvania is estimated to be over 12.8 million. *Pennsylvania Population 2016*, WORLD POPULATION REVIEW (Nov. 21, 2016, 6:56 PM), <http://worldpopulationreview.com/states/pennsylvania-population/>.

84. *See History, supra* note 82.

85. *Id.*

86. *See* PA. CONST. art. V, § 4 (1968) (establishing the Commonwealth Court).

87. *Learn*, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, <http://www.pacourts.us/learn/history> (last visited Oct. 9, 2016). As provided by the Penn-

In 1992, the Superior Court adopted Internal Operating Procedure Section 65.37.⁸⁸ This rule authorized the Superior Court to dispose of cases via unpublished memorandums.⁸⁹ Section 65.37 provides that “[t]he decision to publish is solely within the discretion of the panel.”⁹⁰ This rule leaves the judges of each particular case with the ultimate discretion in whether or not to publish a case.⁹¹ However, the rule also has a profound effect on litigants and counsel because it generally prohibits the citation of decisions which are designated as unpublished.⁹² While this prohibition limits litigants and counsel to citing only published opinions of the Superior Court, the rule does not restrict citation to cases from other jurisdictions outside of Pennsylvania, whether those cases are published or not.⁹³

sylvania Judicial Code, the Commonwealth Court maintains exclusive jurisdiction of appeals taken from final orders of the courts of common pleas (general trial courts) in “Commonwealth civil cases” (civil cases in which the state is a party), “[g]overnmental and Commonwealth regulatory criminal cases,” “[s]econdary review of certain appeals from Commonwealth agencies,” “[l]ocal government civil and criminal matters,” “[c]ertain private corporation matters,” eminent domain cases, and immunity waiver matters. 42 PA. CONS. STAT. § 762 (2016). The Commonwealth Court also exercises exclusive jurisdiction over appeals taken from final orders of government agencies in various cases and over certain mandatory arbitration awards involving state employees. *Id.* § 763. Generally, the Commonwealth Court also possesses original jurisdiction over civil suits brought against the state and has exclusive original jurisdiction over election disputes. *Id.* §§ 761, 764. While this may seem like a significant portion of Pennsylvania’s adjudication, the Superior Court maintains exclusive appellate jurisdiction over all other appeals taken from the courts of common pleas (except for those in which the Pennsylvania Supreme Court has exclusive jurisdiction), including the overwhelming majority of criminal cases. *See id.* § 742. Thus, the Commonwealth Court’s workload is primarily cases involving the state government, excluding most criminal matters. *See id.* §§ 761–64.

88. PA. SUPER. CT. I.O.P. § 65.37 (2016).

89. *See id.*

90. *Id.* at § 65.37(B).

91. The majority of cases heard by the Superior Court are decided by panels of three judges. *Learn, supra* note 87.

92. PA. SUPER. CT. I.O.P. § 65.37(A). This portion of the rule states in full:

An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party to the Court.

Id.

93. *See id.*

In contrast to the Superior Court's approach, in 2013, the Commonwealth Court amended its Internal Operating Procedures to allow persuasive citations to its unpublished decisions.⁹⁴ The Commonwealth Court is now placed in a position similar to that of federal courts.⁹⁵ Despite this change in practice initiated by its sister court, the Superior Court has yet to make a similar change which would allow for persuasive citation to its unpublished memorandums. In fact, since the adoption of Internal Operating Procedure Section 65.37 in 1992, the vast majority of cases before the Superior Court have been disposed of via unpublished memorandum.⁹⁶

2. *The Current Debate*

In recent years, many scholars have called for reconsideration of the Superior Court's no-citation rule.⁹⁷ Perhaps the most convincing plea for review of the current policy comes directly from a judge of the Superior Court.⁹⁸ In a short persuasive article, Judge Mary Jane Bowes advocates for the Superior Court to consider conforming with the federal judiciary by allowing persuasive citation to the court's unpublished decisions.⁹⁹ In support of her position, Judge Bowes argues that the Superior Court's work product should be publicized and not sent "to languish in file cabinets."¹⁰⁰ She also argues that no downside to persuasive citation exists because the Court remains free to disregard those citations,¹⁰¹ the provision of "transparency in the decision-making process" of the court will improve public confidence in the judicial system,¹⁰² and attorney's

94. PA. COMMW. CT. I.O.P. § 69.414(a) (2016). This portion of the rule states in full:

(a) An unreported opinion of this court may be cited and relied upon when it is relevant under the doctrine of law of the case, res judicata or collateral estoppel. Parties may also cite an unreported panel decision of this court issued after January 15, 2008, for its persuasive value, but not as binding precedent.

Id.

95. Compare *id.* with FED. R. APP. P. 32.1 (allowing citation to unpublished or non-precedential federal decisions).

96. See, e.g., *2015 Caseload Statistics of the Unified Judicial System of Pennsylvania*, ADMIN. OFF. OF PA. CTS., <http://media-downloads.pacourts.us/2015Reportcompressed.pdf?cb=4182111> (last visited Nov. 21, 2016) (noting that out of the 4,946 opinions filed in 2015, 4,672 were unpublished).

97. See *infra* Part II.B.2.

98. Mary Jane Bowes & Megan Bode, *Feature: Private Justice or Public Right?*, 30 PA. LAW. 48, 51 (2008).

99. See *id.* at 50.

100. *Id.*

101. See *id.*

102. *Id.*

fees would likely not increase if citation to unpublished decisions were permitted.¹⁰³ Thus, Judge Bowes concludes that permissive citation to unpublished decisions would benefit all Pennsylvanians.¹⁰⁴

Some practitioners have also made advances for a change and have come to the same conclusion as Judge Bowes.¹⁰⁵ Others have questioned the current Superior Court practice of disposing of so many cases as unpublished memorandums because these cases often involve important legal issues.¹⁰⁶ Indeed, one practitioner has observed that unpublished opinions tend to be just as carefully written and well-reasoned as their published counterparts.¹⁰⁷

Despite all of these calls for change, prominent appellate attorney and Chair of the Pennsylvania Appellate Court Procedural Rules Committee, Kevin McKeon, has cautioned that citing unpublished opinions may have some unintended consequences, such as confronting and overcoming adverse unpublished memorandums.¹⁰⁸ Moreover, the Superior Court has defended the constitutionality of its no-citation rule¹⁰⁹ and cited the reasoning of Judge

103. *See id.* at 51.

104. *See id.* The article stated as follows:

Memorandum decisions constitute the vast bulk of the judicial output of the Superior Court of Pennsylvania. This court, for most citizens, is the court of last resort. The methods and results of its decisions affect the lives of every person in Pennsylvania. Why not give attorneys every possible tool, including the thoughts and processes of most of the judicial reasoning in Pennsylvania, as they seek zealously to represent their clients?

Id.

105. *See, e.g.,* Howard Bashman, *Superior Court Should Lift Ban on Citing Its Unpublished Opinions*, THE LEGAL INTELLIGENCER (Aug. 8, 2016), <http://www.thelegalintelligencer.com/id=1202764598900/Superior-Court-Should-Lift-Ban-on-Citing-Its-Unpublished-Opinions?slreturn=20160818133840>.

106. *See, e.g.,* Robert N. Feltoon, *Pa. Superior Court Should Change Its Publishing Policy*, LAW 360 (Jan. 27, 2015), <http://www.law360.com/articles/614853/pa-superior-court-should-change-its-publishing-policy>.

107. Wendy Rothstein, *Pa Superior Court—Why so Many Unpublished Opinions?*, FOX ROTHSCHILD: PA. TRIAL PRACTICE BLOG (Oct. 1, 2013), <http://patrialpractice.foxrothschild.com/pennsylvania-superior-court/pa-superior-court-why-so-many-unpublished-opinions/>.

108. *See* Kevin McKeon, *Citing Unreported Opinions: Worth the Trouble?*, HAWKE MCKEON & SNISCAK: HMS LEGAL BLOG (Feb. 23, 2011), <http://www.hmslegal.com/easyblog/entry/citing-unreported-opinions-worth-the-trouble.html>.

109. *See* *Schaaf v. Kaufman*, 850 A.2d 655, 661 (Pa. Super. Ct. 2004). The court stated:

It is true that there is a substantial body of opinion that believes that counsel should be able to refer to memorandum decisions, not as binding precedent, but for their reasoning, as one would refer to an opinion from another state or a federal court. Other options are available, but regard-

Kozinski in *Massanari*.¹¹⁰ In light of the current debate, a careful analysis of both sides of the debate and how the various arguments apply to Pennsylvania is needed.

III. ANALYSIS

A. *Main Arguments Against Allowing Citation to Unpublished Opinions*

1. *Unpublished Opinions and No-Citation Rules Allow Judges to Efficiently Dispose of Cases Without Devoting Too Many Judicial Resources*

Not surprisingly, a chief proponent of the use of unpublished opinions to conserve judicial resources is Judge Kozinski, the author of the opinion in *Hart v. Massarini*.¹¹¹ In that case, Judge Kozinski averred that crafting a precedential opinion “is an exacting and extremely time-consuming task.”¹¹² Thus, he opined that appellate courts lack the time and resources to issue such carefully constructed precedential opinions in every matter they are called upon to decide.¹¹³ Judge Kozinski then went on to compare the utility of unpublished opinions to the Supreme Court’s power of discretionary review,¹¹⁴ concluding that deciding cases on an unpublished and non-precedential basis enables appellate courts to decide a “manageable” number of cases that hold precedent.¹¹⁵ In fact, his concern extended to a belief that allowing citation to unpublished opinions would result in more work for already overburdened appellate judges because of an increase in unpublished concurrences and dissents.¹¹⁶ He feared such a development would lead to published opinions of noticeably lower quality.¹¹⁷

less of which is “best,” we believe our current practice passes constitutional muster.

Id.

110. *Id.* at 660.

111. *Hart v. Massanari*, 266 F.3d 1155, 1158 (9th Cir. 2001).

112. *Id.* at 1177.

113. *See id.* (“It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.”).

114. The United States Supreme Court decides most cases on a discretionary basis in which parties file a writ of certiorari seeking the Court’s review. *See SUP. CT. R. 10* (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”).

115. *Massanari*, 266 F.3d at 1178.

116. *See id.*

117. *See id.* (“The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.”).

Judge Kozinski reiterated this position when he appeared before a congressional subcommittee to the Committee on the Judiciary regarding the state of unpublished opinions in the federal judicial system.¹¹⁸ Interestingly, Judge Kozinski asserted that the only difference between published and unpublished opinions in the Ninth Circuit was the no-citation rule pertaining to opinions of the unpublished type.¹¹⁹ However, in the same prepared statement, he also highlighted that unpublished opinions are completed in a relatively short amount of time and with less scrutiny than a published opinion.¹²⁰

Nonetheless, appellate courts face daunting caseloads,¹²¹ but scholars disagree as to whether the use of unpublished opinions increases the efficiency of the judiciary.¹²²

118. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the Comm. on the Judiciary*, 107th Cong. 28 (2002) [hereinafter *Unpublished Judicial Opinions*] (statement of Hon. Alexander Kozinski) (“Quite simply, deciding some cases by unpublished disposition, which is simply a letter to the parties telling them who won and who lost, and why, frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law.”).

119. *Id.* at 30 (“Unpublished dispositions differ from published ones in only one respect—albeit an important one: They may not be cited by or to the courts of our circuit.”).

120. *Id.* at 32 (“While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising.”).

121. See, e.g., *Federal Court Management Statistics, June 2016, U.S. Court of Appeals Summary*, ADMIN. OFF. OF THE U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2016> (last visited Nov. 22, 2016) (providing that between July 1, 2015, and June 30, 2016, 11,531 appeals were filed in the Ninth Circuit alone).

122. Compare Stucky, *supra* note 67, at 448 (“The use of unpublished opinions curbs the strain on court resources while promoting the facilitation of a manageable body of caselaw.”) with Kenneth F. Hunt, Note, *Saving Time or Killing Time: How The Use Of Unpublished Opinions Accelerates The Drain On Federal Judicial Resources*, 61 SYRACUSE L. REV. 315, 341 (2011). Hunt concluded, in part, as follows:

Certainly, the workload of the federal courts is an important consideration, if not the most important, for the proliferation of rules governing procedure in those courts. The evidence of the increased workload of the federal courts speaks for itself, and it is unnecessary to expound upon it in any detail. But if the premises of the argument made in this Note are true, maintaining a system of unpublished opinions undermines the very rationale that unpublished opinions are founded upon. Saying that unpublished opinions decrease the workload of the federal appellate courts does not magically make it so.

Id.

2. *Unpublished Opinions are Written for a Limited Audience; Therefore, They Should Not Serve as Citable Authority*

Again, Judge Kozinski stands in the forefront of the argument that unpublished opinions are not intended to be citable authority.¹²³ He has declared that unpublished opinions serve an important goal of resolving a legal dispute and appraising the parties of why the court ruled the way it did.¹²⁴ However, he cautioned that unpublished opinions do not necessarily make good precedent, in part because they are often written by clerks and staff attorneys.¹²⁵ He also asserted that some cases are not “suitable for preparation of a precedential opinion” primarily due to poor briefing by lawyers and/or “poorly developed records.”¹²⁶ Lastly, he suggested that because the Ninth Circuit generally decides cases via three-judge panels, and published decisions are often reviewed by other judges of the court, nonpublished opinions do not serve as pertinent authority that represents the views of the court as a whole because most judges never read them.¹²⁷ Accordingly, Judge Kozinski concluded with a warning that a rule allowing persuasive citation¹²⁸ could lead to appellate courts providing parties with less pertinent information out of fear that their words in the opinion may be misused or misinterpreted.¹²⁹

Judge Kozinski’s view of judges writing unpublished opinions for a private audience of only the parties themselves has not gone without criticism.¹³⁰ In fact, one scholar has proclaimed that judges who take the view endorsed by Judge Kozinski do not fully appreci-

123. See Hon. Alexander Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36 (2004) [hereinafter Kozinski, *In Opposition*].

124. See *id.* at 38 (declaring that the use of unpublished opinions allows judges to “make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost”).

125. See *id.*

126. *Id.*

127. See *id.* (stating that it is “possible to assert truthfully that our published opinions do represent the view of the full court,” while on the other hand, “unpublished dispositions are highly misleading as a source of authority.”).

128. Presently, the federal rule permitting citation to unpublished opinions is FED. R. APP. P. 32.1.

129. Kozinski, *In Opposition*, *supra* note 123, at 42 (“The rule may, in fact, have perverse effects, as courts of appeals judges, wary of having their words misused, will tell the parties less and less in cases where they do not publish a precedential opinion.”).

130. See generally Joan M. Shaughnessy, *Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597 (2005) (examining Judge Kozinski’s views and its criticisms).

ate their audience.¹³¹ This averment is supported by firsthand solicitation of the opinions of lawyers¹³² and by the notion that judges who sign their name to any opinion, published or unpublished, should be responsible for what it says.¹³³

3. *Unpublished Opinions Hold No Precedential Value and Add Nothing New to the State of the Law*

Another one of Judge Kozinski's arguments against citation to unpublished opinions is that unpublished opinions inherently hold no precedential value.¹³⁴ In *Massanari*, he maintained that regarding unpublished opinions as precedent would unnecessarily add to the body of precedent because cases decided on a non-precedential and unpublished basis tend to deal with well-established areas of law.¹³⁵ Thus, he claimed that increasing the body of precedent would multiply "the number of inadvertent and unnecessary conflicts," due to slight language differences in opinions that express the same reasoning.¹³⁶

To no surprise, Judge Kozinski would go on to repeat his concerns,¹³⁷ and others have also proclaimed that unpublished opinions add nothing new to the legal importance of cases because they merely apply well-settled law to the facts of a case.¹³⁸ However, some unpublished opinions do deal with new and/or important legal issues.¹³⁹ Indeed, when applying these various arguments against citation to unpublished opinions to the current practice in Penn-

131. *Id.* at 1602 (proclaiming that "the judges who conceive of unpublished dispositions as private letters misunderstand their audience").

132. *See id.* (citing Stephen R. Barnett, *The Dog that Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491, 1504 (2005) (finding "virtually no complaints" in allowing citation to unpublished opinions)).

133. *See id.* at 1603.

134. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

135. *See id.* ("Cases decided by non-precedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions.").

136. *Id.*

137. *See Kozinski, In Opposition, supra* note 123, at 40 (citing J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 492 (1994) (asserting that the clear majority of unpublished opinions do not establish new law nor involve new factual situations)).

138. *See* Memorandum from Hon. Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules to J. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 57 (May 14, 2004), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-2004.pdf> (relaying statement of Ninth Circuit Judge Stephen S. Trott that unpublished opinions simply apply settled law).

139. *See id.*

sylvania's Superior Court, it becomes clear that many of the concerns do not pass muster.

B. Application to Pennsylvania

This Part will present arguments specific to the Commonwealth of Pennsylvania in favor of citation to unpublished opinions. In addition, it will directly address the arguments advanced against citation, primarily those discussed in Part III.A.

1. Holding Judges Accountable

Perhaps the strongest argument to be made for allowing citation to the Superior Court's unpublished memorandums is the important public interest in holding judges accountable for their decisions. In Pennsylvania, many public scandals have demonstrated the need for increased judicial accountability.¹⁴⁰ Alarmingly,¹⁴¹ a few of these scandals involved Justices of the Pennsylvania Supreme Court.¹⁴² Public opinion demands holding

140. See, e.g., *Luzerne County Kids-for-Cash Scandal*, JUVENILE LAW CENTER, <http://jlc.org/luzerne-county-kids-cash-scandal> (last visited Jan. 22, 2017). The Juvenile Law Center explains the infamous kids-for-cash scandal as follows:

In 2007, a frantic call from an alarmed parent prompted Juvenile Law Center to investigate irregularities in Pennsylvania's Luzerne County juvenile court. We discovered that hundreds of children routinely appeared before Judge Mark Ciavarella without counsel, were quickly adjudicated delinquent (found guilty) for minor offenses and immediately transferred to out-of-home placements. We petitioned the Pennsylvania Supreme Court in 2008 to vacate the juveniles' adjudications of delinquency and expunge their records.

Though the court denied our initial petition, once the United States Attorney alleged that Ciavarella and another Luzerne County judge had accepted nearly \$2.6 million in alleged kickbacks from two private for-profit juvenile facilities, the Pennsylvania Supreme Court granted our request for extraordinary relief. The US Attorney also filed federal criminal charges against both judges.

Id. This scandal inspired both a book and a movie. See WILLIAM ECENBARGER, *KIDS FOR CASH: TWO JUDGES, THOUSANDS OF CHILDREN, AND A \$2.8 MILLION KICKBACK SCHEME* (2012); *KIDS FOR CASH* (SenArt Films 2013).

141. See generally PA. COURT WATCH, <http://www.pacourtwatch.com/> (last visited Jan. 22, 2017) (providing news and resources regarding "Public Advocacy for Judicial Accountability" in Pennsylvania).

142. See Brad Bumsted and Natasha Lindstrom, *Pa. Supreme Court Justice Eakin Retires Amid Criticism Over Lewd Emails*, TRIB LIVE (Mar. 15, 2016), <http://triblive.com/news/adminpage/10149648-74/eakin-emails-attorney> ("Suspended Supreme Court Justice Michael Eakin stepped down Tuesday after months of criticism about racy and lewd emails he exchanged, his attorney said."); Adam Brandolph, *Pennsylvania Court of Judicial Discipline Officially Removes Joan Orié Melvin from Supreme Court Seat*, TRIB LIVE (Aug. 18, 2015), <http://triblive.com/news/alleggheny/8936462-74/court-melvin-office> ("The Pennsylvania Court of Judicial Discipline officially removed former Supreme Court Justice Joan Orié Melvin

judges accountable for their actions, and judicial accountability is vital to the public's trust in the judicial system.¹⁴³ Amid these recent scandals, judicial accountability has become a paramount concern of Pennsylvania citizens.¹⁴⁴

Pennsylvania's unique judicial system demands even more accountability for its elected judges. Under the current system, Pennsylvania judges are elected by their constituents.¹⁴⁵ Most of the judges, including those on the Superior Court, are elected to a term of ten years.¹⁴⁶ Following the completion of that ten-year term, the judges are then eligible for a retention election.¹⁴⁷ If a majority of voters favor retention via a straightforward "yes" or "no" vote, the judge is then appointed to another ten-year term.¹⁴⁸ Recently, Pennsylvania voters narrowly approved a constitutional amendment changing the mandatory judicial retirement age from 70 to 75.¹⁴⁹ Critics of the amendment have proclaimed that a mandatory retirement age of 70 is a crucial check on the judiciary's power and that extension of the retirement age to 75 entrenches judges in positions of power without enough public oversight.¹⁵⁰

from office more than two years after she resigned and became ineligible to hold public office because of a campaign corruption scandal."); Karen Langley, *Justice McCaffery Steps Down from Pennsylvania Supreme Court*, PITT. POST GAZETTE (Oct. 27, 2014), <http://www.post-gazette.com/news/state/2014/10/27/Sources-Justice-McCaffery-to-step-down-from-Pennsylvania-Supreme-Court/stories/201410270154> ("Pennsylvania Supreme Court Justice Seamus McCaffery, who was temporarily suspended last week amid accusations of sending pornographic emails and attempting to blackmail a fellow justice, resigned Monday . . .").

143. See Aharon Barak, Foreword, *A Judge On Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 60–62 (2002).

144. See, e.g., *Pennsylvania Court Watch Demands Transparency and Accountability in the Courts*, WILKES-BARRE/SCRANTON INDEP. GAZETTE (Apr. 28, 2015), <http://wilkesbarrescrantonig.com/2015/04/28/pennsylvania-court-watch-demands-transparency-and-accountability-in-the-courts>. Pennsylvania Court Watch noted that:

We are demonstrating in response to decades of abuse and miscarriages of justice that have been heaped on the people of this great state: the lack of due process and unequal treatment in criminal and civil courts, rampant legal abuse in family courts in backroom deals, and other injustices, all due to a lack of outside oversight.

Id.

145. See 42 PA. CONS. STAT. § 3131(a) (2016) (mandating that judges be elected).

146. *Id.* § 3152(a).

147. *Id.* § 3153.

148. See *id.*

149. See *2016 Presidential Election, Tuesday, November 8, 2016 Official Returns*, PA. DEPT. OF STATE, http://www.electionreturns.pa.gov/ENR_NEW (last updated Jan. 22, 2017).

150. Editorial, *Vote 'No' on Judges: In Plain Language—Keep Their Retirement Age at 70*, PITT. GAZETTE (Oct. 28, 2016), <http://www.post-gazette.com/opin->

While it has been argued that merit selection and retention elections are beneficial in our democratic system of government,¹⁵¹ others, including a former Superior Court Judge, have argued that popular elections are “the most democratic approach to choosing a judiciary.”¹⁵² That contention may be true; however, it also reinforces the notion that judges must be held accountable to their constituents.¹⁵³

Because judges in Pennsylvania are elected, they are public servants and should be held accountable to the people.¹⁵⁴ Allowing judges to spend less time analyzing legal issues and to dispose of them via unpublished opinions because of a subjective belief that they may not advance or clarify the law is a circumvention of the judiciary’s role.¹⁵⁵ Each case still involves citizens of the Commonwealth to whom judges should be accountable. Moreover, as advanced by Judge Arnold in *Anastasoff*, this circumvention of legal issues through the use of unpublished opinions allows judges to subjectively decide what cases are more important than others and effectively act as legislators.¹⁵⁶

ion/editorials/2016/10/28/Vote-No-on-judges-In-plain-language-keep-their-retirement-age-at-70/stories/201610310069.

151. See, e.g., Billy Corriher, *Merit Selection and Retention Elections Keep Judges Out of Politics*, CTR. FOR AM. PROGRESS ACTION FUND (NOV. 1, 2012), <https://www.americanprogressaction.org/issues/courts/reports/2012/11/01/43505/merit-selection-and-retention-elections-keep-judges-out-of-politics/>.

152. Hon. Peter Paul Olszewski, Sr., *Who’s Judging Whom? Why Popular Elections are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 2 (2004).

153. See *id.* at 15. Judge Olszewski notes that:

Popular elections preserve the right of each eligible citizen to vote for those who will serve him or her by applying the laws that govern all citizens. The people’s right to elect those by whom they are to be judged is the “very touch-stone in the foundation of the democratic process.” The judicial election system maintains these long-cherished principles by holding the state judges responsible to the people of the state, providing judicial accountability, neutrality, and independence.

Id.

154. See 42 PA. CONS. STAT. § 3131(a) (2016) (mandating that judges are elected); Bowes, *supra* note 98, at 50–51.

155. See *Anastasoff v. United States*, 223 F.3d 898, 904–05 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).

156. *Anastasoff*, 223 F.3d at 904. Judge Arnold explained:

At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.” As we have tried

Even Judge Kozinski has admitted that in his experience, unpublished opinions are lower quality than published opinions¹⁵⁷—a disturbing admission for the parties whose lives are deeply affected by the outcome of an apparently sloppily-decided, non-precedential case. Allowing persuasive citation to all cases might even encourage judges to assiduously scrutinize and work on all opinions, resulting in fairer and more thorough adjudications for all litigants.

In fact, despite the Superior Court's enormous caseload, the judges are still able to dispose of a vast amount of cases with thorough legal reasoning and application of the law via unpublished memorandums.¹⁵⁸ Accordingly, all judges, especially those elected to Pennsylvania's Superior Court, must take responsibility for their decisions and should not be able to hide behind those decisions by delegating them to an "un-citable" status.¹⁵⁹ The argument that unpublished opinions allow judges to efficiently dispose of cases without devoting too many judicial resources¹⁶⁰ undermines the important public interest of holding judges accountable to their constituents.

2. *Creating Legal Authority*

When the Supreme Court of the United States established its power of judicial review, Chief Justice Marshall declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁶¹ It follows that every judicial decision espouses an interpretation of the law.¹⁶² Since the founding of the

to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

Id.

157. See *Unpublished Judicial Opinions*, *supra* note 118, at 32 ("While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising.").

158. This author has analyzed many of the Superior Court's unpublished memorandums and has yet to discover what could be considered sub-par legal reasoning and application. Additionally, this author has not found any sources claiming or establishing that the judges of the Superior Court place less importance on unpublished memorandums than they do on published opinions.

159. See 42 PA. CONS. STAT. § 3131(a) (mandating that judges are elected); Bowes, *supra* note 98, at 50–51 (arguing that the Superior Court's work product should be publicized and that allowing persuasive citation to unpublished memorandums would enhance the public's confidence in the Court).

160. See *supra* Part III.A.1.

161. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

162. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (citing *Marbury*, 5 U.S. at 177–78) ("Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law.").

United States, the leaders of the country have acknowledged that the duty of an appellate court is to apprise the facts from the record and articulate and apply the law accordingly.¹⁶³ Under the doctrine of precedent, which has always directed our common law system, each judicial decision serves as authority that binds future cases of the same nature.¹⁶⁴

This established history of the American judicial process and authority directly contradicts the assertion that unpublished opinions hold no precedential value and add nothing new to the state of the law.¹⁶⁵ To the contrary, the claim that judges, like those sitting on the Pennsylvania Superior Court, consider their previous unpublished memorandums of no value is unrealistic. To the contrary, it is more likely that those judges rely upon and confer with their unpublished memorandums to ensure an accurate interpretation of the law and to avoid attacks of inconsistency or judicial activism.

Furthermore, unpublished opinions do contribute to the state of the law.¹⁶⁶ On numerous occasions, the Superior Court has encountered cases of first impression, but nonetheless, disposed of them with an unpublished memorandum.¹⁶⁷ Such action by the Superior Court disproves the contention that unpublished opinions af-

163. See THE FEDERALIST NO. 81 (Alexander Hamilton).

164. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833).

165. See *supra* Part III.A.3.

166. See generally Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004) (arguing “that limited publication and, especially, no-citation rules are fundamentally incompatible with a system based on the rule of precedent” and noting that unpublished opinions do sometimes add to the state of law).

167. The following is a brief compilation of unpublished Superior Court decisions that address issues of first impression: *Immaculata Univ. v. Hess Corp.*, No. 1021 EDA 2014, 2014 Pa. Super. Unpub. LEXIS 4855 (Pa. Super. Ct. Dec. 9, 2014) (deciding whether an energy corporation could be classified as a nontraditional marketer or a marketing services consultant under 52 Pa. Code § 62.101); *Commonwealth v. Kingston*, No. 2016 MDA 2012, 2014 Pa. Super. Unpub. LEXIS 2430, (Pa. Super. Ct. Oct. 29, 2014) (deciding whether 18 PA. CON. STAT. ANN. § 906 prohibits multiple convictions based upon separate solicitations that are designed to culminate in the commission of the same crime); *Commonwealth v. Torres*, No. 2877 EDA 2013, 2014 Pa. Super. Unpub. LEXIS 4038, (Pa. Super. Ct. June 26, 2014) (deciding whether a trial court can consider a criminal defendant’s immigration status in imposing a sentence creates a substantial question of law); *In re E.P.L.*, No. 2207 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 452 (Pa. Super. Ct. Dec. 7, 2013) (Wecht, J., dissenting) (deciding whether 18 PA. CON. STAT. § 6111(g)(2) constitutes a separate, chargeable offense under Pennsylvania law); *Estate of Righter*, No. 228 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 1184, (Pa. Super. Ct. Mar. 19, 2013) (deciding whether non-compliance with Rule 5.6 of the Orphans Court Rules results in a shifting of the burden of proof as a sanction); *Commonwealth v. Nguyen*, No. 1337 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 4134, (Pa. Super. Ct. Jan. 11, 2013) (deciding whether the regulation subsection of

fect only the parties involved and hold no legal importance or precedential value.¹⁶⁸ Additionally, issues of first impression disposed of via unpublished memorandums controvert the assertion that unpublished opinions should not be regarded as any type of citable authority.¹⁶⁹ A better assumption, based on legal reasoning and common logic, is that unpublished memorandums resolving issues of first impression will act as a starting point for future decisions from the Superior Court or the Supreme Court of Pennsylvania.

3. *Availability of Cases*

Since the end of 2012, all the Superior Court's opinions, published and unpublished, have been available on the Unified Judicial System of Pennsylvania's website.¹⁷⁰ The unpublished memoranda are also now available on both Lexis and Westlaw.¹⁷¹ Such widespread availability of these cases brings many advantages and few disadvantages.¹⁷² For starters, the publication of all the Superior Court's work product allows for easy access to the court's legal reasoning and rulings.¹⁷³ Consequently, litigants and their lawyers have everything they need at their fingertips with no added cost.¹⁷⁴ The availability of these cases also conflicts with the position that unpublished decisions are fashioned for a limited audience.¹⁷⁵ Even without citing the unpublished cases, a prudent lawyer would be sure to analyze any unpublished decision that pertains to his cur-

204 PA. CODE § 201(a)(1) mandates that a defendant or his counsel notify the trial court of his need for an interpreter).

168. *See supra* Parts III.A.2–3.

169. *See supra* Part III.A.2.

170. *See* Zack Needles, *Superior Court Aims to Begin Putting Unpublished Memorandum Opinions Online by Year's End*, PITT. POST GAZETTE (Oct. 8, 2012), <http://www.post-gazette.com/business/legal/2012/10/08/Superior-Court-aims-to-begin-putting-unpublished-memorandum-opinions-online-by-year-s-end/stories/201210080152>.

171. This is based on the author's personal usage and experience with these services.

172. *See, e.g.*, Bowes, *supra* note 98, at 50 (noting the benefits of publicizing the Superior Court's work product).

173. The opinions are available to the public for no cost through an internal search engine at UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, Superior Court, Court Opinions, <http://www.pacourts.us/courts/superior-court/court-opinions/Default.aspx> (last visited Jan. 22, 2017).

174. *See* Bowes, *supra* note 98, at 50 (“The scholarly work of the judiciary as reflected in the unpublished decisions could assist later litigants, attorneys and judges in resolving disputes.”).

175. *See supra* Part III.A.2.

rent legal issue or objective. This type of research would certainly benefit clients and the legal community without an added cost.¹⁷⁶

4. *Ethical Duties of Lawyers*

As professionals, lawyers are held to certain ethical standards.¹⁷⁷ Lawyers have a duty to competently represent their clients.¹⁷⁸ Rules of Professional Conduct specify that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁷⁹ Lawyers also have a duty to “make reasonable efforts to expedite litigation consistent with the interests of the client.”¹⁸⁰ Furthermore, lawyers have a duty of candor towards the tribunal.¹⁸¹ Included within the duty of candor is the obligation to bring legal authority adverse to a client’s position to the attention of the court.¹⁸²

These ethical duties ask a lot from lawyers. Lawyers owe an allegiance to not only their clients, but also to the court.¹⁸³ Accordingly, by allowing persuasive citation to unpublished memorandums, lawyers can better serve their clients by citing cases that align with the issues before them and alerting judges of the same.¹⁸⁴ Overall, this could expedite litigation, clarify areas of law, and ensure that lawyers are providing competent representation.

By limiting citation to only those few cases that are published by the Superior Court, a lawyer may find himself in an uncomfortable situation. If a lawyer discovers an unpublished case adverse to his client’s position, should he disclose the case to the Court? Likewise, if a lawyer finds an unpublished case that supports his client’s

176. See Bowes, *supra* note 98, at 51 (“Attorneys have always used discretion in their research, following their best leads rather than pursuing every possible avenue. Members of the bar are experienced in determining quickly whether a decision is relevant, and they will not waste time on futile research efforts.”).

177. See generally MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983).

178. *Id.* r. 1.1; PA. RULES OF PROF’L CONDUCT r. 1.1 (2013).

179. MODEL RULES OF PROF’L CONDUCT r. 1.1; PA. RULES OF PROF’L CONDUCT r. 1.1.

180. MODEL RULES OF PROF’L CONDUCT r. 3.2; PA. RULES OF PROF’L CONDUCT r. 3.2.

181. MODEL RULES OF PROF’L CONDUCT r. 3.3; PA. RULES OF PROF’L CONDUCT r. 3.3.

182. MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(2); PA. RULES OF PROF’L CONDUCT r. 3.3(a)(2).

183. See *supra* notes 177–182 and accompanying text.

184. See Bowes, *supra* note 98, at 50 (arguing that there is no downside to allowing persuasive citation and noting that “judges must discern which case law is helpful and which is irrelevant”).

position, must he ignore it when submitting arguments to the Court?

The simple solution would be to allow the lawyer to persuasively cite the unpublished decisions.¹⁸⁵ The lawyer would then be spared from an ethical dilemma.¹⁸⁶ Moreover, the judges of the Superior Court would still be free to ignore the persuasive citation if they find it prudent to do so.¹⁸⁷

C. The Superior Court Should Adopt the Approach Taken by the Commonwealth Court and Allow Persuasive Citation to its Unpublished Memorandums

Based upon the preceding analysis of the primary arguments against allowing citation to unpublished opinions as they apply to the Pennsylvania Superior Court, this Comment now proposes that the Superior Court adopt the approach taken by its sister court. Allowing mere persuasive citation to the Superior Court's unpublished memorandums will result in numerous advantages for the court, counsel, clients, and all Pennsylvania citizens.¹⁸⁸

If the Superior Court were to adopt the approach that the Commonwealth Court has taken, by continuing a practice of disposing of most cases via unpublished memorandums yet allowing counsel to persuasively cite those decisions, the following should

185. See generally Bowes, *supra* note 98 (calling for allowance of persuasive citation to the Superior Court's unpublished memorandums and presenting supporting arguments).

186. See Goering, *supra* note 29, at 47–56 (describing the “ethical dilemma” facing lawyers when considering citations to unpublished opinions).

187. See Bowes, *supra* note 98, at 50. Judge Bowes provided the following instructive comments:

Persuasive citation means that judges would not necessarily be bound by previous unpublished decisions. If a memorandum is helpful, a judge will certainly consider how the writing might be applicable to the case at bar. On the other hand, if an unpublished decision is not on point, a judge can ignore the citation and rely instead on published law or more specific unpublished memoranda.

Judges do not typically address every published case cited in a brief. Under the current system, judges discern which case law is most helpful and which is irrelevant. If persuasive citation to memoranda were allowed, judges would not suddenly lose their sense of prudence. Similarly, they would not discuss every citation. Rather, Pennsylvania judges — like those on the federal courts of appeals — could decide whether to address or ignore the cited case.

When judges have the discretion to ignore, consider or follow the persuasive citation of a memorandum, any concern that the judicial workload might increase or that permissive citations would indirectly create precedential law is unfounded.

Id.

188. See *supra* Part III.B.

transpire: 1) Judges will be held more accountable to their constituents and will gain public confidence as a transparent judicial body;¹⁸⁹ 2) The Superior Court's caseload will be unaffected;¹⁹⁰ 3) Lawyers will be better advocates for their clients and better officers of the court;¹⁹¹ 4) The state of the law in Pennsylvania will be clearer and more defined for everyone;¹⁹² 5) The Superior Court will be in accord with not only the Commonwealth Court, but also the federal judicial system, providing greater consistency for litigants and lawyers alike.¹⁹³

IV. CONCLUSION

For years, lawyers and judges alike have assessed the value of unpublished opinions, particularly the unpublished opinions of appellate courts. Prominent judges have even contemplated the constitutionality of unpublished opinions. But, in Pennsylvania, the debate has turned into a question of practicality, focused on the Superior Court's no-citation rules for unpublished memorandums. Many of the arguments advanced in support of the use of unpublished opinions and corresponding no-citation rules simply do not apply to the operational realities of the Superior Court.

Indeed, Pennsylvania lawyers and judges have recognized the need for change in the Superior Court's rule pertaining to citation and unpublished memorandums. The time has come for the Superior Court of Pennsylvania to amend its internal operating procedures and expressly allow for persuasive citation to its unpublished memorandums. In so doing, the Court will not only make life easier for litigants and lawyers, but it will also hold itself accountable to the citizens of Pennsylvania. Moreover, the Court would finally put itself in accord with the approach taken by federal courts and the Commonwealth Court of Pennsylvania which will increase uniformity and transparency throughout the judicial system.

189. *See supra* Part III.B.1.

190. *See supra* notes 8, 122 (noting the Superior Court's caseload for 2015 and comparing arguments pertaining to the relationship between unpublished opinions and a court's workload).

191. *See supra* Parts III.B.2-4.

192. *See id.*

193. *See supra* Parts II.A.3, II.B.2, III.C.