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## THOSE UNPUBLISHED OPINIONS: AN APPROPRIATE EXPEDIENCE OR AN ABDICATION OF RESPONSIBILITY?

*Lawrence J. Fox\**

I was originally going to discuss unciteable opinions. But then I thought, this is such a trivial topic. With so many more important things happening in America, I decided to switch topics and discuss the crises in healthcare and education. I want you to consider two hypotheticals.

DOCTOR TO PATIENT: "I'm in a hurry. Lots of patients to see. Sorry I can't tell you more. But you've had a standard issue myocardial infarction. If you go to the WebMD site everything you need to know is found under 'Typical Heart Attack.'"

"But Doctor Kozinski . . ."

"No buts about it. Do you want me to complete my rounds or not?"

"Actually . . ."

TEACHER TO STUDENT: "I have read your paper. It deserves a C."

"Oh, I worked so hard, Professor Kozinski."

"Well, maybe you'll do better next time."

"How can I do better?"

"I wish I had the time to tell you. But with twenty essays to mark, I just don't have the time. Why don't you read Emily's essay? She got an A+."

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“Thanks, Professor Kozinski.”

Well, on second thought, maybe those topics are too daunting for me. I think unciteable decisions may be just the kind of topic I can get my small mind around.

Actually, when Monroe Freedman asked me to tackle this issue, my immediate response was that I was glad to do so. My interest then was entirely practical. I’m a practicing lawyer. I have an obligation to represent my clients to the best of my ability. Since I am a trial lawyer I spend the better part of my life—not researching, heaven forefend—but reviewing the drafts of my associates, who I expect to undertake a comprehensive review of applicable case law and related authorities so that I can turn their careful research memoranda into passionate arguments dotted with citations explaining why the court should find for our client.

I only have one standard for that work. Whether for paying clients or pro bono, whether a minor discovery motion or a petition for certiorari to the United States Supreme Court, I strive for excellence. And that search for excellence often leads me to unpublished decisions of a court,<sup>1</sup> decisions that my associates and I view as extremely helpful to our client’s position.

Sometimes the unpublished decision appears to be the only authority going our way. Sometimes it provides affirmation of a

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1. For typical standards for publishing, see, for example, 4TH CIR. R. 36(a). Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or
- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

*Id.*

Though beyond the scope of this paper these standards present serious problems. While the issues they raise are numerous, permit me to address two. First, the court decides this issue at the wrong time and without the benefit of outside input. I know judges are well-informed, and they are undoubtedly well-informed about the public interest, but is the judiciary the only repository of what is in the public interest? Moreover, can you always tell today what will be in the public interest in the future? Second, whole categories of opinions that are important are systematically excluded by this standard. For example, it is one thing to be able to cite to a case that announces a new rule, but opinions that follow that new rule can be virtually as important to the development of the law as the original opinion. Similarly, while a case that criticizes a precedent has great interest, so does one that endorses an existing precedent that may, sometime later, be under attack.

principle enumerated in a published opinion that we wish to cite to show our leading precedent is not an outlier. Sometimes it demonstrates that a published precedent involving different facts on which we wish to construct our argument should be applied to the facts of our case.

However it arises, if the unpublished opinion is from a different court from the one in which we appear, we can cite the case without fear or trepidation.<sup>2</sup> But if the unpublished opinion was issued by the very court we wish to persuade, then the mere mention of the case—not its citation as precedent but its citation for any reason—will not only violate a rule of the court<sup>3</sup>—never a very good idea—but, at least in the view of Judge Kozinski, will represent “a specific kind of fraud on the deciding court.”<sup>4</sup> Wow! One point I do know. It is one thing to get judges angry with you. It is quite another to engage in fraud.

But it is hard to overstate the frustration that the inability to cite these cases can cause. Here I am providing the court with all the reasons why my client should prevail, able to bring anything to the attention of the court that I think might be persuasive. I can use published opinions, unpublished opinions from other courts, Brandeis briefs, lectures at Hofstra, articles in *Vanity Fair* or the *Hofstra Law Review*, websites,

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2. Judge Kozinski, about whom more later, recognizes this irony. See *Hearing on Unpublished Judicial Opinions Before the House Subcommittee on Courts, the Internet, and Intellectual Property*, 107th Cong. (statement of Judge Alex Kozinski), available at <http://www.house.gov/judiciary/kozinski062702.htm> (June 27, 2002) [hereinafter Kozinski Testimony].

3. See, e.g., 9TH CIR. R. 36-3. This Ninth Circuit rule, titled “Citation of Unpublished Dispositions or Orders,” provides:

- (a) *Not Precedent*: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
- (b) *Citation*: Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit except in the following circumstances.
  - (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
  - (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case.
  - (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

*Id.*

4. Kozinski Testimony, *supra* note 2.

whatever. Judge Kozinski himself thought it was worthwhile to cite to an article by Michael Hunter, a condemned man on death row.<sup>5</sup>

But the one thing I cannot cite is an unpublished opinion written by real judges who sat on the very court before whom I appear in a case that involved real litigants in a real dispute that was actually decided using the English language as a way of informing the litigants how the court reached its decision. That opinion, if cited, could land me in jail, in contempt of court.<sup>6</sup>

That's all I knew when Monroe Freedman called me. And since any interference with my ability to be as zealous and effective an advocate as I can be—particularly an impediment as absurd on its face as this one—is something I rail against, I therefore gladly embraced the assignment.

Little did I realize that I was embarking on a journey that would take me into questions of procedural due process and equal protection,<sup>7</sup> both the free speech and free petition clauses of the First Amendment,<sup>8</sup> and both Article III and the philosophical foundations behind the development of precedent in the common law.<sup>9</sup> Scholars<sup>10</sup> and frustrated lawyers<sup>11</sup> alike have spent an enormous amount of energy conjuring theories why the concept of unpublished opinions is fundamentally flawed. These theories are fascinating and undoubtedly reflect serious challenges to the practice of making decisions of some courts unpublished and unciteable.

That, however, is not my emphasis in this article. Rather, I want to focus on the merits of the justifications that have been offered to support unpublished opinions. This is not simply because they are of dubious

5. See Eugene Volokh, *Capital Complications*, NAT'L REV. ONLINE, Feb. 24, 2003 at <http://www.nationalreview.com/comment/comment-volokh022403.asp>.

6. See 9TH CIR. R. 36-3, 46-2(a).

7. See, e.g., Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 217 (1992).

8. See David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1161-67 (2002).

9. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999). Judge Arnold's view that the use of unciteable precedent threatened the Article III role of judges found expression in his opinion in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated *en banc* 235 F.3d 1054 (8th Cir. 2000). For a good discussion of the tortured history of this case see Greenwald & Schwarz, *supra* note 8, at 1159-61.

10. The most comprehensive work in this area is by Professors William L. Reynolds and William M. Richman. See generally Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

11. See generally Greenwald & Schwarz, *supra* note 8.

validity, but also because they raise serious questions about whether judges are acting ethically when they write opinions that they then designate as unciteable.

Before I get to the main event, permit me to cast aside some arguments that have been offered to justify this practice, but that clearly have no validity.

First, we have been told that unpublished opinions should not be citeable because they are not generally available or, alternatively, they are only available to the well-heeled, thus creating a mismatch of resources, something the courts can correct by making these decisions unciteable.<sup>12</sup> Whatever merit this argument had years ago, it reflects a world that no longer exists. The competition among databases and publishers means that almost everything judges do is broadcast to the world almost as soon as it happens. West even publishes volumes of unpublished opinions.<sup>13</sup> So do local legal newspapers.<sup>14</sup> And Lexis and Westlaw have included in their electronic brains virtually every act by every judge, except perhaps snoring during dull oral arguments.<sup>15</sup> Moreover, the courts often make unciteable opinions available on their websites.<sup>16</sup>

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12. See Reynolds & Richman, *supra* note 10, at 1187 n.111 (“This argument is probably the most frequently mentioned aspect of the entire limited publication, no-citation debate.”). See, e.g., *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974); *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972).

13. The volumes are called the *Federal Appendix* and they are steadily marching across library shelves in those few places where people still maintain books. See ZIMMERMAN’S RESEARCH GUIDE, Unreported Decisions, at <http://www.lexisone.com/zimmermanguide/U/UnreportedDecisions.html> (last visited March 21, 2004).

14. See *id.* In Philadelphia, *The Legal Intelligencer* regularly makes available unpublished opinions.

15. See RONALD JAY COHEN, AMERICAN BAR ASSOCIATION, REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS, available at <http://abanet.org/leadership/2001/115.pdf>. (March 31, 2001) (draft). The Eleventh Circuit does not release its unpublished opinions to Westlaw.

16. The First, Second, Third, Fourth, and Eighth Circuits make unpublished opinions available on their websites. See UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, OPINIONS, available at <http://www.ca1.uscourts.gov/cgi-bin/ChkUser2.pl?GotoURL=/opinions/main.php> (last visited March 21, 2004) (making available the latest unpublished opinions of the First Circuit); UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TODAY’S OPINIONS, available at <http://www.ca8.uscourts.gov/cgi-bin/new/today2.pl> (last visited March 21, 2004) (making available the latest unpublished opinions of the Eighth Circuit). See, e.g., *SEC v. Armstrong*, No. 03-6080(L), 2004 WL 362318 (2d Cir. Feb. 26, 2004), available at [http://www.ca2.uscourts.gov:81/isysnative/RDpcT3BpbnNcU1VNxDaZLTywODBfc28ucGRm/03-6080\\_so.pdf#xml=http://10.213.23.111:81/isysquery/irl1668/1/hilite](http://www.ca2.uscourts.gov:81/isysnative/RDpcT3BpbnNcU1VNxDaZLTywODBfc28ucGRm/03-6080_so.pdf#xml=http://10.213.23.111:81/isysquery/irl1668/1/hilite) (last visited March 21, 2004); *Dunkin’ Donuts Inc. v. Liu*, No. 02-2972, 2003 US App. LEXIS 22812 (3d Cir. Nov. 6, 2003), available at <http://www.ca3.uscourts.gov/opinarch/022972u.pdf> (last visited March 21,

Nor is there a difference in access to this information between rich and poor. In my humble opinion, every lawyer in America, regardless of practice setting, cannot meet the standard of care to his or her clients without checking the electronic wizardry of Lexis or Westlaw (and perhaps both). There is no legal service office, public defender, or solo practitioner in Hazleton, Pennsylvania who does not have access to and is not required to consult these databases daily in order to represent their clients in a manner consistent with the rules of professional conduct governing competence and diligence.<sup>17</sup>

Second, even with the huge increase in the number of reported and unreported decisions,<sup>18</sup> the burden of researching this corpus bears no relationship to the pain lawyers used to endure to drag out volumes of the old Decennial Digests, wandering aimlessly using the very rough tool of West Digest key numbers, for that nugget of a case buried in some dusty supplement, the consulting of which was both a tedious and essential research process when I was first called to the bar.

An oft-repeated Drinker Biddle & Reath story will illustrate the point. When I came to the firm in 1972, my colleague Amy Davis had become a firm heroine because across the last number of days she had leafed through dozens of volumes of the *Federal Supplement* searching for any class action decisions by Judge Lord; miraculously, she had found one, a decision the Drinker partner was convinced would win the day. Using one of the electronic databases, that same process would take less than five seconds today.

So when Judge Kozinski tells us that lawyers and judges would have to consult an additional 3800 yearly Ninth Circuit decisions in researching a question,<sup>19</sup> I am not impressed by that “burden.” First of all, of course, I won’t do it; my associates will. More importantly, they will be able to do so with virtually the same speed with which they search a smaller number of cases, thanks to the gift of computers. Almost instantly 99.9% of these new cases will be discarded as irrelevant, leaving us with perhaps three or four more cases to read

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2004); *Chandler v. Lee*, No. 03-6, 2004 U.S. App. LEXIS 4278 (4th Cir. March 5, 2004), available at <http://pacer.ca4.uscourts.gov/opinion.pdf/036.U.pdf> (last visited March 21, 2004).

17. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002) (requiring, for competent representation of a client, “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); MODEL RULES OF PROF’L CONDUCT R. 1.3 (2002) (requiring a lawyer to “act with reasonable diligence and promptness” in his or her representation of the client).

18. See Greenwald & Schwarz, *supra* note 8, at 1145-47.

19. See Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!: Why We Don’t Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 44.

which will be very short decisions if they are written as unpublished opinions.

Moreover, making these 3800 opinions unciteable does not really relieve lawyers from reviewing them. In connection with advising clients, it would be terribly difficult to defend a failure to consult with a client on the learning of a particularly relevant case because the opinion was unciteable. Unciteable opinions also have to be reviewed to determine if they can squeeze through one of the narrow exceptions that permit citation.<sup>20</sup> Last, lawyers everywhere but in the Ninth Circuit are free to cite these Ninth Circuit cases<sup>21</sup> and, therefore, presumably have to review the 3800 anyway.

Third, citing these cases is not going to lead to some kind of wholesale change in the way our presentations look to the courts. Though judges often tell us otherwise, we are not stupid. We know the judges don't like citation to unpublished opinions. So any citation to an unpublished opinion will be made reluctantly. But when we find that little gem that seems so important that we are prepared to throw caution to the wind in the hope that we can use the decision in that case to make a point we believe we have no other way of making, surely it makes no sense that we not bring it to the attention of the court, when we know that judges can be persuaded by matters far further afield than that—even articles by prisoners on death row.<sup>22</sup>

But none of my arguments responds to the real reason the courts wish to promote and expand the use of unciteable opinions. And that is the reason that I must address head-on. No, the use of unciteable opinions has nothing to do with the unequal access to information or the burden of creating too many precedents or the effect it will have on the briefs we file. It has to do solely with the proposition that the courts believe that if they make certain decisions unciteable then they are free to treat those opinions with second-class status.

I take as my text Judge Kozinski himself. And I note that these comments were made by Judge Kozinski, not in an unpublished opinion, but in carefully crafted testimony he delivered to a Congressional Subcommittee on the Courts, the Internet and Intellectual Property on June 27, 2002<sup>23</sup> and repeated in an article he published with Judge

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20. *See, e.g.*, 9TH CIR. R. 36-3(b). Citation is permitted to show preclusion, factual circumstances of a previous related case, or in a petition for a rehearing. *Id.*

21. *See supra* notes 2-3 and accompanying text.

22. *See generally* Volokh, *supra* note 5.

23. *See* Kozinski Testimony, *supra* note 2.



Reinhardt in the *California Lawyer*;<sup>24</sup> therefore, *these* comments are citeable, even quotable. He argues, heaven forefend, that if these decisions were citeable, the judges who write them might have “to pay much closer attention to their precise wording,”<sup>25</sup> the judges might have to “agree on the precise reasoning,”<sup>26</sup> the judges who dissent from the result might have to make that fact known,<sup>27</sup> and judges not on the panel might “have to pay much closer attention” to the decisions written by their colleagues.<sup>28</sup> These are exact quotes, ladies and gentlemen.

Well, we cannot have that. What a terrible world we would have if judges had to worry about all those things!

Au contraire. The world that is terrible is one in which we let judges get away with these heretical notions. Judge Kozinski’s rationalizations, echoed by many others, are not only outrageous, but in my view, violate the fundamental principles of the American Bar Association Code of Judicial Conduct. First the outrage. Let’s address these rationalizations one by one.

Can we ever give judges a pass not to be precise in their language? Of course not. From something as simple as an informal letter to litigants to formal published opinions, judges must say what they mean and mean what they say. Even if it is only the mere litigants before the court, not the rest of the world, that will be guided and informed by the text, judges have an absolute obligation to speak clearly. We mere mortals—practicing lawyers who dutifully call judges “Your Honor” and rise every time they walk in—play a critical role in the system of justice. We are the intermediators between the courts and our clients. As a result, just as we monitor every judge’s raised eyebrow, laugh, sneer, and off-hand remark for meaning, searching for clues to what judges think, we carefully read every word judges write, and look for instructions and guidance which we can share with our clients. “What does she, Her Honor, really think” is our obligation to divine or discover, and we do so by reading and rereading your words. If we are going to place such weight on what you write—even in our garden variety cases—then judges must write with precision or we will be misled. And please, dear judges, remember that as garden variety as our cases may appear to you

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24. See Kozinski & Reinhardt, *supra* note 19.

25. Kozinsky Testimony, *supra* note 2; Kozinski & Reinhardt, *supra* note 19, at 44.

26. Kozinsky Testimony, *supra* note 2; Kozinski & Reinhardt, *supra* note 19, at 44.

27. See Kozinsky Testimony, *supra* note 2; Kozinski & Reinhardt, *supra* note 19, at 44.

28. Kozinsky Testimony, *supra* note 2; Kozinski & Reinhardt, *supra* note 19, at 44.

(and perhaps even to us lawyers), there has never been a litigant who thought his or her case was garden variety in any respect.

Judge Kozinski's next justification—that judges might have to agree on the reasoning if the opinions were citeable—is equally troubling.<sup>29</sup> If in fact judges reach the same result, but for different reasons, are not the litigants—if not the entire world—absolutely entitled to know that fact? Embedded in that undisclosed difference is a real opportunity for the party who loses the appeal to seek further review. The failure to agree on the principle that supports the result—if it were disclosed to the lawyer for the disappointed appellant or appellee—could demonstrate how tenuous the result really is and, if disclosed on a petition for en banc review or a petition for certiorari, might, just might, capture the imagination of some conscientious judges. Indeed, as two astute lawyers have observed, “If a case truly fails to ‘establish[], alter[], modify, or clarify a rule of law,’ why then can three judges not agree on the appropriate reasoning?”<sup>30</sup> By putting whitewash over the panel's differences by issuing unciteable opinions that render such disputes opaque, one litigant has been denied information to which it is clearly entitled.

Worse still, Judge Kozinski says that if we made all decisions citeable the judges who dissent from the result might have to make that fact known.<sup>31</sup> If it is a sin to hide differences in reasoning from a losing party in litigation, then hiding a dissent has to be a mortal sin. First, speaking just as a lawyer who, from time to time, has confronted disappointed clients after my eloquence on appeal did not carry the day, how much better I (and even my client) would have felt if the opinion had included a dissent. The fact that I captured the imagination of one judge lends a certain credibility to my earlier incorrect prediction of victory. But enough of my ego. The fact that one judge dissented is a fact that must be disclosed to the litigants, even if it means the opinion has to be citeable. Whatever basis for further review a difference of

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29. Here is what Judge Patricia M. Wald has described:

I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.

Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

30. Greenwald & Schwarz, *supra* note 8, at 1149 (quoting 9TH CIR. R. 36-2(a), the court rule laying out the criteria for publication of a court opinion).

31. See *supra* note 27 and accompanying text.

opinion on the reason for the result might provide, by definition a dissent by one judge provides even more. Indeed, review en banc is rarely a route that should be pursued unless there has been a split on the appellate panel.

Finally, Judge Kozinski tells us how important it is that the Ninth Circuit “maintain[s] a consistent, internally coherent and predictable body of circuit law.”<sup>32</sup> This goal would be undermined, we are also told, if judges on the Ninth Circuit had to review these unciteable opinions. Am I allowed to be shocked? One would have thought just the opposite. In order to have “a consistent, internally coherent and predictable body of circuit law”<sup>33</sup> what is required are real decisions entirely consistent with this body of law. Otherwise, why bother having precedent?

This “see no evil, hear no evil” aspect of the no-citation rule is particularly troubling. It is as if the courts are scared that if they let counsel cite to these unpublished decisions, the courts may be confronted with arguments whose implications are embarrassing. If we don’t let you tell us that we have acted inconsistently, the courts seem to be saying, then we can blissfully wallow in our ignorance, convinced that we are “maintaining a consistent, internally coherent and predictable body of circuit law”<sup>34</sup> because nobody has told us otherwise. The fact that “we” haven’t let the poor practicing lawyers tell us is irrelevant, I suppose.

I know. I know. This is all done in defense of a badly overworked judiciary that thinks it has found a way out of the morass. I am sure the judges who have reached this conclusion have done so in good faith. Besides, unlike many academics in this audience, I am still practicing law, and therefore have no choice but to assert the judiciary’s good faith in this regard.

But this is an ethics conference. And the ethics issue cannot be avoided. As clear as it is that the no-citation rules reflect bad public policy, can we also make the argument that the judge’s conduct runs afoul of the applicable judicial canons of ethics? There are three provisions of the ABA Canons that are certainly implicated by what has been outlined above.

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32. Kozinski Testimony, *supra* note 2.

33. *Id.*

34. *Id.*; see also Hinderks & Leben, *supra* note 7, at 184-85 (discussing the various ways that the no-citation rules offend the traditional policies behind the use of precedent).

First, the Code tells judges that they shall perform their duties “diligently.”<sup>35</sup> When one thinks about the cognate for lawyers, Model Rule 1.3,<sup>36</sup> it would not be difficult to conclude that a lawyer who failed to perform assiduously because he was too busy would have that excuse fall on deaf ears. Even a lawyer in the public interest has an absolute obligation to limit her case load so that she can be diligent on behalf of all her clients.<sup>37</sup> The question then arises whether an overworked, underpaid judiciary confronted with too great a caseload can solve the problem by giving all of the litigants half a loaf. Or whether the proper response, given the diligence obligation, doesn’t mean that judges should not facilitate underfunding of the judiciary by delivering second class justice.

Second, judges are to be “faithful to the law.”<sup>38</sup> We have no case law that puts real meaning to this provision. But, if Judge Arnold is right, judges have no greater calling than to decide cases fairly, impartially, consistently, and with a full explanation to the parties of the basis for the decision. Without each of these the system of justice either is corrupt or will be perceived that way.

And on a more mundane level, can judges say they are being faithful to the law when they take steps to avoid knowing what the court on which the judge sits decided in a case that the lawyers (wrongheadedly, of course) think is persuasive support for their client’s position?

Third, judges are admonished to maintain “professional competence.”<sup>39</sup> Again, we have little in the way of commentary or case law to tell us what is required to fulfill this obligation. Am I free to argue that based on the lawyer cognate, Model Rule 1.1,<sup>40</sup> a judge who fails to write opinions with sufficient clarity of language and adequate consideration of the opinion’s precedential value violates the obligation

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35. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

36. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2003).

37. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 347, at 141 (1981) (discussing the ethical obligations of legal services lawyers to clients when those offices lose funding); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 399, at 382 (1996) (discussing the ethical obligations of public service lawyer during a reduction in staffing to refrain from accepting additional assignments).

38. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990).

39. *Id.*

40. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003).

of competence? Looking at the cases brought under Rule 1.1,<sup>41</sup> one can find violations reasonably similar to the lapses admitted by Judge Kozinski in his justification for a body of unciteable opinions. Thus, one would certainly hope so.

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In conclusion, I was struck by Professor Charles Fried's reference, in this symposium, to the importance of ritual to the role of the judge.<sup>42</sup> Professor Fried's discussion called to mind a vignette not unlike the ones with which I opened my remarks.

RABBI TO CONGREGATION: "I'm quite busy this Shabbas. So sorry. But to speed things along I thought we would eliminate that parading of the Torah scrolls around the synagogue."

"But Rabbi Kozinski," shouted an alarmed Cantor Freedman, "that's the most popular part of the service."

"That may be, but as I read the Talmudic scholars, it's hardly required, Cantor."

So too with judges' opinions. It may not, in the end, be absolutely required that all litigants receive opinions that are prepared with precision, that disclose disputes among the panel regarding reasoning, that reveal dissents, and that take into account all existing precedent. But it is important—to the litigants, to society, to the judges themselves. As a result I can only conclude that expedient unciteable justice is really no justice at all. And that the practice of generating unciteable opinions ought to end for public policy, ethical, and symbolic reasons.

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41. *See id.*; *see, e.g.*, *Ky. Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000) (holding under a state version of Rule 1.1 that the attorney failed to provide competent representation where he did not follow rules governing form and content for his brief).

42. *See* Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1236 (2004).