REQUESTS REGARDING RULES 342 - 472

PROF. WILLIAM V. DORSANEO III

March 7 & 8, 1986

SUPREME COURT OF TEXAS ADVISORY COMMITTEE

AGENDA FOR STANDING SUBCOMMITTEE ON RULES 342-472

Professor William V. Dorsaneo III, Chairman

Meeting of March 7 and 8, 1986

Requests not addressed in November meeting:

a. Rule 354 and 380 submitted by James Milam.

b. Rule 364(a) submitted by Guy Hopkins.

c. Rule 377 submitted by Raymond Judice.

d. Rule 423 submitted by Raymond Judice.

e. Rule 439 submitted by Judge Robertson.

f. Rule 452 Requested by Jim Kronzer and John Feather.

g. Rules 456 and 457 submitted by Charles Jordan and I. Nelson Heggen.

h. Rule 458 submitted by Judge Solomon Casseb.

New requests to be addressed in March meeting:

i. Rules 356 and 386 submitted by Judge Frank J. Douthitt.

j. Rules 360, 363, 385a, 447, 469 submitted by Professor Jeremy Wicker.

Date: April 6, 1984

TO: THE ADMINISTRATION OF JUSTICE COMMITTEE
Subcommittee to Study Rules 354, 355 and 380

The committee appointed by the Chairman to study the above Rules makes the following report:

We have had correspondence from the Court Reporters Association and I have talked to various reporters and trial judges in reference to the Rules and the following were the only complaints we had:

1. The Court Reporters complained that there was no Rule requiring the appellant to pay for the Statement of Facts where a deposit for costs or a cost bond was filed. This was corrected by Rule 354 (e) of the Rules adopted by the Supreme Court effective April 1, 1984.

2. Rule 355 did not require that the person filing the affidavit of inability to pay costs had to give notice to the Court Reporter. The sub-committee has prepared an amendment to this Rule, a copy of which is enclosed herewith. The portions added to the presert Rule are underlined.

3. Rule 380 provides that the court reporter shall not receive compensation for preparing a Statement of Facts where an affidavit of inability to pay costs is filed. The Court Reporters feel like that they should be paid for their services as most court reporters are busy and have to employ people to transcribe the testimony and that they should be paid as in criminal cases under Article 40.09 of the Code of Criminal Procedure. The sub-committee feels that this is a matter not to be changed by the Rules, but should be submitted to the Legislature.

If any member has any suggestions they would like to present to the subcommittee prior to the meeting on April 14, please to contact Judge George Thurmond at Del Rio, whose address is as follows: Judge George M. Thurmond, P. O. Box 1089, Del Rio, Texas 78840 - phone (512) 774-3611.

Respectfully submitted,

James H. Milam, Chairman
Subcommittee

RULE 355 (As Amended):

(a) When the appellant is unable to pay the cost of appeal or give security therefor, he shall be entitled to prosecute an appeal or writ of error by filing with the clerk, within the period prescribed by Rule 356, his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.

(b) The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the Court Reporter of the Court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

(c) Any interested officer of the court or party to the suit, may by sworn pleading, contest the affidavit within ten days after the affidavit is filed, whereupon the court trying the case (if in session) or (if not in session) the judge of the court or county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the parties notice of such setting.

(d) The burden of proof at the hearing of the contest shall rest upon the appellant to sustain the allegations of the affidavit.

(e) If no contest is filed in the allotted time, the allegations of the affidavit shall be taken as true. If a contest is filed, the court shall hear same within ten days unless the court signs an order extending the hearing within the ten day period, but shall not extend the time for more than twenty additional days. If no ruling is made on the contest within the ten day period or the period of time extended by the court, the allegations of the affidavit shall be taken as true.

(f) If the appellant is able to pay or give security for a part of the costs of appeal, he shall be required to make such payment or give such security (one or both) to the extent of his ability.

Section Three. Appeals From Judgments and Orders of Trial Courts

Rule 30. Ordinary Appeal - How Perfected

(a) Appeals in Civil Cases.

(1) When Security is Required. When security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. The writ of error is perfected when the petition and bond or cash deposit is filed or made (when bond is required), or affidavit in lieu thereof is filed, or, if contested, when the contest is overruled.

(2) When Security is Not Required. When security for costs on appeal is not required by law, the appellant shall in lieu of a bond file a written notice of appeal with the clerk or judge which shall be filed within the time otherwise required for filing the bond. Oral notice or a recital in the judgment of notice does not comply with this rule. Such notice shall be sufficient if it states the number and style of the case, the court in which pending, and that appellant desires to appeal from the judgment or some designated portion thereof. Copy of the notice shall be mailed by counsel for appellant in the same manner as the mailing of copies of the appeal bond.

(3) When Party is Unable to Give Security

(A) When the appellant is unable to pay the cost of appeal or give security therefor, he shall be entitled to prosecute an appeal or writ of error by filing with the clerk, within the period prescribed by Rule 31, his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.

(B) The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

(C) Any interested officer of the court or party to the suit, may by sworn pleading, contest the affidavit within ten days after notice thereof, whereupon the court trying the case (if in session) or (if not in session) the judge of the court or county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the parties notice of such setting.

(D) The burden of proof at the hearing of the contest shall rest upon the appellant to sustain the allegations of the affidavit.

(E) If no contest is filed in the allotted time, the allegations of the affidavit shall be taken as true. If a contest is filed, the court shall hear the same within ten days after its filing unless the court extends the time for hearing and determining the contest by a signed written order made within the ten day period. The court shall not extend the time for more than twenty additional days after the date of the order of extension. If no ruling is made on the contest within the ten day period or within the period of time as extended by the court, the allegations of the affidavit shall be taken as true.

(F) If the appellant is able to pay or give security for a part of the costs of appeal, he shall be required to make such payment or give such security (one or both) to the extent of his ability.

(4) Notice of Limitation of Appeal. No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(5) Judgment Not Suspended by Appeal. Except as provided in Rule 33, the filing of a bond or the making of a deposit or affidavit does not have the effect of suspending the judgment. Unless a supersedeas bond or deposit is made as provided in Rule 37, execution may issue thereon as if no appeal or writ of error had been taken.

(b) Appeals in Criminal Cases.

(1) Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the district or county attorney as appropriate.

(2) Effect of Appeal in Criminal Cases. In the appeal of a criminal case when the record has been filed in the appellate court all further proceedings in the trial court, except as provided by law or by these rules, shall be suspended and arrested until the mandate of the appellate court is received by the trial court.

COMMENT. This proposed rule is patterned upon Tex. R. Civ. P. 363 as to paragraph (a)(1); Tex. R. Civ. P. 356(c) as to paragraph (a)(2); Tex. R. Civ. P. 355 as to paragraph (a)(3); Tex. R. Civ. P. 353 as to paragraph (a)(4); and Tex. R. Civ. P. 357 as to paragraph (a)(5). Paragraph (b)(1) is based upon CCP Art. 44.08 with some modifications and deletions. Paragraph (b)(2) is based upon CCP Art. 44.11 (first sentence).

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February 10, 1986

Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed are proposed changes to Rules 356 and 386 submitted by Judge Frank J. Douthitt. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

February 4, 1986

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules, Cliffe & Reed
800 Milam Building
San Antonio, TX 78205

Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

Re: Rule 356 (perfecting appeal) and
Rule 386 (filing of statement of facts and transcript)

Dear Luke and Mike:

I am enclosing a letter from Judge Frank J. Douthitt of Henrietta, regarding the above rules.

May I suggest that these matters be placed on our next Agenda.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Honorable Frank J. Douthitt
Judge, 97th Judicial District
P. O. Box 530
Henrietta, Texas 76365

ARCHER, CLAY AND
MONTAGUE COUNTIES

RAY SHIELDS
COURT REPORTER

FRANK J. DOUTHITT
JUDGE
97TH JUDICIAL DISTRICT

P. O. BOX 530
HENRIETTA, TEXAS 76365

AREA CODE 817
538-5913

November 14, 1985

Hon. James P. Wallace
P.O. Box 12248
Austin, Texas 78711

Dear Jim:

In the last couple of years every time we have a judges' meeting, somebody on the Supreme Court raises criticisms of court reporter delay in preparing statements of fact for appellate purposes. I may have written you about this before. I know I have commented to the Chief on the matter.

Recently, a case tried by me has had appeal perfected in a manner timely under the rules, but impossible with respect to the clerk and court reporter. It will require my court reporter to get an extension of time, which extension will probably be later cited by some appellate judge at some meeting to demonstrate "court reporter delay".

The problem is the two rules which have to do with perfecting appeal (Rule 356) and filing of the statement of facts and transcript (Rule 386). As you know Rule 386 provides that the transcript and statement of facts will be filed in the Appellate Court within 60 days of the date the judgment is signed unless there has been a motion for new trial filed in which case it must be filed within 100 days. Rule 356 provides that appeal must be perfected by the filing of a cost bond within 30 days of the date the judgment is signed, or if a motion for new trial is filed, within 90 days after the judgment is signed.

To give you an example of the problem caused, the case I mentioned above had its final judgment signed on August 12, 1985. In perfect compliance with Rule 356, the losing attorney filed a cost bond on November 12, 1985, 92 days after the judgment was signed, but the first day following a Sunday and legal holiday. He filed it late that afternoon and therefore left 7 days for the transcript and statement of facts to be prepared and filed in the Appellate Court.

In checking with the clerk with the Second Court of Appeals, I understand that it is probably 4 to 5 months after an appeal is filed with the Court of Appeals before it is actually submitted. It seems to me that there could either be more time for the court reporter to get the statement of facts ready after the appeal is perfected, or there could be a requirement that a notice to the court reporter and clerk be earlier than 90 days after judgment when a motion for new trial has been filed.

Frankly, Jim, I don't guess I have a solution. However, if you feel the court would be interested in trying to do something about this, I would put more time into a possible solution.

Very truly yours,

Frank J. Douthitt

FJD:lb

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January 9, 1986

Professor William V. Dorsaneo, III
Southern Methodist University
Dallas, Texas 75275

Dear Bill:

Enclosed are proposed changes to Rules 360, 363, 385a, 447, and 469 submitted by Jeremy Wicker. Please draft, in proper form for Committee consideration appropriate Rules changes for submission to the Committee and circulate them among your Standing Subcommittee members to secure their comments.

I need your proposed Rules changes by February 15, 1986, to circulate to the entire Advisory Committee.

As always, thank you for your keen attention to the business of the Advisory Committee.

Very truly yours,

Luther H. Soules III

LHSIII:tk
Enclosures

cc: Honorable James P. Wallace,
Justice, Supreme Court of Texas

COAJ Lit

Texas Tech University

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Lubbock, Texas 79409-0004 / (806) 742-3791 Faculty 742-3785

October 14, 1985

Mr. Michael T. Gallagher, Esq.
Fisher, Gallagher, Perrin & Lewis
70th Floor
Allied Bank Plaza
1000 Louisiana
Houston, TX 77002

Re: Administration of Justice Committee, State Bar of Texas

Dear Mike:

Enclosed are my proposed amendments to Rules 18a, 30, 72, 87, 111, 112, 113, 161, 163, 165a, 182a, 188, 239a, 360, 363, 385a, 447, 469, 483, 496, 499a, 621a, 657, 696, 741, 746, 772, 806, 807, 808, 810 and 811. Also enclosed are suggested amendments to several Supreme Court orders that accompany two other rules.

The vast majority of these proposed changes are necessitated by the recent enactment of two new codes -- the Texas Government Code and the Texas Civil Practice and Remedies Code. The affected rules expressly refer to civil statutes that have been repealed & superseded by these codes. The other proposed amendments attempt only to cure errors or anomolies in the existing rules.

Please add these proposed amendments to the agenda of the December meeting. I am prepared to report on these proposals at that meeting.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

Enclosure

cc: Ms. Evelyn A. Avent
Mr. Luther H. Soules, III
Justice James P. Wallace

Rule 72. Filing Pleadings: Copy Delivered to All Parties or Attorneys

Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party [~~all parties~~] or his [~~their~~] attorney[s] of record a copy of such pleading, plea or motion. The attorney or authorized representative of such attorney, shall certify to the court on the filed pleading in writing over his personal signature, that he has complied with the provisions of this rule. If there is more than one adverse party and the adverse parties are represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney representing the adverse parties, but a firm of attorneys associated in the case shall count as one. Not more than four copies of any pleading, plea, or motion shall be required to be furnished to adverse parties, and if there be more than four adverse parties, four copies of such pleading shall be deposit with the clerk of court, and the party filing them, or asking leave to file them, shall inform all adverse parties or their attorneys of record that such copies have been deposited with the clerk. The copies shall be delivered by the clerk to the first four applicants entitled thereto, and in such case no copies shall be required to be mailed or delivered to the adverse parties or their attorneys by the attorney thus filing the pleading. After a copy of a

pleading is furnished to an attorney, he cannot require another copy of the same pleading to be furnished to him.

Comment: The proposed amendment restores the rule to the pre-1984 version. The current version is illogical in that it requires service of a pleading or motion on all parties only if it is not required by law or the rules to be served on the adverse party. If a particular pleading or motion is required by law or the rules to be served on the adverse party, then under the terms of Rule 72 it need not be served on the nonadverse parties. It would seem that nonadverse parties would have at least as much interest -- if not more -- in a pleading or motion expressly required by law or rule to be served on the adverse party, as a pleading or motion that is not required to be served on an adverse party or any party. The current version of the rule is also troublesome in that it first prescribes the circumstance under which a pleading or motion must be served on all parties, but the remainder of the rule addresses specific procedural details of service only as regards adverse parties.

Rule 165a. Dismissal for Want of Prosecution

. . .

3. Cumulative Remedies. . . . The same reinstatement procedure and timetable are [~~is~~] applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

Comment: Grammatical correction.

Rule 182a. Court Shall Instruct Jury on Effect of Article 3716

In the caption of the rule, delete "Article 3716" and substitute:

Evidence Rule 601(b)

Comment: Article 3716 was repealed, effective September 1, 1983. The caption of the rule is amended to conform to Evidence Rule 601(b).

Rule 239a. Notice of Default Judgment

At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail by first-class mail ~~[a-post-card]~~ notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. ~~[Failure to comply with the provisions of this rule shall not affect the finality of the judgment.]~~

Comment: The proposed amendment conforms the rule to the 1984 amendment to Rule 306a, which requires notice by first-class mail. The last sentence of the rule is deleted to conform to the 1984 amendment to Rule 306a, which provides for up to a ninety-day extension of the date on which the time period for perfecting an appeal begins to run, if the appellant proves he has failed to receive notice of the judgment.

Rule 360. Appeal by Writ of Error to Court of Appeals

. . .

5. Cost bond or Substitute. At the time of filing the petition, or within six months provided by section 4, the appellant shall file with the clerk an appeal bond, cash deposit in lieu of bond, or affidavit of inability to pay costs, [~~or a notice of appeal if no bond is required,~~] as provided by these rules for appeals.

. . .

8. Perfection. The writ of error is perfected when the petition and bond or cash deposit in lieu of bond or affidavit of inability to pay is filed or a contest is overruled [~~, or a notice of appeal, if permitted, is filed~~].

Comment: The proposed amendment deletes the reference to a notice of appeal, which had never been required in an appeal by writ of error prior to the 1984 amendments to the rules. Based on the last sentence of the comment to the 1984 amendment of Rule 360, paragraph 8 was intended to state the provisions of the last sentence of Rule 363 in a shortened and modernized form, but with no change in substance. The proposed amendment also deletes the reference to a notice of appeal in paragraph 5. See also the comment to the proposed amendment to Rule 363.

Rule 363. Appeal [~~or Writ of Error~~] Perfected

When a bond is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. When a bond for costs on appeal is not required by law, the appeal is perfected when notice of appeal is made under the provisions of Rule 356(c). [~~The writ of error is perfected when the petition and bond or cash deposit is filed or made (when bond is required), or affidavit in lieu thereof is filed, or, if contested, when the contest is overruled.~~]

Comment: The 1984 amendment to Rule 360 attempted to transfer the perfection requirements for writ of error from Rule 363 to paragraph 8 of Rule 360. The proposed amendment deletes the last sentence of Rule 363, since that subject matter is covered in Rule 360. See also the comment to the proposed amendment to Rule 360.

Rule 447. Execution on Failure to Pay Costs

Delete "Rule 506" and substitute:

Rule 507

Comment: Rule 506 was repealed effective April 1, 1984, and its subject matter transferred to Rule 507.

Rule 496. Briefs of Respondents and Others

Briefs of the respondent or other party shall comply with the provisions of the rules prescribed for an application for writ of error and particularly with the provisions of Rule 469 [~~414~~] (b), (c), (e), (f), (g), and (h) [~~,-(j)-and-(n)~~].

Comment: The proposed amendment deletes the erroneous reference to Rule 414 (requisites of briefs in the court of appeals) and substitutes Rule 469 (requisites of application for writ of error to the Supreme Court); also, the references to subdivisions (j) and (n) are deleted.

Supreme Court Order Relating to Preparation of Transcript (following Rule 376a)

. . .

(g) . . .

The Clerk shall deliver the transcript to the appropriate Court of Appeals. [~~and shall in all cases indorse upon it before it finally leaves his hands as follows, to wit:~~]

(h) The following indorsement shall be made by the Clerk on certificates for affirmance on notice under Rule 387(a):

"Applied for by P.S. on the _____ day of _____, A.D. 19 _____, and delivered to P.S. on the _____ day of _____, A.D. 19 _____," and shall sign his name officially thereto. [~~The same indorsement shall be made on certificates for affirmance of the judgment.~~]

(i) [~~(h)~~] . . .

Comment: Since the clerk of the trial court delivers the transcript directly to the clerk of the court of appeals, instead of to the appellant, an indorsement of its delivery to the appellant is erroneous. Under Rule 387(a), however, the clerk of the trial court may be requested by the appellee to deliver certified copies of the judgment and the appeal bond or other document required to perfect an appeal. In such event, the indorsement is required.

Supreme Court Order Relating to Rule 388a, originally issued February 1, 1950

Delete "Rule 388-a" and substitute:

Rule 388a

Comment: Minor textual change

Supreme Court Order Relating to Rule 388a, originally issued April 24, 1950

Delete "Rule 443) and substitute:

Rule 442(a)

Comment: Rule 443 was repealed effective April 1, 1984, and the subject matter transferred to Rule 442(a)

Comment applicable to the remaining proposed amendments: The following rules contain express references to various articles of the civil statutes that were repealed, effective September 1, 1985. The substance of these statutes have been codified in either the Texas Government Code or the Texas Civil Practice and Remedies Code, both effective September 1, 1985. The amendments conform these rules to the two new codes. Several rules also need to be amended to conform to the Texas Business and Commerce Code and the Texas Property Code.

Rule 18a. Recusal or Disqualification of Judges

In subdivision (g), delete "Article 200a" and substitute:

sections 74.034 and 74.035 of the Texas Government Code

Rule 30. Parties to Suits

Delete "title of the Revised Civil Statutes of Texas, 1925, dealing with Bills and Notes" and substitute:

Texas Business and Commerce Code

Delete "Articles 1986 and 1987 of such statutes" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code

Rule 87. Determination of Motion to Transfer

In subdivision (a) of paragraph 2:

Delete "Section 1" and substitute:

section 15.001

Delete "Section 2" and substitute:

sections 15.011-15.017

Delete "Section 3" and substitute:

sections 15.031-15.040

Delete "Subsections (a) and (b) of Section 4" and substitute:

sections 15.061 and 15.062

Delete "Article 1995" and substitute:

the Texas Civil Practice and Remedies Code

Rule 111. Citation by Publication in Actions Against Unknown Heirs or Stockholders of Defunct Corporations

Delete "Art. 2040 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 17.004 of the Texas Civil Practice and Remedies Code

Rule 112. Parties to Actions Against Unknown Owners or Claimants of Interest in Land

Delete "Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

section 17.005 of the Texas Civil Practice and Remedies Code

Rule 113. Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land

Delete "If the plaintiff in an action authorized under Acts 1931, 42nd Leg., p. 369, ch. 216" and substitute:

In suits authorized by section 17.005 of the Texas Civil Practice and Remedies Code, the plaintiff,

Rule 161. Where Some Defendants Not Served

Delete "Art. 2088 of the Texas Revised Civil Statutes" and substitute:

"section 17.001 of the Texas Civil Practice and Remedies Code"

Rule 163. Dismissal as to Parties Served, Etc.

Delete "Art. 2088 of the Revised Civil Statutes of Texas" and substitute:

section 17.001 of the Texas Civil Practice and Remedies Code.

Rule 186. Depositions in Foreign Jurisdictions

In paragraph 2, delete "Article 3746 of the Revised Civil Statutes of Texas" and substitute:

section 20.001 of the Texas Civil Practice and Remedies Code

Rule 385a. Court Unable to Take Immediate Action

Delete "Article 1819 of the Revised Civil Statutes, as amended" and substitute:

section 22.220(b) of the Texas Government Code

Rule 469. Requisites of Application

In line 4 of subdivision (d), delete "Subdivision 2 of Article 1728" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

In lines 6 and 7 of subdivision (d), delete "subdivision of Article 1728" and substitute:

subsection of section 22.001 of the Texas Government Code

In lines 8 and 9 of subdivision (d), delete "Subdivision 6 of Article 1728" and substitute:

subsection (a)(6) of section 22.001 of the Texas Government Code

Rule 483. Orders on Application for Writ of Error, Petition for Mandamus and Prohibition

In the second paragraph, delete "subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended" and substitute:

subsection (a)(2) of section 22.001 of the Texas Government Code

Rule 499a. Direct Appeals

In the first paragraph, delete "Article 1738a" and substitute:

section 22.001(c) of the Texas Government Code

Rule 621a. Discovery in Aid of Enforcement of Judgment

Delete "Article 3772, V.A.T.S." and substitute:

section 34.001 of the Texas Civil Practice and Remedies Code

Rule 657. Judgment Final for Garnishment

Delete "subdivision 3 of Article 4076 of the Revised Civil Statutes of Texas, 1925" and substitute:

subsection 3 of section 63.001 of the Texas Civil Practice and Remedies Code

Rule 696. Application for Writ of Sequestration and Order

In the second paragraph, delete "Article 6840, Revised Civil Statutes" and substitute:

sections 62.044 and 62.045 of the Texas Civil Practice and Remedies Code

Rule 741. Requisites of Complaint

Delete "Articles 3973, 3974 and 3975, Revised Civil Statutes" and substitute:

sections 24.001-24.004 of the Texas Property Code

Rule 746. Only Issue

Delete "Articles 3973-3994, Revised Civil Statutes" and substitute:

sections 24.001-24.008 of the Texas Property Code

Rule 772. Procedure

Delete "Art. 6101 of the Revised Civil Statutes of Texas, 1925," and substitute:

section 23.001 of the Texas Property Code

Rule 806. Claim for Improvements

Delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.024 of the Texas Property Code

Rule 807. Judgment When Claim for Improvement is Made

In lines 2 and 3, delete "Articles 7393-7401, Revised Civil Statutes" and substitute:

sections 22.021-22.042 of the Texas Property Code

In line 7, delete "Articles 7397-7399, Revised Civil Statutes" and substitute:

sections 22.022 and 22.023 of the Texas Property Code

Rule 806. These Rules Shall Not Govern When

Delete "Articles 7364-7401A, Revised Civil Statutes," and substitute:

sections 22.001-22.045 of the Texas Property Code

Rule 810. Requisites of Pleadings

Delete "Article 1975, Revised Civil Statutes," and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

Rule 811. Service by Publication in Actions Under Article 1975

In the caption delete "Article 1975" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

In line 1, delete "Article 1975, Revised Civil Statutes" and substitute:

section 17.003 of the Texas Civil Practice and Remedies Code

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Received 5-4-84

May 2, 1984

Mr. Hubert Green
Attorney at Law
900 Alamo National Bldg.
San Antonio, Texas 78205

Re: Administration of Justice Committee
Rule 364a (Proposed)

Dear Hubert:

Please find enclosed proposed Rule 364a.

As you can see there have been some changes made which were presented recently, and hopefully these changes will satisfy any objections made at our last meeting.

I am, by copy of this letter, asking that Ms. Avant send a copy of this proposed Rule to the members of the committee.

Sincerely,

Guy E. Hopkins

GEH/blh
encl.
cc: Evelyn Avant
State Bar of Texas
Box 12487
Capitol Station
Austin, Texas 78711

Luther Soules
Jim Kronzer
Michael Hatchell

(Proposed) RULE 364a

STAY OF ENFORCEMENT OF JUDGMENT OR ORDER PENDING APPEAL

In lieu of a supersedeas bond provided for in Rule 364a, the court from which or to which an appeal is taken may order a stay of all or any portion of any proceedings to enforce the judgment or order appealed from pending on appeal upon further finding that the appeal is not frivolous, not taken for purposes of delay and that the interest of justice will be served by a stay.

Either court may vacate, limit or modify the stay for good cause during the pendency of the appeal. A motion to vacate, limit, or modify the stay shall be filed and determined in the court that last rendered any order concerning the stay subject to review by any higher court.

Any order granting, limiting, or modifying a stay must provide sufficient conditions for the continuing security of the adverse party to preserve the status quo and the effectiveness of the judgment or order appealed from.

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 602 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Chief Justice Pope

FROM: C. Raymond Judice

DATE: August 22, 1984

RE: Proposed amendments to Rules of Civil Procedure.

One of the proposed amendments to the Rules and Standards for the Court Reporters Certification Board would require that the court reporter insert in the certification of any deposition or court proceeding his or her certification number, date of expiration of current certification and his or her business address.

Presently, the Supreme Court Order Relating to the Preparation of Statement of Facts as found following Rule 377 of the Texas Rules of Civil Procedure does not require these matters to be inserted in such certification.

Attached is a draft of a proposed amendment to this order which would insert these requirements in that order.

OCA:MEMPOP.21

PROPOSED AMENDMENT TO SUPREME COURT ORDER RELATING TO THE PREPARATION OF STATEMENTS OF FACTS

Item (e) of the Supreme Court Order Relating to the Preparation of Statements of Facts (Rule 377, T.R.C.P.) is amended to read as follows:

(e) The statement of facts shall contain the certificate signed by the court reporter in substance as follows:

"THE STATE OF TEXAS
COUNTY OF _____

I, ... , official court reporter in and for the . . . . . court of . . . . . County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the repsective parties.

WITNESS my hand this the . . . . day of . . . . . , 19 . . . .

. . . . . .
(Signature)
Official Court Reporter"

. . . . . .
(Typed or Printed Name of Reporter)

Certification Number of Reporter: . . . . . .

Date of Expiration of Current Certification: . . . . . .

Business Address: . . . . . .

. . . . . .

Telephone Number: . . . . . .

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL
1414 Colorado, Suite 600 • P.O. Box 12066 • Austin, Texas 78711 • 512/475-2421

TO: Justice Jim Wallace

FROM: C. Raymond Judice

DATE: December 11, 1984

RE: Proposed amendments to Rule 423, T.R.C.P.

During the meeting of the Chief Justices of the Courts of Appeals on Friday, November 30, 1984, the assembled Chief Justices adopted a motion by Chief Justice Summers that the attached proposed amendments to Rule 423, T.R.C.P. be submitted for consideration by the Supreme Court.

I was asked to forward it to you for consideration by the Advisory Committee.

Amend Rule 423 as per attached,

OCA:LETJIM.21

SUGGESTED AMENDMENTS TO RULE 423, TEX. R. CIV. P.

Rule 423 Argument.

(a) Right to Argument. When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court. [~~either oral or plainly written or printed. If written or printed, six copies shall be filed with the record.~~]

(b) Unchanged.

(c) Unchanged.

(d) Time Allowed. In the argument of cases in the Court of Appeals, each side may be allowed thirty (30) minutes in the argument at the bar, with fifteen (15) minutes more in conclusion by the appellant. In cases involving difficult questions, the time allotted may be extended by the court, provided application is made before argument begins. The court may also align the parties for purposes of presenting oral argument. The Court may, in its discretion, shorten the time allowed for oral argument.

Not more than two counsel on each side will be heard, except on leave of the court.

Counsel for an amicus curiae shall not be permitted to argue except that an amicus may share time allotted to one of the counsel who consents and with leave of the court obtained prior to argument.

(e) Unchanged.

(f) A party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. Failure of a party to

file a request shall be deemed a waiver of his right to oral argument in the case. Although a party waives his right to oral argument under this rule, the Court of Appeals may nevertheless direct such party to appear and submit oral argument on the submission date of the case.

The Court of Appeals may, in its discretion, advance cases for submission without oral argument where oral argument would not materially aid the Court in the determination of the issues of law and fact presented in the appeal. Notice of the submission date of cases without oral argument shall be given by the Clerk in writing to all attorneys of record, and to any party to the appeal not represented by counsel, at least twenty-one (21) days prior to the submission date. The date of the notice shall be deemed to be the date such notice is delivered into the custody of the United States Postal Services in a properly addressed post-paid wrapper (envelope).

NOTE: Additions in text indicated by underline; deletions by [~~strikeouts~~].

WILLIAM W. KILGARLIN
JUSTICE
THE SUPREME COURT OF TEXAS

August 20, 1985

P. O. BOX 12248
CAPITOL STATION
AUSTIN, TEXAS 78711

(512) 475-2548

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

Enclosed is a copy of my letter in reply to Jim Kronzer's protest that the supreme court is not ordering published Rule 452 opinions from the courts of appeals in those cases in which the supreme court grants writ and writes. I think Jim has a valid concern, and I personally would appreciate an expression of opinion from the Advisory Committee on the subject.

Likewise, I enclose a copy of an article I am submitting to the Texas Bar Journal in regards to problems with the unidentified expert witness. Please read the conclusion in which I recommend that Rule 215-5 be amended to include certain language. I would like for you to present my proposal to the Advisory Committee.

Sincerely,

William W. Kilgarlin

WWK:sm

Encl.

WILLIAM W. KILGARLIN
JUSTICE
THE SUPREME COURT OF TEXAS

P. O. BOX 12248
CAPITOL STATION
AUSTIN, TEXAS 78711

(512) 475-2548

August 20, 1985

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

Dear Jim:

Thank you for your letter of August 12, 1985. It raises a very valid point about which this court has never reached agreement.

When I came on the court, we routinely ordered previously unpublished court of appeals' opinions printed anytime we granted writ in the case. Then, one day in discussion, one of the judges pointed out that in his view the court of appeals' opinion was not worth publishing, as it added nothing to the law. Accordingly, we issued our opinion without ordering the appeals court opinion published.

Since that time, we have been inconsistent in ordering opinions published when we have written in cases.

Of equal concern is that sometimes courts of appeals originally order their opinions not published, then we n.r.e. the case, and subsequently the court of appeals orders the opinion to be published. I do not mean to say that we treat differently cases with published opinions from those with unpublished opinions, but sometimes we might well write an n.r.e. per curiam if we knew that the appeals court opinion was going to be published.

In Woods v. Crane Carrier Corp., the El Paso Court of Appeals decided the case on the basis that it was not erroneous to fail to give an instruction in conjunction with an issue when that instruction appeared later in the charge in connection with another issue. I do not agree with the position of the El Paso court, as you can probably gather from my opinion. However, the El Paso court totally missed

---

the fact that the requested instruction had been dictated in conjunction with objections to the charge. As we were affirming the judgment of the El Paso court, I did not wish to give weight to what I considered to be an incorrect position by having the El Paso court opinion published. Tovar is a different matter. It followed close on the heels of Redinger v. Living, Inc. and was clearly controlled by that case. In my opinion, there was no need to publish the Amarillo court's writing in Tovar.

I do agree with you that this matter is of significant validity, and I personally would appreciate a recommendation from the Advisory Committee. Therefore, I am sending a copy of this letter to Luke Soules.

Sincerely,

William W. Kilgarlin

WWK:sm

cc: Luther H. Soules, III

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

July 9, 1985

Mr. Luther H. Soules, III, Chairman
Supreme Court Advisory Committee
Soules & Cliffe
1235 Milam Building
San Antonio, TX 78205

Re: Tex. R. Civ P. 216, 439, 440, 441

Dear Luke:

Enclosed is a memo from Judge Robertson supporting deletion of Rules 439, 440 and 441. His suggestion is that all remittiturs should be eliminated.

The First Court in Houston recently handed down an unpublished opinion in First State Bank of Bellaire v. C. H. Adams, a copy of which is enclosed. To avoid the problem in the future, I suggest that Rule 216 be amended to require both a jury fee and a request for jury not less than ten days before trial.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosure
cc: Mr. Michael T. Gallagher, Chairman
Administration of Justice Committee
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, TX 77010

MEMORANDUM

TO : Judge Wallace
FROM: Judge Robertson
DATE: July 8, 1985

RE : Supreme Court Advisory Committee

It is suggested that the Supreme Court Advisory Committee consider deleting and/or abolishing Rules 439, 440 and 441 of the Texas Rules of Civil Procedure.

Court of Appeals
First Supreme Judicial District

OPINION C 4032

C.H. ADAMS, APPELLANT

NO. 01-84-0536-CV VS.

FIRST STATE BANK OF BELLAIRE, APPELLEE

On Appeal from the 189th Judicial District Court
of Harris County, Texas
Trial Court Cause No. 78-8109

The appellant, C.H. Adams, brought this suit for damages alleging an illegal offset by the appellee, First State Bank of Bellaire, against funds that Tri-State Oil and Gas, Inc. had on deposit with the bank. The appellant was a shareholder of Tri-State Oil and Gas, Inc. and, as its successor in interest, intervened in the suit. The trial court granted a summary judgment for the appellee, and the appellant now asserts three points of error on appeal. He alleges that the trial court based its judgment on issues not expressly set out in the appellant's motion for summary judgment; that the four-year statute of limitations is applicable to his cause of action, not the two-year statute of limitations; and he asserts that the doctrines of res judicata and estoppel prevent a recovery by the appellee.

Tri-State's relationship with the appellee was as a depositor and a borrower. It maintained four bank accounts with the appellee, and on January 16, 1976, borrowed $100,000 from appellee. The loan was evidenced by a note which was secured by warehouse receipts. On February 20, 1976, Tri-State borrowed another $30,000 from the appellee, executed a second note and secured that note by an assignment of oil leases.

On March 1, 1976, the State of Texas filed suit against Tri-State and some of its officers and stockholders, alleging irregularities in Tri-State's operations and prayed for a receiver to be appointed. The state court, after an ex parte hearing, granted the state's request and appointed a receiver.

On March 3, 1976, because of an article in a Houston newspaper concerning the state's activities against Tri-State, the appellee became aware of the state court action. Although the appellant's notes had not matured, the appellee declared itself to be insecure, and offset $102,000 of the appellant's deposits against the $100,000 note. Thereafter, numerous checks which Tri-State had issued were dishonored by the bank.

Unknown to the appellee, on March 1, 1976, Tri-State had filed with the Federal Bankruptcy Court a petition under Chapter XI of the Federal Bankruptcy Act, seeking an arrangement to pay off and satisfy the debts it owed to its creditors. The appellee became aware of the bankruptcy action about two or three days after it was filed.

On March 31, 1976, the bankruptcy court entered its order appointing a receiver and authorizing the receiver to operate the business and manage the property of Tri-State until further order of that court. The bankruptcy court also ordered the appellee to set up a special trust account and place the $102,000, which it had offset against Tri-State's note, in that account. Funds could not be withdrawn except by order of the bankruptcy court. The appellee protested the setting up of this special account and appealed to the Federal District Court.

On appeal, the district court reversed the judgment of the bankruptcy court. That order also noted that the appellant had reached an arrangement with its creditors, that the issue of the special trust account was then moot, and dismissed the appeal. The appellant then appealed to the 5th Circuit Court of Appeals, which dismissed that appeal as being moot.

The appellants filed the present lawsuit on March 2, 1978. The trial court's docket sheet reflects that the appellee filed two motions for summary judgment which were denied. In May of 1983, the case was certified as being ready for trial, was placed on the non-jury docket of the civil district courts of Harris County, Texas, and in April of 1984, the case was assigned to trial in another district court.

After briefly discussing the issues of the case with

the attorneys, the trial judge stated as follows:

> The court, as a matter of judicial economy, is going to reconsider the defendant's motions for summary judgment and the Plaintiff's responses to them and all of the attachments, affidavits and documents furnished with them.

The parties apparently acquiesced in this procedure because no objections were made, and the court's action is not raised as a point of error on appeal.

After the court made its announcement, the parties presented their marked exhibits to the court. The parties also made several stipulations to the court. After a discussion between the court and the attorneys, the court announced its ruling.

Although the court's reasons for granting the summary judgment are not shown on the face of its final judgment, the record made at the summary judgment hearing reveals that the court stated its reasons as follows:

> My holding is that in any event the checks were presented after the filing and the property not then being the property of the drawer but the property of the estate of the bankrupt, they were lawfully dishonored.

The appellant's complaint in its first point of error is that the trial court erred in granting a summary judgment on issues that were not expressly set out in a motion, answer, or any other response.

The appellee's amended motion for summary judgment stated that the appellee was entitled to a summary judgment as there was no genuine issue of material fact and no disputed issue of fact in the instant case: (1) because appellee had fully complied with the orders of the court (bankruptcy court); and, (2) that the appellant's cause of action was barred by the Texas two-year statute of limitations. See Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon Supp. 1985).

It is manifest that the trial court's judgment was not based upon the two grounds set forth in the appellee's motion for summary judgment. However, the appellee contends that although the question of lawful dishonor was not raised in its written motion for summary judgment, the parties orally agreed at the

summary judgment hearing to consider the question of the dishonoring of the checks. We have reviewed the record made at the summary judgment hearing, and we find nothing in that record to substantiate the appellant's contention.

Texas Rules of Civil Procedure 166-A(c) requires that a motion for summary judgment must state the specific grounds therefor. If the trial court finds there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in the answer or other response, the court must then render summary judgment for the moving party. City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671 (Tex. 1979).

Thus, since the basis of the trial court's judgment was not on either of the two grounds expressly set forth in the appellee's motion for summary judgment, the basis for its judgment must be contained in appellant's response or answer to the motion, or the judgment cannot stand. Tex. R. Civ. P. 166A(c).

The appellant's response and answer to appellee's amended motion for summary judgment initially reiterates the facts set forth in its petition. It then asserts the defenses of res judicata, estoppel, and asserts that the four-year statute of limitations is applicable, not the two-year statute. These defenses do not raise the issue of the bankruptcy court having the appellant's deposits in custodia legis at the time the appellee made its offset against the appellant's accounts, which was the basis of the trial court's summary judgment.

We find that the summary judgment granted by the trial court was not based on issues expressly presented to it by written motion, answer or other response. We hold that such action is prohibited by Rule 166-A(c), and sustain the appellant's first point of error.

We also hold that the record would not support a summary judgment on the grounds asserted by the appellee in its motion for summary judgment. The appellee asserts that the two-year statute of limitations bars a recovery by the appellant.

As heretofore stated, the parties agreed that the checks which were dishonored were dishonored after March 4, 1976. The docket sheet reflects that this law suit was filed on March 2, 1978. Thus, the present suit was filed within the two-year statute.

The appellee's second basis for summary judgment was that it had fully complied with all the orders of the bankruptcy court and accordingly had the legal right to dishonor the Tri-State checks. The record indicates that the first order of the bankruptcy court was dated March 31, 1976. The appellant introduced into evidence approximately seventy checks that were dishonored by the appellee after March 4, 1976. Because of the numerous stamped endorsements on the back of each of the checks, we cannot ascertain how many of the checks were dishonored between the dates of March 4 and March 31. We assume, as the appellee asserts, that it did follow all the bankruptcy court's orders, but the issue, as we understand it, is whether the appellee wrongfully offset Tri-State's debts prior to the bankruptcy court accepting jurisdiction over the assets and liabiities of Tri-State. This issue requires a legal determination of when the bankruptcy court's jurisdiction attached. It also requires a factual determination of when the appellee became aware of the bankruptcy action and whether it applied the offset before or after it became aware of the bankruptcy action. Also, there is the issue of whether the appellee was justified in making the offset when all of its loans were secured by collateral which it had deemed adequate just a few weeks before it declared itself insecure and applied the offset. Further, there is the issue of what checks were dishonored and when the dishonor occurred. Since there were factual issues to be determined, appellee was not entitled to a summary judgment on the basis it had complied with the bankruptcy court's orders.

We do not reach the issue of whether the trial was correct in its holding that Tri-State's bank accounts were in custodia legis at the time its checks were dishonored by appellee. The reason for this is that the issue was not raised

in the party's pleadings in the summary judgment proceedings.

The judgment of the trial court is reversed and this cause of action is remanded to the trial court.

/s/ JACK SMITH
Jack Smith
Associate Justice

Associate Justices Bass and Levy sitting.

No Publication. Tex. R. Civ. P. 452.

JUDGMENT RENDERED AND OPINION DELIVERED FEBRUARY 14, 1985.

TRUE COPY ATTEST;

Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

WILLIAM W. KILGARLIN
JUSTICE
THE SUPREME COURT OF TEXAS

P. O. BOX 12248
CAPITOL STATION
AUSTIN, TEXAS 78711

(512) 475-2548

August 20, 1985

Mr. Luther H. Soules, III
Soules, Cliffe & Reed
800 Milam Building
San Antonio, Texas 78205

Dear Luke:

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William W. Kilgarlin

WWK:sm

Encl.

WILLIAM W. KILGARLIN
JUSTICE
THE SUPREME COURT OF TEXAS

P. O. BOX 12248
CAPITOL STATION
AUSTIN, TEXAS 78711

(512) 475-2548

August 20, 1985

Mr. W. James Kronzer
1001 Texas Avenue
Suite 1030
Houston, Texas 77002

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I do agree with you that this matter is of significant validity, and I personally would appreciate a recommendation from the Advisory Committee. Therefore, I am sending a copy of this letter to Luke Soules.

Sincerely,

William W. Kilgarlin

WWK:sm

cc: Luther H. Soules, III

215

WHAT TO DO WITH THE UNIDENTIFIED EXPERT?

William W. Kilgarlin
Justice
The Supreme Court of Texas
August 20, 1985

WHAT TO DO WITH THE UNIDENTIFIED EXPERT?[1]

On the last day before summer recess, the Supreme Court of Texas granted writ in Yeldell v. Holiday Hills Retirement and Nursing Center, Inc.,[2] and scheduled oral argument in November. Hopefully, when we write in that case, the court will lay down guidelines that will aid trial judges in deciding when to allow the testimony of an expert witness or person having knowledge of relevant facts[3] not identified in response to interrogatories. Guidelines are needed because in the years following Werner v. Miller,[4] an inconsistent body of law has developed as to when to permit such testimony.

This article will examine the problems encountered with unidentified witnesses.[5] Specifically, case law both before and after the 1981 amendments to the Rules of Civil Procedure will be discussed. This discussion should demonstrate that there is no consistent standard used by appellate courts in allowing or refusing testimony. Finally, a suggestion for problem solving in this area will be proposed.

I. HISTORY OF RULE 215-5

The current provision, Tex. R. Civ. P. 215-5, allows for the exclusion of unidentified witnesses' testimony "unless the trial court finds that good cause sufficient to require admission exists."[6] This rule, effective since April 1, 1984, is virtually the same as former Rule 168(7),[7] with the exception that the current rule requires identification at least thirty days prior to trial, whereas the former rule had a fourteen-day requirement.

For this reason, all cases involving testimony of unidentified witnesses arising since January 1, 1981, may be treated similarly. Prior to the 1981 rules amendment, Tex. R. Civ. P. 168[8] only provided that "[a] party may be required in his answers to identify each person whom he expects to call as an expert witness at the trial and to state the subject matter concerning which the expert is expected to testify." Supplementing interrogatory answers was not required under the pre-1981 rule unless there was an agreement by the parties to supplement, a court order requiring supplementation, or service of new interrogatories requesting supplementation.

While it is true that under the pre-1981 rules, with persistent effort it was possible for a party to discover identities of expert witnesses and other persons having knowledge of relevant facts, there was no provision which required the revealing of witness information a designated number of days prior to trial. Further, prior to Lewis v. Illinois Employers Insurance Co.,[9] it generally had been held that answers to interrogatories could be obtained only by first securing an order compelling them. Thus, acquiring the identities of experts was a cumbersome task at best.

II. PRE-1981 CASE LAW

In Werner v. Miller,[10] a method requiring identification of expert witnesses was utilized by the late George Miller, then a Harris County district judge. Judge Miller had pending before him a products liability suit in which plaintiff Werner sought an

order compelling International Harvester Company to answer certain interrogatories. These questions included a request for identification of expert witnesses. International Harvester had likewise sought the identity of Werner's experts. Judge Miller sustained International Harvester's objections to Werner's interrogatories. Contemporaneously, he granted International Harvester's motion for designation of experts. Utilizing Harris County local rules then in effect, which permitted the setting of cases on request by attorneys, Judge Miller ordered that the party setting the case for trial designate thirty days prior to filing his setting request such experts he intended to call to testify. Two days after receiving the designation, the other party was required to designate its expert witnesses. The order culminated with the language "[e]xperts not designated as provided by this Order shall not be allowed to testify."[11] Werner sought mandamus against Judge Miller, arguing that he should not be forced to wait thirty days prior to a trial setting request before obtaining a list of International Harvester's expert witnesses. Although granting leave to file, the supreme court denied the mandamus, finding that Judge Miller had not abused his discretion in sustaining International Harvester's objections to Ronald Werner's interrogatories.

The court's opinion in Werner v. Miller was barely off the printing presses when the Supreme Court Advisory Committee convened on May 4, 1979, to consider amendments to the discovery rules. The minutes, which consist of recorded comments of the members of the Advisory Committee, demonstrate that there was considerable concern for the need to end gamesmanship as to designating witnesses.[12]

Many members argued for a rule that would allow ample time prior to trial for deposing witnesses.

Another supreme court case interpreting the pre-1981 Rule 168 was Smithson v. Cessna Aircraft Co..[13] Because a trial court ruling applied New Mexico law to future loss of earnings in a wrongful death action, Mrs. Smithson changed her strategy in mid-trial and opted to call a previously unidentified commercial airline pilot to testify as to her husband's potential earnings had he pursued a flying career. The trial court postponed the trial over a weekend in order to allow Cessna to depose the pilot, and then allowed the deposition into evidence. The court of appeals reversed the judgment for Mrs. Smithson, saying that the trial court had abused its discretion in permitting the deposition testimony. Although approving of the delay in the trial to allow Cessna to depose the pilot, the court of appeals held that was not enough -- that Cessna also needed an opportunity to verify the testimony respecting the qualifications and salary levels of commercial pilots.[14] The supreme court reversed the court of appeals, pointing out that Cessna had failed to request a lengthier postponement of the trial, or a continuance.[15]

III. POST-1981 CASE LAW

Although the 1981 addition of the good cause language to Rule 168 was designed to remove ambiguities in interpretation of the rule, in fact it has not achieved its purpose. Already, as this survey of twelve decisions indicates, trial courts have been affirmed when they allowed testimony; reversed when they allowed

testimony; affirmed when they refused testimony; and, reversed for refusing testimony. While such decisions can be easily categorized as "allowance" and "rejection," the standards used to reach those holdings -- when standards are mentioned in the opinions -- are less susceptible to labeling. The standards are remarkably inconsistent.

A. Case Law Allowing Testimony

The first case to be decided under the 1981 rule was National Surety Corp. v. Rushing,[16] a worker's compensation case. Rushing had failed to identify any doctors who might appear in his behalf, answering the interrogatory "[t]his has not been determined." During voir dire examination, Rushing queried the veniremen as to their knowledge of a chiropractor, Dr. Elliott. Immediately, National Surety objected to Dr. Elliott being permitted to testify. The trial court offered the compensation carrier a recess to depose the witness. National Surety declined the court's offer and made no other motion. The trial court thereupon overruled National Surety's objection and found good and sufficient cause for allowing Dr. Elliott's testimony. The court of appeals affirmed the trial court judgment for Rushing, stating: "We invoke the well-established rule that the failure to comply with the discovery rules is directed to the sound discretion of the trial court whose action can be set aside only upon a showing of clear abuse of discretion."[17] The court of appeals emphasized "[a]gain, we note that defendant did not seek a continuance of the case and there is no indication in the record that such relief would have been denied if sought."[18]

In another worker's compensation case, Texas Employers' Insurance Association v. Webb,[19] Webb's response to requests to name her testifying experts was that she did not know at the time. However, she did name, in response to another interrogatory, that she had been treated by a Dr. Stockton. Texas Employers' deposed Dr. Stockton and secured his records. At trial, when Webb sought to call Dr. Stockton as a witness, Texas Employers' objected. Its objection was overruled and Dr. Stockton was permitted to testify. In affirming the judgment for Webb, the court of appeals said "[i]n such situation the testimony of Dr. Stockton could not constitute a surprise to defendant and we think the trial court authorized to find that good cause sufficient to admit his testimony existed, and authorized to overrule defendant's objection."[20] In its application for writ of error to the supreme court, Texas Employers' complained that the court of appeals had placed a burden on the insurance carrier to show surprise, which was not authorized by the rules. The supreme court refused the application for writ of error, with the notation "no reversible error." However, it should be noted that the position of Texas Employers' that it had no burden to show surprise in order to prevent the testimony is undoubtedly correct. The fact that Texas Employers' had deposed Dr. Stockton and was therefore cognizant of what his testimony was likely to be, probably constituted the basis of good cause for the trial court's admitting the testimony, although this does not appear of record.

Another case turning on the no clear abuse of discretion standard was Harris County, Texas v. Jenkins.[21] In that case,

Jenkins had sued the county because it withheld medication from him while he was incarcerated in the county jail. He had identified a Dr. Ratinov as the expert witness he intended to call, but had failed to reveal, in response to a proper interrogatory, that videotapes related to the lawsuit existed and would be used in connection with Dr. Ratinov's testimony. The court of appeals affirmed the judgment for Jenkins, holding that supplementation of a party's answers to interrogatories was permitted within fourteen days of trial, but only if the trial judge believed that good cause for such supplementation existed. The court said that it was unable to say that the trial court abused its discretion by allowing the videotape into evidence.

Supplementation of interrogatories was also the subject of Texas Employers' Insurance Association v. Garza.[22] In that case, Texas Employers' had served interrogatories upon Garza, a worker's compensation claimant, requesting the identity of testifying experts. The interrogatories had been submitted on October 8, 1982. On September 29, 1983, four days prior to the beginning of trial, Garza responded by identifying Dr. W. E. Foster as a testifying expert. Over objection, the trial court allowed Dr. Foster to testify. In affirming the trial court judgment, the court of appeals stated that under Rule 168, the trial judge had the authority to grant leave for late filing of answers to interrogatories. The court also observed that Rule 168 applied only in instances where there was no pre-trial notice of the prospective expert witness. The court of appeals reasoned that in such situations where the trial court grants leave for late supplementation,

then the trial court is not bound to find good cause before allowing the testimony. Although finding "no reversible error," the supreme court, in a per curiam opinion, disapproved of the twofold rationale of the court of appeals. Therefore, it can be concluded that prior to allowing testimony of any witness named within what was then fourteen days, and now thirty days, in advance of trial, there must be good cause found by the trial court.

Another court of appeals opinion introducing the element of surprise and harm in conjunction with allowing the testimony of a previously unidentified expert witness was Doyle v. Members Mutual Insurance Co.,[23] a case involving a suit on a fire insurance policy. Doyle's attorney was permitted to testify as to the reasonableness and necessity of his fees even though he had not previously been named in response to interrogatories as an expert witness. The court of appeals stated that because Doyle had pleaded for attorney's fees, the court could not see how Members Mutual could be either harmed or surprised.

The court of appeals concluded that allowing the testimony was an exercise of discretion by the trial court and could only be set aside upon a showing of a clear abuse thereof. There had been a similar holding in another case involving recovery of attorney's fees in Allied Finance Co. v. Garza[24] and was relied upon by the court of appeals in Doyle as authority. Both Members Mutual and Doyle filed applications for writ of error.

As previously observed in connection with Texas Employers' Insurance Association v. Webb,[25] there should be no burden upon

the party opposing the testimony of the unidentified witness to show harm or surprise. The burden is on the offeror to show that he has good cause for allowing the testimony in spite of his failure to identify the witness. Nevertheless, the supreme court refused both applications for writ of error with the notation "no reversible error." While the court does not give reasons for its refusals of applications, as in Webb, the court in Doyle could have concluded from the record that under an abuse of discretion test, good cause existed to allow the testimony. It will be noted that the court of appeals' opinion observes that attorney's fees had been pled for and that Members Mutual was knowledgeable that Doyle's attorney had done considerable work on the case.[26]

One last case which would have allowed testimony is Holiday Hills Retirement and Nursing Center, Inc. v. Yeldell.[27] Yeldell had sued her employer for damages for an on-job injury because the center was not a subscriber to worker's compensation. In interrogatories served on the nursing home, Yeldell had inquired of the identity of anyone having personal knowledge of the facts of the case. A co-worker, Shirley Scroggins, was not listed in the response to the interrogatories, nor was she listed in a supplemental response. The fact situation in this case is not unlike that of Texas Employers' Insurance Association v. Webb. Although Scroggins' name had not been listed in response to interrogatories, there was evidence that Yeldell's attorney knew of Scroggins' existence and at one time asked to take her deposition. When the nursing home sought to call Scroggins to testify that Yeldell's injuries were solely attributable to Yeldell's

conduct, the trial judge refused to permit the testimony. The court of appeals held the exclusion of Scroggins' testimony to be error. After a lengthy discussion of duty to supplement under Rule 168, the court of appeals observed that there had been no claim of surprise or prejudice by Yeldell, and that Yeldell had not asked for a continuance to either depose Scroggins or otherwise to prepare to meet her testimony.[28] The court of appeals concluded that there had been no duty on the part of the nursing home to supplement its answers to interrogatories.

B. Case Law Disallowing Testimony

While the above cases all stand for the proposition that the testimony of a previously unidentified witness was either properly allowed or should have been allowed, at least three recent court of appeals' opinions have held that it was not an abuse of discretion for the trial judge to refuse to permit the testimony of previously unidentified witnesses. One case, Olin Corp. v. Dyson,[29] while reversed by the supreme court on other grounds, involved an effort by the corporation to call Dyson's father as a witness to testify to Dyson's admission of alcohol consumption before the collision which led to the lawsuit. Prior to trial, Dyson had sent interrogatories to Olin, asking it to identify every witness who had any knowledge of any facts pertaining to the cause of the alleged occurrence or to any alleged acts of the plaintiff. Olin had not named Dyson, Sr. in response to the interrogatories. Olin complained that the trial court had abused its discretion in refusing to allow any testimony by Dyson, because part of the testimony that it sought to elicit from him

was as to a "deal" between Dyson and another individual to suppress evidence, which was an independent event not addressed by any of Dyson's interrogatories. The holding of the court of appeals was that the trial court properly excluded all of the testimony because sanctions could be used selectively.

In Temple v. Zimmer U.S.A., Inc.,[30] a products liability/medical malpractice suit, the plaintiff had failed to name Dr. Donald Baxter as a testifying expert in response to interrogatories. Temple's complaint was that an intramedullary rod, manufactured by Zimmer, which was placed in her thigh bone some thirteen years earlier, had fractured. The trial court allowed Dr. Baxter to testify solely in a rebuttal capacity, over Zimmer's objection. However, during Dr. Baxter's testimony Temple sought to elicit an opinion that the rod was defective. The trial court excluded this testimony because it was not rebuttal evidence. The court of appeals affirmed the judgment adverse to Temple, saying that the exclusion by the trial court was within its sound discretion.

The third case is Texas Employers' Insurance Association v. Meyer.[31] Although a pre-1981 rule case, the holding in Meyer is still applicable. Even though the rules may not require it, if one promises to name all witnesses, expert or not, he is bound by that promise. In a worker's compensation case, Meyer requested Texas Employers' to name all potential witnesses. Not only did Texas Employers' fail to object to the interrogatory, as it was entitled to do, it promised that when the identity of the witnesses were known, it would supplement by naming the witnesses. At trial, Texas Employers' sought to introduce the testimony of a

fact witness to show that Meyer, although claiming disability, had been seen working after the date of his alleged injury. The trial court excluded the testimony of the fact witness, and the court of appeals affirmed the judgment for Meyer, saying that it was within the sound discretion of the trial judge to impose sanctions which excluded evidence when discovery violations existed.

Two recent cases have held, however, that it was error for the trial court to admit testimony of previously unidentified expert witnesses or other persons having knowledge of relevant facts. Refusing to follow the precedent of Doyle v. Members Mutual Insurance Co. or Allied Finance Co. v. Garza, the court of appeals in GATX Tank Erection Corp. v. Tesoro Petroleum Corp.,[32] reversed a judgment in a case in which Tesoro's attorney had been allowed to give testimony as to attorney's fees. In that case, Tesoro had identified several expert witnesses in response to interrogatories, but had failed to name its attorney. When the lawyer sought to testify on the reasonableness and necessity of attorney's fees, GATX objected, but the court overruled the objection. The court of appeals observed that Tesoro did not offer any evidence showing good cause sufficient to require the admission of the testimony. The court likewise observed that such testimony was the only testimony of reasonableness of the attorney's fees and without the testimony, there was no evidence to support the recovery. The opinion does not mention an abuse of discretion standard, and the holding is surely what the law ought to be. The burden should be on the one seeking the testimony

to show good cause sufficient to require the admission of that testimony. Without good cause appearing of record, the allowing of the testimony should be erroneous.

Another case, similar in point but utilizing abuse of discretion language, is Texas Industries, Inc. v. Lucas.[33] Although holding that it was error to permit the testimony of a previously unnamed expert witness, the court of appeals modified and affirmed a judgment for Lucas. Texas Industries and Lucas both filed applications for writ of error. The supreme court granted both applications and reversed the judgment as to Lucas, thereby making it unnecessary to write on the sanctions point. Lucas had sought to call a previously unnamed economist to testify as to the inflationary effects and future value of any presently awarded damages. Lucas' argument supporting admission of testimony was that he had believed that the trial judge was not going to permit Texas Industries to argue to the jury about the earning value of any lump sum jury award. When informed by the court that such argument would be permitted, Lucas said that he needed to call the expert. The trial judge announced that he would permit the expert to testify even though Texas Industries and another defendant, Everman, objected, asked for a continuance, or, in the alternative, asked to withdraw their announcements of ready. While overruling these motions, the trial court did allow the overnight taking of the economist's deposition. The court of appeals held that Lucas had not shown a compelling reason for allowing the testimony. The appellate court further reasoned that the expert's testimony was not necessary to rebut the discussion of the lump sum factor

and, therefore, the trial court had abused its discretion. In a novel approach to avoid remanding the case, the court of appeals ordered a remittitur of $344,316.60, saying that sum was what the jury had awarded as a result of the expert's testimony.

IV. CONCLUSION AND PROPOSALS

The question now arises where are we in this thicket? Clearly, as long as an abuse of discretion test without adequate guidelines is utilized, there can be no crystallization of the law in regards to testimony by previously unnamed witnesses. Trial judges have no standard to follow, particularly when two courts of appeals have held the testimony of a previously unidentified attorney on the subject of attorney's fees to be admissible, but another court has held it not so. In order to extricate ourself from the briarpatch, certain rules should be followed.

First, the burden to show good cause should be placed squarely upon the offeror of the testimony. It should not be incumbent upon one opposing testimony to show surprise, prejudice, or anything else. Second, it was the clear intent of the drafters of Rule 215-5 to put an end to discovery gamesmanship; to allow for full discovery of testifying experts' opinions; and, hopefully, because of such, to induce settlement without costly trials and delay. Therefore, efforts to avoid the rule's purpose should be thwarted.

Good cause can and, I am sure, frequently does exist to support the calling of a previously unidentified witness. For example, one's expert may become ill or unavoidably unable to attend trial

for a host of good reasons. Rather than seeking a continuance of the trial on that basis, a party may conclude to go ahead with trial so long as he can utilize the testimony of another expert, even though the latter has not been named. Perhaps, as in Texas Employers' Insurance Association v. Webb, where the expert has already been deposed and his records obtained, it can be said that good cause requiring the admission of his testimony exists. However, that the opponent has not been prejudiced by the testimony is not enough. Simply because the opponent has not been taken by surprise is also insufficient. Even when the pleadings show a necessity for using expert opinion in order to make out a prima facie case, good cause does not exist. On the other hand, if unforeseen developments occur in trial, such as the granting of a trial amendment, surely that would constitute good cause requiring the admission of a previously unidentified witness to combat the evidence adduced pursuant to the trial amendment. While I recognize that to some extent there must always be discretion upon the part of the trial judge to decide when to allow and when to refuse testimony, we can aid the trial judge by developing a consistent body of law in this relatively new field.

One solution is to amend Tex. R. Civ. P. 215-5 by borrowing language from Tex. R. Civ. P. 141 which reads "[t]he court may, for good cause, to be stated on the record, adjudge . . . ." The mere inclusion of the words "stated on the record" would enable us to do certain things. First, if the trial judge failed to state on the record the good cause found by him to require the admission of the testimony, it would obviously be error to have

allowed it. Second, by stating the good cause on the record, appellate courts could more easily crystallize the law by deciding what constitutes good cause and what does not. The rule could be further amended by adding a final sentence that the burden of showing good cause is upon the offeror of the testimony. I fear that unless some steps such as these are taken, inconsistencies will continue to mount in the field of admission or exclusion of testimony of previously unidentified witnesses, and the well-intended motivations of the drafters of the discovery rules will be thoroughly frustrated.

I realize my solutions are harsh and may result in the loss of a case by a non-complying party. But imposition of such a sanction will guarantee future compliance by that party's attorney. When all the cards are on the table, a greater chance for settlement exists, and we may see a reduction in costly and lengthy trials which pose an ever increasing threat to the administration of justice in Texas.

FOOTNOTES

[1] The word "expert" is used to encompass the following categories of persons whose identities are required in response to interrogatories: (a) expert witnesses who will testify; (b) consulting experts whose opinions are relied upon by testifying experts; (c) potential parties; and (d) persons having knowledge of relevant facts. See Tex. R. Civ. P. 166-b-1-d,e.

[2] See 28 Tex. Sup. Ct. J. 567 (July 17, 1985); docketed as C-4177 in the supreme court. Argument is scheduled for November 13, 1985.

[3] Tex. R. Civ. P. 166b-2-d, e, supra note 1.

The Advisory Committee to the Supreme Court of Texas recommended to the court that the rules be changed to require the identification of all witnesses in response to interrogatories. See Minutes, Advisory Committee to the Supreme Court of Texas, November 12-13, 1982. However, in promulgating the amendments to the Rules of Civil Procedure, effective April 1, 1984, the Supreme Court of Texas rejected the recommendation.

[4] 579 S.W.2d 455 (Tex. 1979).

[5] Technically, the word "witness" is inaccurate but is used for simplicity. See Dyson v. Olin Corporation, 692 S.W.2d 456 (Tex. 1985) (Kilgarlin, J., concurring); Employers Mutual Liability Insurance Co. v. Butler, 511 S.W.2d 323 (Tex. Civ. App.--Texarkana 1974, writ ref'd n.r.e.). See also supra note 1.

[6] Although Tex. R. Civ. P. 215-5 refers to "Supplementation of Discovery Response," it clearly includes situations where there

has been no initial discovery response. Tex. R. Civ. P.. 166b-5-b provides: "If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court."

[7] See Tex. R. Civ. P. 168(7)(a)(3), effective January 1, 1981 and amended April 1, 1984.

[8] Amendments to Tex. R. Civ. P. 168, effective February 1, 1973 and amended January 1, 1981. Tex. R. Civ. P. 168, as originally adopted September 1, 1962, contained no provision as to identity of expert witnesses. Tex. R. Civ. P. 186a, by amendments effective January 1, 1971, allowed for discovery of potential parties and by amendment effective February 1, 1973 allowed for discovery of persons having knowledge of relevant facts. Rule 186a was repealed, effective April 1, 1984.

[9] 590 S.W.2d 119 (Tex. 1979).

[10] 579 S.W.2d 455 (Tex. 1979).

[11] Id. at 456.

[12] See generally Minutes, Advisory Committee for the Supreme Court of Texas, May 4-5, 1979, Austin, pp. 49-118.

[13] 665 S.W.2d 439 (Tex. 1984).

[14] 632 S.W.2d 375, 384-85 (Tex. App.--Austin 1982).

[15] 665 S.W.2d at 444. The supreme court stated:

> Of the actions available to the trial court, exclusion of Baumann's testimony may have been the only remedy Cessna desired. It was not, however, the only appropriate means available to the trial court for dealing with Mrs. Smithson's violation of Rule 168. Therefore, the trial court's refusal to exclude the testimony was neither arbitrary nor unreasonable.

[16] 628 S.W.2d 90 (Tex. Civ. App.--Beaumont 1981, no writ).

[17] Id. at 93.

[18] Id. at 92.

[19] 660 S.W.2d 856 (Tex. App.--Waco 1983, writ ref'd n.r.e.).

[20] Id. at 858.

[21] 678 S.W.2d 639 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.).

[22] 675 S.W.2d 245 (Tex. App.--Corpus Christi), writ ref'd n.r.e. per curiam, 687 S.W.2d 299 (Tex. 1985).

[23] 679 S.W.2d 774 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.).

[24] 626 S.W.2d 120 (Tex. App.--Corpus Christi 1981, writ ref'd n.r.e.).

25 660 S.W.2d 856.

26 The court of appeals stated:

> The trial court apparently found that good cause existed for the admission of this expert testimony by the lawyer trying this case. We fail to see how appellee was surprised or harmed by this testimony as to attorney's fees because this attorney and his firm had represented Doyle at all times in this action. The petition prayed for recovery of attorney's fees, and at least a considerable portion of the attorney's work in this case was known to the insurance company.

679 S.W.2d at 778 (emphasis added).

27 686 S.W.2d 770 (Tex. App.--Fort Worth 1985, writ granted).

28 Id. at 772-73.

29 678 S.W.2d 650 (Tex. App.--Houston [14th Dist.] 1984), rev'd on other grounds, 692 S.W.2d 456 (Tex. 1985).

30 678 S.W.2d 723 (Tex. App.--Houston [14th Dist.] 1984, no writ).

31 620 S.W.2d 179 (Tex. Civ. App.--Waco 1981, no writ).

32 ___ S.W.2d ___ (Tex. App.--San Antonio 1984, writ requested). (No. 04-83-00452-CV, April 24, 1985).

33 634 S.W.2d 748 (Tex. App.--Houston [14th Dist.] 1982), rev'd on other grounds, 27 Tex. Sup. Ct. J. 491 (July 11, 1984).

5. FAILURE TO MAKE SUPPLEMENTATION OF DISCOVERY RESPONSE IN COMPLIANCE WITH RULE 166b. A party who fails to supplement seasonably his response to a request for discovery in accordance with paragraph 5 of Rule 166b shall not be entitled to present evidence which the party was under a duty to provide in a supplemental response to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter when the information required by Rule 166b concerning the witness has not been disclosed, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the offeror of the evidence. If the trial court finds that good cause sufficient to require admission exists, it must succinctly state the reasons for the determination of good cause on the record prior to admitting any such evidence.

COMMENT: Justice Kilgarlin makes the above recommended change in his paper "What To Do With The Unidentified Expert?" published on August 20, 1985. This suggestion merely states that the offeror of the evidence has the burden of establishing good cause and the trial court must state the basis of the finding of good cause on the record.

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RE: Administration of Justice Committee
Rule 452

Gentlemen:

Our efforts with West Publishing Company, National Office of State Courts and others has begun to bear fruit in furnishing information for the subcommittee and committee to consider in connection with possible revision of Rule 452. I would like to have some opinions of substance to report to the committee at the next meeting although I do not believe we can undertake an actual revision of the rule before receiving at least a consensus on an approach. From what I have heard and some of the enclosures indicate, it is my view that the question of "unpublished opinions" or "selective publication" may well become a public issue. Enclosed are three articles which were forwarded to me by the editorial department of West Publishing Company which surveys the available information with respect to the publication of opinions.

Please let me have your views at your earliest convenience.

Sincerely,

John Feather

cc: Mr. Hubert W. Green

SELECTIVE PUBLICATION: AN ALTERNATIVE TO THE PCA?

HARRY LEE ANSTEAD*

> "Of the cases that come before the court in which I sit, a majority, I think could not, with semblance of reason be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmances without opinion."
>
> Cardozo[1]

INTRODUCTION

The last few years have been a time of tremendous activity and change within Florida's appellate justice system. In 1977, the rules of appellate procedure were substantially revised.[2] In 1979, a fifth appellate district was created,[3] and the Industrial Relations Commission, the traditional reviewing tribunal for workers' compensation appeals, was abolished, and statewide jurisdiction for review of all workers' compensation appeals placed in the First District Court of Appeal.[4] Finally, and perhaps most significantly, a constitutional amendment passed in 1980 redefined the Florida Supreme Court's jurisdiction.[5] In addition to these structural and procedural changes, there was a substantial increase in the number of judges serving on the district courts of appeal,[6] and these courts substantially revised their internal procedures for processing appeals.[7] Almost all of these changes resulted from pressures created by the enormous increase in appeals filed during the 1960's and 1970's and from the consequent state appellate court overload.[8]

Appellate overload has existed for some time throughout the federal and state appellate systems, and many believe the problem has reached crisis pro-

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1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164 (1921) (referring to his service on the New York Court of Appeals). Cardozo subsequently increased this estimate to "nine tenths, perhaps more." B. CARDOZO, THE GROWTH OF THE LAW 69 (1924).

2. *See* Mann & Whitley, *Florida's New Appellate Rules*, 52 FLA. B.J. 120 (1978).

3. *In re* The Creation of the District Court of Appeal, Fifth District, 374 So. 2d 972 (Fla. 1979).

4. Miami-Dade Water & Sewer Authority v. Cornejo, 373 So. 2d 1278 (Fla. 1979).

5. FLA. CONST. art. V, § 5(b) (1980). *See generally* England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 1 (1980) (delineating the jurisdictional reforms).

6. *In re* Advisory Opinion to Governor, 374 So. 2d 959 (Fla. 1979).

7. *See, e.g., In re* Rule 9.331, 374 So. 2d 992 (Fla.) (per curiam) (adopting Florida Rule of Appellate Procedure 9.331, which allows district court en banc proceedings), *modified*, 377 So. 2d 700 (1979) (clarifying the earlier adoption of the en banc rule).

8. *See* REPORT OF THE COMMISSION ON THE FLORIDA APPELLATE COURT STRUCTURE at ii (March 15, 1979) (for the Florida Supreme Court, Tallahassee, Florida) (hereinafter cited as *Report*).

portions.[9] Naturally, with the increase in appeals filed there has been a corresponding rise in the number of appellate opinions issued. In response to complaints that the courts were producing more opinions than could be properly assimilated, and that many opinions held no precedential value, many jurisdictions have stopped publishing all of their opinions.[10] Although similar complaints from Florida's legal community have not surfaced publicly, in 1980 Chief Justice Alan Sundberg requested the Appellate Rules Committee of the Florida Bar Association to study the selective publication concept and to make recommendations concerning its adoption in Florida.[11] Subsequently, the committee voted unanimously to report its opposition to implementation of any form of selective publication.[12]

The purpose of this article is to examine the concept of selective publication as it has been utilized in the United States and to compare that practice with the current Florida opinion practice. This article focuses on the impact selective publication would have on the Florida appellate justice system. It concludes with a proposed solution to the problems of the burgeoning appellate workload and the proliferation of opinions, which integrates the selective publication concept with Florida's current opinion practice.

Selective Publication

The term selective publication refers to the practice whereby only certain appellate court opinions are published in an official reporter. For example, under such a practice, some Florida district court of appeal opinions, all of which the West Publishing Company presently prints in the Southern Reporter, would not be published. An unpublished opinion would remain part of the official court record and available to the public, but its distribution would be limited to the parties, the trial court, and others having a specific need. The appellate panel issuing the opinion, or some other body, such as the state's highest court, would determine whether the opinion would be published.

Most selective publication systems are embodied in court rules the highest court in the jurisdiction adopts.[13] Specific standards for publication vary widely.

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9. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Hopkins, *Appellate Overload: Prognosis, Diagnosis, and Antidote*, APPELLATE CT. ADM. REV. 35, 75 (1980-81).

10. Hopkins, *supra* note 9, at 39.

11. Minutes of the Appellate Rules Committee of the Florida Bar Association (June 26, 1981) (on file with the Florida Bar Association, Tallahassee, Florida) [hereinafter cited as Minutes].

12. *Id.*

13. One widely followed model rule provides:

> 1. Standard for Publication
>
> An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:
>
> a. The opinion establishes a new rule of law or alters or modifies an existing rule; or
>
> b. The opinion involves a legal issue of continuing public interest; or
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> c. The opinion criticizes existing law; or
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> d. The opinion resolves an apparent conflict of authority.
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> 2. Opinions of the court shall be published only if the majority of the judges

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Some rules simply provide that an opinion must have precedential value to be published, while others invoke a presumption against publication and require a case to meet strict and detailed threshold tests before publication is authorized.[14] Publication is typically reserved for opinions that establish a new rule of law; that alter, modify, explain, or criticize an existing rule of law; that resolve issues of continuing public interest; resolve conflicts of law; or that apply an existing rule of law to a novel factual situation.[15] Publication rules frequently provide that unpublished opinions, since they have been determined to be of no precedential value, may not be cited as precedent in any other case.[16] The primary purpose of these provisions is to discourage the private publication and use of unpublished opinions to defeat the original purpose of selective publication: reducing the body of case law that needs to be examined to determine the current state of the law.

Under the provisions of some selective publication rules, the panel deciding the case may decide to publish only a portion of an opinion.[17] The panel is also encouraged to make an early decision concerning publication, usually at the time the decision conference is held, so that the author may save time in drafting the opinion, safe in the knowledge that it is intended primarily to communicate the court's decision to the parties, and not to establish any lasting legal principle.[18] Some jurisdictions also authorize an independent body, in one instance a special committee of court administrators and judges, to make the publication decision.[19] Most states with intermediate appellate courts

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participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order an unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part will be published.
4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.
5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1978) [hereinafter cited as STANDARDS FOR PUBLICATION].

14. *See* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 45 U. CHI. L. REV. 573, 585-91 (1978).

15. *See, e.g.*, STANDARDS FOR PUBLICATION, *supra* note 13 (no publication unless certain threshold tests met).

16. *See, e.g., id.*

17. *See, e.g., id.*

18. *See, e.g., id.*

19. *See, e.g.*, N.J.R. GEN. APPLICATION 1:36.

limit selective publication to intermediate court opinions, while providing for publication of all opinions of the state's highest court.[20]

History of Selective Publication

Although the modern selective publication movement has its roots in the appellate boom of the past twenty years, the concept of selective publication is not new. Complaints concerning the proliferation of appellate opinions and the legal community's inability to deal with the resulting mass of published reports extend to the beginning of case law publication.[21]

Selective publication by private publishers remains the rule among civil law systems. No regular or official reporter systems similar to those of this country exist in those jurisdictions, and it is left to private legal publishers to choose which opinions are sufficiently noteworthy for publication. In practice, few opinions are actually published in those jurisdictions. Of course, these systems rely almost exclusively on detailed civil codes as the source of their law, while the common law systems rely substantially upon case precedent.[22] Even in England, however, where the common law was born, publication of appellate opinions has been the exception rather than the rule.[23] It was not until the mid-nineteenth century that selected English cases began to be reported in any regular manner, and even today only a small percentage of cases are published.[24] For example, the All England Law Reports, the largest collection of cases published in England, contains only about three volumes of cases each year.[25]

The reporting of appellate opinions in this country followed a pattern similar to the English practice through most of the nineteenth century.[26] Private reporters and publishers selected the opinions, or in many cases the portions thereof, reported in their publications. In the latter half of the nine-

20. *See, e.g.*, CAL. SUP. CT. RULE 976.

21. "Thus, as the rolling of a snowball, it increaseth in bulk in every age, till it becomes utterly unmanageable. . . . It must necessarily cause ignorance in the professors and and profession itself; because the volumes of the law are not easily mastered." D. MELLINKOFF, THE LANGUAGE OF THE LAW 141 (1963) (quoting Lord Hale).

22. *See generally* M. ZANDER, THE LAW-MAKING PROCESS 131-34 (1980) (quoting R. CROSS, PRECEDENT IN ENGLISH LAW 12-22 (3d ed. 1977)).

23. The determination of which cases to report is left to the publishers, who employ no precise standards for selecting publishable cases:

> What finds its way into the pages of the law reports is, however, to an extent a matter of happenstance. It has been estimated that only about a quarter of the decisions of the Civil Division of the Court of Appeal appear in the officially sanctioned Weekly Law Reports. About 70 per cent of those of the House of Lords and the Privy Council appear and about 10 per cent of those of the Court of Appeal, Criminal Division. The body of case law as reflected in the Weekly Law Reports grows at the rate of three volumes per year.

Id. at 130. The English have repeatedly rejected proposals that all opinions be officially reported, objecting that such a system would impose too much strain "upon an already overworked judiciary." M. WALKER & R. WALKER, THE ENGLISH LEGAL SYSTEM 142 (1976).

24. *See* M. ZANDER, *supra* note 22, at 146.

25. *Id.*

26. Reynolds & Richman, *supra* note 14, at 575-76.

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27. *Id.* at 576.

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31. *Id.*

32. *See* Jacobstein,
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33. *See* Newborn &
L. REV. 57, 59-60 (1978)

teenth century, federal and state appellate courts began officially reporting all of their opinions, and private publishers gradually lost control of the publication decision.[27] Today, West Publishing Company, the official reporter for the federal courts and most of the states, publishes virtually all of this country's appellate opinions and many federal trial court opinions as well.[28]

In contrast to the unified court systems of most countries, the United States has a bifurcated judicial system. In addition to the federal judicial system, each state has a judicial system complete with its own appellate courts. Despite their separate existence, the state and federal systems generally share the same legal traditions and a great deal of uniformity in their laws. As a result, a legal researcher may have to search for published authority not only from his own state, but also from other states and the federal courts to properly answer a legal problem put before him.[29]

As our country has grown, activity in our appellate courts has more than kept pace. Literally millions of appellate opinions have been published. Since 1897, West Publishing Company alone has published 2,331,781 opinions.[30] In 1981, West published 266 volumes of federal and regional reports containing 54,104 opinions.[31] Indexing and organizing this huge body of case law, so that pertinent authority can be efficiently retrieved, results in obvious difficulties. To meet the legal community's immediate need to know the current law, new publications, usually focused on one or more subject areas, have been developed. These publications supplement the large array of reports, digests, treatises and encyclopedias that have traditionally been relied upon to organize the body of law into usable form.[32] Modern technology has also moved into the field with the development of computer assisted storage and retrieval systems.[33] Notwithstanding these attempts to confine the onslaught of published opinions to manageable bounds, the modern legal researcher faces an enormous and expensive task in searching for opinions with precedential value.

Even before the recent appellate explosion, some members of the legal community were critical of the blanket publication of all appellate opinions regardless of precedential value. One of the earliest and strongest criticisms came from Dean Roscoe Pound, who observed:

> After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelf room should be devoted to the perpetuation of

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27. *Id.* at 576.

28. *Id.*

29. For example, states recently adopting the Uniform Commercial Code frequently look to decisions of other states for guidance in construing the Code provisions.

30. Letter from Donna Bergsgaard, Manuscript Department of West Publishing Company to the author (March 19, 1982) (confirming a previous telephone interview).

31. *Id.*

32. *See* Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 795-96 (1975).

33. *See* Newbern & Wilson, *Rule 21: Unprecedent and the Disappearing Court*, 32 ARK. L. REV. 37, 59-60 (1978).

> what for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious.[34]

Others, including members of the judiciary, echoed Pound's sentiments;[35] however, no effective movement to curtail the proliferation of appellate opinions began until 1962, when Eugene Prince published an article in the *American Bar Association Journal* assailing the continuing practice of publishing all appellate opinions regardless of precedential value.[36]

Prince's article has generally been credited with giving birth to the modern movement toward selective publication. Prince reasoned that practical difficulties mandated reform of the continued publication of all appellate opinions. He contended the time and expense that members of the legal community must devote to keeping abreast of the law in such a system would, if indeed it had not already, ultimately become prohibitive. He further noted that most decisions involve obvious points of law, the outcome of which is important only to the interested parties.[37] Although the justification for se-

34. K. LLEWELLYN, APPELLATE JUDICIAL OPINIONS 309 (1974) (quoting R. Pound).

35. *See id.* at 309-10.

36. Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134 (1962).

37. Due to the importance of Prince's views, it may be best to consider his views untarnished by translation:

> American printed judicial decisions today number about two and a quarter million. The rate of increase is sharply, steadily and ominously up. The fifty years from 1790 to 1840 produced 50,000 reported decisions; the next fifty years, ending in 1940, 1,250,000; add six or seven hundred thousand more for the past twenty years, and we have two and a quarter million plus.
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> . . .
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> This state of affairs is simply preposterous. It has already impaired and must eventually destroy the reason for our present system. The indemnite preservation of reported decisions is justified largely on the ground of certainty—so that the lawyer can advise his client. When books get so numerous that the lawyer cannot afford to buy, house or read them or reconcile conflicts therein, the basic purpose fails.
>
> It must be recognized that there is often good reason for opinions of some length even in simple cases. The normal litigant cares nothing about the impact of the opinion in his case on the future of law. Nor is he interested in the merit of the opinion as a legal essay. He is interested in the result; and, after all, the court's primary duty (exceptions to be recognized in a few fields when basic questions of great public interest are involved) is to settle private disputes by deciding cases. Development of the law is incidental.
>
> If the decision is adverse, the loser wants to know why, and while no opinion is ever satisfactory to the loser, his respect for the courts will be less impaired if the opinion gives a basis for assuring him that his points were fairly considered. This is essential in all or almost all criminal cases and many civil ones, and it may take a lot of pages.
>
> But if the opinion involves no new point of law, if the court's discussion proceeds on settled legal principles, or holds upon a commonplace factual situation that the evidence is sufficient to support the findings, why should that opinion go beyond the parties or the court of further review, if such there is? Both the parties and the reviewing court are entitled to the reasons for a decision; hence the answer to the problem before us is not abolition of written opinions . . . considered. . . . Why should the issuing court not conscientiously exercise its right to say "This opinion is rendered for the benefit of the parties and reviewing courts; it is not to be officially reported nor cited as a precedent?"

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40. *Id.*

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42. Smith, *The*
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44. Shuchman
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45. *Id.*

lective publication has since been expanded, Prince's views remain the cornerstone for most selective publication systems.

In 1964, the California Supreme Court responded to Prince's call for reform by becoming the first state high court to adopt a selective publication rule applicable only to its intermediate appellate courts. By 1975, the California district courts of appeal were publishing only sixteen percent of their opinions.[38] Also in 1964, the Judicial Conference of the United States recommended that federal courts publish only opinions with general precedential value.[39] Subsequently, all federal circuit courts of appeal have adopted the practice of selective publication.[40]

Perhaps the single greatest impetus to the selective publication movement was its 1973 endorsement by the Advisory Council on Appellate Justice.[41] The Council, composed of distinguished lawyers, law professors, and judges,[42] added judicial time savings as a substantial justification for selective publication. The Council suggested that appellate judges should identify cases which do not merit published opinions; draft shorter, less polished opinions on such cases; and utilize the time saved to resolve the more difficult cases.[43]

Although judicial economy was not Prince's focus, it has been a major reason why selective publication has been embraced by many members of the overworked appellate judiciary. Appellate judges generally regard opinion writing as their most laborious task.[44] One study concluded opinion writing consumes thirty percent of an appellate judge's time.[45] This figure appears especially significant when one considers that a busy appellate judge must annually read thousands of briefs and memoranda; listen to oral arguments; confer with

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The truth is that opinions important to the parties but not to the law should not go into the permanent books. The fine thought which has expressed itself on our subject is unanimous on this point and is unanimous also that the courts, if they will, can remedy the situation so far as concerns judicial opinions.

Id. at 154-55.

38. B. WILKIN, MANUAL ON APPELLATE COURT OPINIONS 21 (1977).

39. *See* Reynolds & Richman, *supra* note 14, at 577.

40. *Id.*

41. *See* STANDARDS FOR PUBLICATION, *supra* note 13.

42. Smith, *The Selective Publication of Opinions: One Court's Experience*, 27 ARK. L. REV. 26, 28 (1973).

43. In remarks directed to the Ninth Circuit Judicial Conference, one commentator stated:

> [T]he unpublished opinion is faster and easier for the court. Since it is intended primarily for the litigants and for the instruction of the trial court, all of whom know the matter to start with, considerably less thorough exposition is required. Since the opinion will not be cited as authority, there need be less pruning and polishing. The premium on research and erudition goes down, the premium on simple exposition goes up.
>
> Assuming that the unpublished opinion has some text and is not a simple "affirm" or "reversed," the question arises as to precisely how much time is truly saved. Without a time study one cannot know this; from my own conversations, I estimate that the time saving is about half.

Frank, *Remarks Before the Ninth Circuit Judicial Conference*, JUDGES' J. Winter 1977, at 11.

44. Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L.J. 195, 200 (1980).

45. *Id.*

colleagues and prepare review records; conduct research; keep abreast of current law; review, rule, and prepare orders on motions; and supervise his staff.[46]

Selective publication has been endorsed by an impressive array of practicing attorneys, members of the judiciary, and appellate scholars.[47] The American Bar Association's Commission on Standards of Judicial Administration has endorsed the concept in its *Standards Relating to Appellate Courts*.[48] Today, in addition to all federal circuits, thirty-two states and the District of Columbia have adopted some form of selective publication.[49] Typically in those jurisdictions, no more than fifty percent of opinions are published.[50] The majority of the states that have not adopted the practice have no intermediate appellate courts and enjoy a modest volume of appeals.[51]

Criticisms of Selective Publication

Although selective publication is now accepted in the vast majority of jurisdictions, the practice has been the subject of substantial controversy. Some commentators argue all appellate opinions have precedential value, while others criticize selective publication's various practical aspects or effects. Among other complaints, critics claim the practice undermines the principle of stare decisis; denies publication to many opinions of precedential value; reduces judicial accountability, public confidence in the courts and the quality of appellate review; and ignores the impracticality of the no-citation rule.

Proponents of the stare decisis principle claim all cases have some precedential value, although some may be of more value than others.[52] Under our

46. For instance the current appellate caseload recommended by the Florida Supreme Court is 250 assigned cases per judge. Judges sit in panels of three, therefore the true caseload of a judge under such a standard is 750 cases annually. If two briefs and one memorandum were involved in each case the judges would read 2250 documents annually. For discussion of this standard, see KEITH, *supra* note 8. One widely cited treatise on appellate practice suggests a maximum caseload of 100 assigned cases per judge. See R. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 143 (1976).

47. Smith *supra* note 42.

48. STANDARDS RELATING TO APPELLATE COURTS § 5.37(2) (1977) (approved draft) [here cited as APPELLATE STANDARDS].

49. Those states employing selective publication are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. This list was compiled from responses to a survey conducted by the author of appellate judges in each state [hereinafter cited as Survey].

50. *See generally* Reynolds & Richman, *supra* note 14, at 589.

51. The states without selective publication are Alabama, Connecticut, Florida, Georgia, Idaho, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, Vermont, West Virginia, and Wyoming. *See* Survey, *supra* note 49.

52. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581 (1978). An English response to computerized research may also apply here:

> It proceeds upon the specious assumption that all judgments are worthy of preservation and citation, which is manifestly not the case. If anything, it would tend to encourage the trends adverted to earlier—namely the obsessive citation of case-law as an end in itself and the unintelligent search after exact precedent.

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common law tradition and the principle of stare decisis, like cases are to be decided alike. By this process, the resolution of individual cases gradually refines and shapes the law. Under this view, opinions are like the tiny dots in a child's connect-the-dots picture puzzle, each one helping to flesh out a more distinct image of the law: as more are connected, the emerging image becomes sharper; if some dots are left out, the picture is blurred.

Selective publication advocates concede cases are seldom exactly alike, but respond that the issue is whether the distinctions between them are really material or important to legal development.[53] Once a legal rule or principle is well established, repeated application to similar factual settings does little to sharpen the law's image. For example, in a petition for post-conviction relief in Florida, a defendant generally may not raise issues that could have been raised in a plenary appeal from his original conviction.[54] Defendants nevertheless continue to raise such issues, trial courts continue to deny their petitions, and defendants continue to appeal these rulings. It would appear to be of little interest to anyone other than the parties involved to point out repeatedly that such issues should have been raised on plenary appeal. The underlying question is whether all opinions are of sufficient value to justify the same writing, publishing, indexing, distributing, storing, and researching costs. In other words, the outcomes of cases controlled by well-established legal principles may not add enough to the body of law to justify widespread distribution.

Critics of selective publication invariably cite instances where a case of apparent precedential value was not selected for publication.[55] Particular unpublished opinions have been carefully dissected to demonstrate their substantial precedential value.[56] These commentators contend that even if some opinions contain no precedential value, many valuable opinions may be lost to the body of case law through adoption of inadequate selective publication criteria or erroneous application of such criteria. Systematic studies of judicial practice, however, have indicated that judges usually adhere to standards for publication.[57] Defenders of selective publication concede that mistakes will occur but assert that judges will err no more often in determining precedential

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M. ZANDER, *supra* note 22, at 151 (quoting Munday, *New Dimensions of Precedent*, 1973 J. SOC'Y. PUB. L. TCHRS. 201.

53. *See* Smith, *supra* note 42, at 28.

54. Foster v. State, 400 So. 2d 1 (Fla. 1981).

55. *See* Gardner, *Ninth Circuit's Unpublished Opinions*, 61 A.B.A. J. 1224 (1975). The celebrated Marvin palimony case was reviewed in the California District Court of Appeal after retrial and reversed in an opinion not designated for publication. 7 FAM. L. REP. (BNA) 2661 (1981).

56. *See, e.g.*, Reynolds & Richmann, *supra* note 14, at 607-11.

57. Mueller, *Unpublished Opinion Study*, STATE CT. J., Summer 1977, at 23. This study of some 1,600 unpublished opinions concluded that California Courts of Appeal follow the publication criteria in most cases. *Id.* Another study observed: "Our examination of the circuit's work has provided little to justify major concern about the problem of suppressed precedent." Reynolds & Richman, *supra* note 14, at 631. *See also* Frank, *supra* note 42, at 25-26 (judges follow publication criteria in most cases with only occasional mistakes).

value than in ruling on the many other complex and important issues before them.[58]

Some jurisdictions have revised their standards to increase opinion publication and have also made liberal provisions for all interested parties to petition the court for publication.[59] In most instances, however, standards for publication remain unchanged. Indeed, the high degree of uniformity among the standards adopted in the various jurisdictions may reflect a nationwide consensus concerning their adequacy.

Perhaps the major criticism of selective publication rules involves the provision that prohibits the citation of unpublished opinions. One federal trial judge stated he thought it ridiculous that he could give weight to unsigned law review articles written by law students, but could not cite opinions rendered by his own circuit court of appeals because the circuit forbids reliance on unpublished opinions.[60] Others complain of frustration after locating unpublished opinions of precedential value unavailable for citation[61] or point out conflicts within the same court that remain unresolved because one of the opinions is unpublished and therefore unavailable for citation.[62] These critics contend the legal system's credibility will be undermined if an actual case on point, although unpublished, cannot be cited.[63] This practice, it is asserted, will lead to conflicts, inconsistencies, and ultimately disrespect for the judiciary. Hypocrisy will ultimately result if the system refuses to acknowledge existing precedents simply because they are not officially published.[64] This argument is also partially predicated on the claim of judicial inability to correctly determine which cases are without precedential value. Critics who raise this argument identify unpublished opinions incorrectly chosen for nonpublication, which appear to conflict with published opinions of the same court.

One purpose of the no-citation provision is to prevent institutional advocates and others with greater access to unpublished opinions from gaining an advantage over less-privileged litigants.[65] While forbidding citation neutralizes

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58. Goldfold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863 (1980).

59. For examples of several recommendations for reform of California's selective publication practice have been made in the REPORT OF THE CHIEF JUSTICE'S ADVISORY COMMITTEE FOR AN EFFECTIVE PUBLICATION RULE (1979) [hereinafter cited as CALIFORNIA REPORT].

60. *See* Frank, *supra* note 43, at 12.

61. *See* Gardner, *supra* note 55, at 1225.

62. *Id.* at 1226.

63. *Id.* at 1227; 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).

64. Gardner, *supra* note 55, at 1227-28.

65. In a letter written while she was a deputy public defender, present California Supreme Court Chief Justice Rose Bird criticized the limited publication rule asserting:

> The basic unfairness of Rules 976 and 977, the tremendous advantage they afford the State in criminal appeals, the dangerous effect on the doctrine of stare decisis and the power of the courts combined with the pernicious effect on the right of the public and the bar of this state to know the decisions of the appellate courts

this advantage somewhat, critics point out the reasoning in an unpublished opinion may still be used by those who have access to such opinions. Conversely, if the unpublished opinion is truly based on well-established legal principles, the court's reasoning is unlikely to aid in the resolution of other cases.

Some jurisdictions have adopted rules allowing limited citation of unpublished opinions when copies are furnished to the court and opposing counsel well in advance of the case's disposition.[66] Other jurisdictions, however, have tightened their procedures to prevent widespread distribution of unpublished opinions.[67] The vast majority of jurisdictions continue to bar citation of unpublished opinions because they believe that permitting citation would lead to private publication of these opinions, which would undermine the original purpose of selective publication.[68]

Some authorities who originally supported the no-citation practice have changed their minds after observing it in action. For example, the ABA's Commission on Appellate Judicial Standards divided over the issue and adopted a model selective publication rule that permits the citation of unpublished opinions in certain instances.[69] Others, concerned about the no-citation rule's consequences, have completely withdrawn their support for the concept of selective publication.[70] These authorities still maintain routine cases should be identified and treated separately, but they propose alternative methods for doing so.[71]

One important function of appellate opinion publication is to provide the public and the legal community with a means to observe and to evaluate the work of courts and of individual judges. Critics contend that limited publication reduces the opportunities these groups have to assess the judiciary's work, which reduces accountability and fosters poorer judicial performance.[72] It is asserted that judges writing opinions they know will not be published may not give proper care and attention to a case, and the resulting decision and its justification will suffer qualitatively.

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compel this writer once again to strongly dissent from any rule which recognizes the non-publication of appellate opinions.

Los Angeles Metropolitan News, Sept. 21, 1981, at 9.

66. *See, e.g.*, APPELLATE STANDARDS, supra note 48, § 3.37(c). The United States Fifth Circuit Court of Appeals has a limited citation rule, which permits the citation of unpublished opinions if a copy is attached to the briefs. 5TH CIR. R. 25.4. In a telephone interview with the author, Fifth Circuit Chief Judge Charles Clark noted that unpublished opinions are rarely cited, unofficial publications of unpublished opinions have not developed, and, in general, the circuit has not had a problem with the rule. A similar view was expressed to the author by a former member of the Fifth Circuit, John C. Godbold, now chief judge of the Eleventh Circuit.

67. *See, e.g.*, Frank, *supra* note 13, at 11 (discussing the tightening of Fourth Circuit procedures after the discovery that unpublished opinions were being circulated).

68. *See, e.g.*, CALIFORNIA REPORT, *supra* note 50, at 17 (recommendation that a modified nocitation rule be retained).

69. *See* APPELLATE STANDARDS, supra note 48, § 3.37, commentary at 52.

70. R. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 46, at 18-19.

71. *Id.*

72. *See* Reynolds & Richman, *supra* note 14, at 598.

Others contend judges may abuse the process by avoiding controversial issues through use of unpublished opinions. Even if not abused, it is asserted the system may give this impression, thereby damaging public confidence in the judicial process.[73] Critics argue appellate courts may appear to act like certiorari courts with discretionary authority to review, instead of giving litigants with a right to appeal full review.[74] Another concern is that courts may develop a routine practice of treating certain categories of cases that appear to yield a lower percentage of published opinions with less care. Litigants with valid claims falling into these categories may be prejudiced if courts view their cases with preconceived notions that such cases usually result in a decision without precedential value.[75]

Some assert that by deciding early that a full opinion is not needed, the court may deprive a litigant of the kind of careful review accompanying the drafting of a full opinion, which forces the drafter to substantiate his decision with sound reasoning. Some evidence indicates that the quality of opinions selected for nonpublication in some jurisdictions is so low it is equivalent to no opinion at all.[76] Opinions that inform the parties the court has reviewed the record, read the briefs, considered the arguments but found no reversible error, are clearly tantamount to no opinion. Such opinions, however, are not the type of unpublished opinions that selective publication advocates originally contemplated.[77]

Responding arguments point out an abundance of published opinions will be available to evaluate the work of the court and the individual judges and that unpublished opinions will remain public documents available for scrutiny. It is asserted that judges who are entrusted to make life and death decisions can also be relied upon to keep the decision process separate from the publication process. In addition, the judicial time saved by composing fewer published opinions offsets any loss suffered in the quality of opinions rendered in routine cases chosen for nonpublication.[78] Moreover, since unpublished opinions have, by definition, no precedential value, they need not meet the quality standards applicable to opinions with substantial precedential consequences.[79]

Opinion Practice in Florida

Florida's appellate courts are deciding cases at a rate higher than any other jurisdiction of comparable size. A recent national survey cited Florida's intermediate appellate judges as having the highest caseload in the United States.[80] In 1980, the district courts issued some 7,205 decisions. Including

73. *See* 64 A.B.A. J. 318 (1978).
74. *See* Reynolds & Richman, *supra* note 14, at 625-26.
75. *Id.* at 621. Post conviction relief cases and social security cases, among others, are most often cited as cases falling into this category. *Id.*
76. *See* Reynolds & Richman, *supra* note 14, at 603.
77. *See* B. Wilkins, *supra* note 58, at 259.
78. *See* Goldfarb, *supra* note 38, at 864.
79. *See* Smith, *supra* note 42, at 80-81.
80. *See* Hopkins, *supra* note 9, at 85.

Florida Supreme Court decisions, the total appellate decisions for 1981 approximated 9,000.[81] Florida's appellate filings are almost as great as those in California, a state with twice Florida's population and many more appellate judges.[82] Even with the recent addition of another appellate district and additional judges, the intermediate appellate caseload remains high and with the increasing growth in the state it seems unlikely that this trend will subside.[83]

In view of this proliferation, it may appear curious that the Appellate Rules Committee rejected any form of selective publication. After all, selective publication was adopted in most jurisdictions as a means of relieving both the workload of an overworked judiciary and the legal community from the crush of opinions flowing from the courts and appeared to be a means to relieve Florida's overburdened appellate justice system. The committee minutes indicate the primary rationale for the resounding rejection of selective publication was that Florida already had an effective means of dealing with the same problems through an alternative system of selective opinion writing.

Florida courts dispose of cases with no precedential value by issuing per curiam affirmances without opinion.[84] These decisions are commonly referred to as PCA's, the initials for the only words that appear in the opinion: per curiam, affirmed. In 1981, the district courts of appeal issued per curiam affirmances in 4,133 of the 8,478 cases decided.[85] Since these decisions have no accompanying written opinion, no reason exists to limit their publication.[86] Although the committee implicitly concluded that Florida's PCA practice was a more effective remedy for dealing with the problem of the proliferation of appellate opinions and for more efficiently utilizing judicial time, the meeting's minutes indicate the propriety of using the PCA was not discussed.

History of the PCA in Florida

The district courts of appeal were created in response to Florida Supreme

81. These figures are contained in reports filed by each district court with the Florida State Court Administrator's Office in Tallahassee, Florida.

82. In 1979, 12,357 cases were filed in California courts of appeals. Hopkins, *supra* note 9, at 35 (citing 1979 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA 47). In 1979, 9,759 cases were filed in Florida's district courts of appeal. 1980 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF FLORIDA 27. In 1980, the figure increased to 11,801. Telephone interview with Bill Salocker, Judicial Analyst, Florida Office of State Courts Administrator (June 3, 1982).

83. *See supra* note 46.

84. *See* Minutes, *supra* note 11. Most of the objections to selective publication discussed above were also raised at the meeting. Concern was also expressed that adoption of the practice would result in greater appellate delay since it would require written opinions in cases currently decided without opinion. Judges at the meeting feared adoption of the practice would lead to a mandatory requirement to write an opinion on every issue raised in every case. *Id.*

85. *See supra* note 81.

86. Since there are presently no constitutional, statutory or rule provisions in Florida mandating publication of all appellate opinions, the courts may already possess the power to limit publication. The courts have not limited publication, however, and an agreement between the Florida Supreme Court and West Publishing Company requires publication of all opinions routinely furnished to West for publication. *See* Minutes, *supra* note 10.

Court complaints that the court was overworked and spending too much time on routine error correction, as opposed to policy and law-making.[88] The state was originally divided geographically into three appellate districts. As the volume of appeals increased, additional districts were created in 1965 and 1979.

The pressures created by sharp increases in workload prompted the district courts to begin searching for more efficient methods of handling their caseloads. The number and responsibility of judicial aides was increased. Time for oral argument was reduced or dispensed with altogether. Motion practice was curtailed, and eventually oral argument on motions was virtually eliminated. Written opinions grew shorter, and the number of brief per curiam opinions increased. Moreover, the number of cases decided with no opinion at all increased sharply.[89]

Contrary to present practice, the Florida Supreme Court often used the PCA before the district courts were created.[90] The degree of reliance on the PCA, however, increased dramatically in the district courts. In 1958, the first full year district courts operated, 347 PCAs were issued; by 1971 this figure had grown to 4,139, an approximate increase of twelve hundred percent.[91] Although no written standards exist for determining whether a case should be disposed of without an opinion, Florida appellate judges apparently utilize standards similar to those employed for selective publication.[92]

87. *See* England, *supra* note 5, at 152.

88. *See* REPORT, *supra* note 8.

89. Wiles v. State, 159 Fla. 638, 638, 32 So. 2d 273, 273 (1947) (stating in review of a death sentence "that an opinion in this case repeating the several enunciations which we have made in former cases would be of no service to the Bench or Bar"), *cert. denied*, 333 U.S. 861 (1948); Thalheim v. State, 38 Fla. 169, 219, 20 So. 938, 950 (1896) (refusing to pass on assignments of error that did not require serious consideration).

90. *See infra* app. A, figure 2. Statistics were secured from the state Court Administrator's office, Tallahassee, and from the annual reports of the Judicial Council of Florida on file therein. *See supra* note 81.

91. *See* Foley v. Weaver Drugs, Inc., 172 So. 2d 907 (3d D.C.A.) *aff'd*, 177 So. 2d 221 (Fla. 1965). The following excerpt from the *Foley* decision delineates the unwritten standard that Florida appellate courts appear to follow when determining whether to issue a PCA opinion:

> Omitting opinions in a 'minority of affirmances is customary with appellate courts. It is a useful, if not essential practice of a busy appellate court such as this, where the judges each are faced with a need to write more than a hundred opinions annually. Thus, opinions generally are dispensed with upon affirming cases which do not involve new or unusual points of law, or which turn on facts to which established rules of law are applicable, or where a full or adequate opinion has been supplied by the trial judge; and where the writing of an opinion would be without useful purpose, serving only to satisfy the parties that the court adverted to the issues and gave them attention, and to add needlessly to an already excessive volume of opinions.

Id. at 908.

Illustrating another example of the PCA standard, this writer recently received a memorandum from another member of a panel assigned to review the amount of alimony awarded in a divorce case. At the end of the detailed memorandum, which reviewed the facts of the case and the pertinent statutes and case law, my colleague wrote: "I think we should PCA this case. It is not unique. In viewing the four pages of cases cited in the husband's brief, I do not think we have to add another to the list."

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Opinion practice among the various district courts is not uniform. In 1981, the busiest district court, the First, decided 1,277 cases by use of the PCA.[92] In contrast, the Third District issued only 339 PCAs.[93] An obvious contrast in opinion practice and use of the PCA is reflected in the dispositions in the Second and Third Districts. In 1981, while the Third District decided 1,527 cases by opinion and 339 cases by PCA, the Second District, in almost complete reversal of the Third's practice, decided 1,200 cases by PCA and 455 cases by opinion.[94] Significantly, however, 765 of the Third District's opinions were per curiams, many of the brief variety obviously intended principally for the benefit of the parties.[95] Although most PCAs are issued with the concurrence of all three panel members, numerous two-judge majorities publish PCAs with an accompanying special concurrence or dissent. PCAs without concurrence or dissent are published tabularly in the Southern Reporter.

Criticisms of the PCA Practice

Most appellate authorities strongly condemn appellate court decisions without opinion:[96]

> The integrity of the process requires that courts state reasons for their decisions. Conclusions easily reached without setting down the reasons sometimes undergo revision when the decider sets out to justify the decision. Furthermore, litigants and the public are reassured when they can see that the determination emerged at the end of a reasoning process that is explicitly stated, rather than as an imperious ukase without a nod to law or a need to justify. Especially in a case in which there is no oral argument, the opinion is an essential demonstration that the court has in fact considered the case.[97]

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92. *See infra* app. A, figure 1. The First District Court of Appeal has exclusive jurisdiction over all workers' compensation cases in the state, as well as normal appellate jurisdiction over a wide geographic area. *See supra* note 3 and accompanying text.

93. *See supra* app. A, Figure 1.

94. *See id.*

95. *See id.* For an example of the Third District's per curiam practice, examine the several opinions at 40 So. 2d 171-74 (1981).

96. The practice has been "uniformly condemned by commentators, lawyers and judges." Reynolds & Richman, *supra* note 63, at 1174.

97. F. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 46, at 31-32. These commentators provided further criticisms of PCA practice:

> The pressures of heavy workloads have led some appellate courts to overreact by curtailing too sharply the explanation that accompanies the decision. Some have adopted the practice of issuing curt or perfunctory rulings that say nothing more than "Judgment affirmed." These and other cryptic styles of judgment orders tend to give an impression of an imperious judiciary that acts without the need to justify its judgment. They should not be used.

Id. Interestingly, and perhaps inconsistently, the authors recognize an exception in the case of sentence appeals. *Id.* at 102.

The ABA's STANDARDS RELATING TO APPELLATE COURTS mandate that courts state their grounds for decision in every case. APPELLATE STANDARDS, *supra* note 48, § 3.36(b). The rationale of the drafters of this rule is further explained in the commentary to standard 3.36(b):

> Every litigant is entitled to assurance that his case has been thoughtfully considered.

It is difficult to deny that any decision affecting others is more acceptable when accompanied by some reason for the decision. Whether it be a parent scolding a child or a court rendering a decision, an element of fairness attaches when the decision-maker's rationale is stated. Prince noted "while no opinion is ever satisfactory to the loser, his respect for the courts will be less impaired if the opinion gives a basis for assuring him that his points were fairly considered."[98] Supporters of selective publication are quick to distinguish that practice from the no-opinion practice by noting that an unpublished opinion still demonstrates to the litigants that the decision was reached through a reasoned process.[99]

Many regard opinion preparation as the single greatest quality control device on the appellate decisional process. The reduction to writing of reasons for a decision is viewed as a guarantee that valid reasons exist for the decision. Simply stated, a decision that is not predicated on reasons that can be articulated in writing should not be rendered.[100] Exposing those reasons in an opinion allows others to check the court's work and allows the court to correct errors discovered through this process. This quality control device is completely lost under the PCA practice. A major concern is that judges who do not express reasons for their decisions in written form will err more often than those who are required to provide reasons.

The decision of an appellate court to write an opinion became especially important to Florida litigants with the passage of constitutional amendments in 1980, which substantially redefined and limited the Florida Supreme Court's jurisdiction to review district court of appeal decisions. The amendments, in effect, limited the supreme court's jurisdiction to matters of statewide policy and left the matter of individual appellate justice to the district courts of appeal.[101]

The public, also, is entitled to assurance that the court is thus performing its duty. Providing that assurance requires that the decision of every case be supported at least by reference to the authorities or grounds upon which it is based.

Id. commentary at 69.

98. *See supra* note 37.

99. ABA TASK FORCE ON APPELLATE PROCEDURE, EFFICIENCY AND JUSTICE IN APPEALS: METHODS AND SELECTED MATERIALS 115 (1977).

100. Two oft-quoted views on this quality control aspect of opinion writing state:

> In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.

Traynor, *Some Open Questions on the Work of State Appellate Courts*, 21 U. CHI. L. REV. 211, 218 (1957).

> When a judge need write no opinion, his judgment may be faulty. Forced to reason his way step by step and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away. Holmes said that the difficulty is with the writing rather than the thinking. I am sure he meant that for the conscientious man the writing tests the thinking.

Lasky, *A Return to the Observatory below the Bench*, 19 SW. L.J. 579 (1965).

101. *See* England & Williams, *Florida Appellate Reform: one Year Later*, 9 FLA. ST.

The majority of cases accepted by the supreme court for review are predicated on claims of conflict among opinions of the different district courts of appeal.[102] As the recent amendments have been construed, review of a district court decision which is not accompanied by an opinion is impossible.[103] The decision must "expressly and directly" conflict with the prior case and the conflict must appear on the face of the opinion.[104] Other aspects of the supreme court's present jurisdictional scheme also require express holdings by the district court.[105] An express conflict or other holding can hardly appear on the face of a PCA. This limited review[106] contrasts sharply with the court's

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U.L. REV. 221, 224 (1981). The former Chief Justice of the Florida Supreme Court and his co-author observed:

> [T]he major changes instituted by the 1980 amendment were the elimination of direct appeals to the Supreme Court from trial courts in cases other than death penalties and bond validations, the refinement of the Supreme Court's discretionary jurisdiction to eliminate the review of nonprecedential district court decisions, and the elimination of almost all direct appeals to the court from administrative agencies. The intended overall effect of these amendments was to limit the Supreme Court to policy matters of statewide significance, leaving to the district courts of appeal the dispensation of appellate justice to individual litigants.

Id.

102. Statistics from the State Court Administrator's Office reflect that 531 conflict certiorari cases were filed in the Florida Supreme Court in 1981, the largest number in any single category. Interestingly, the next highest category was Florida Bar matters with 265 cases.

103. *See, e.g.*, Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

104. *Id.* at 1359.

105. Other aspects of the supreme court's present jurisdictional scheme also require an express holding by the district court. Supreme court jurisdiction to review decisions of the district courts is regulated by FLA. R. APP. P. 9.030 and includes review of:

> [D]ecisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
>
> ....
>
> [D]ecisions of district courts of appeal that:
>
> (i) expressly declare valid a state statute;
>
> (ii) expressly construe a provision of the state or federal constitution;
>
> (iii) expressly affect a class of constitutional or state officers;
>
> (iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;
>
> (v) pass upon a question certified to be of great public importance;
>
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal; ....

FLA. R. APP. P. 9.030(a)(2)(A)(ii) & (a)(2)(A)(i) to (vi).

106. This limited review has prompted one appellate judge to publicly announce his refusal to issue PCA opinions in the future. *See* Davis v. Sun Banks, No. AI-261, slip op. at 2 (Fla. 1st D.C.A. 1982). In this appeal from a workers' compensation order, Judge E. Richard Mills stated he would render no PCA opinions in the future. Basing his rationale on complaints received regarding the practice, Judge Mills vowed to write a short opinion in each case assigned to him that will briefly delineate the reasons for affirmance. By outlining each decision's rationale, Judge Mills seeks to preserve possible remedies from adverse decisions for consideration on appeal. *Id.* This decision has already prompted practitioner response. In a recent issue of Florida Bar News, two practitioners wrote letters to the editor discussing Judge Mills' opinion. The first stated:

> As an attorney who does a considerable amount of appellate practice and who has been frustrated from time to time by P.C.A. opinions, I was enormously pleased to read of the position taken by Judge E. Richard Mills of the First District Court of

practice under the prior jurisdictional scheme whereby it would review cases based upon its examination of the record and the issues presented in the district courts regardless of the presence or absence of an opinion.[107] The bottom line for litigants is that the existence of some opinion has now become essential for review in the supreme court.[108]

Although Florida judges apparently utilize criteria similar to that used in selective publication jurisdictions for determining when a PCA should be issued, many opinions are still written and published that are of little or no precedential value. By agreement between the Florida Supreme Court and West Publishing Company, all appellate decisions are routinely reported in the Southern Reporter. Florida's appellate courts issued 4,808 written opinions in 1981,[109] almost nine percent of the total number of opinions West published from all of the jurisdictions in the United States. Of the 4,345 opinions the district courts issued in 1981, 1,026, or forty-four percent, were per curiam opinions.[110] Although many of those were opinions of precedential value, many others would not have been chosen for publication under selective

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Appeal who indicates that he shall not be rendering any per curiam affirmed opinions henceforward.

The position he takes of at least rendering a terse opinion setting forth basic reasons presumably accompanied with a cite is sound. The professional courtesy rendered to the parties is obvious and if the position of the appellate court is sound and supported by authority it only helps to enlighten the parties and build confidence in the appellate process.

The prolific use of per curiam affirmed opinions has weakened confidence in the appellate process and has resulted in situations where conflict could be shown to exist in the record, but where resolution of that conflict is now prohibited.

I heartily support Judge Mills' position and encourage other judges of the district courts of appeal throughout the state to please adopt the same position.

Fla. B. News, May 15, 1982, at 2, col. 1.

The second said:

I have read with great interest in the May issue of the *Bar News* the article concerning Judge Mills' recent opinion in *Davis v. Sun Banks* (No. AF 291). His forthright decision to judicially advise litigants will perform a much needed service to the parties and the Bar. In our humble opinion it will also increase respect for the judiciary in the public eye. [Emphasis in original].

Id.

107. England, *supra* note 5, at 152-53.

108. One might expect that with the increased importance of written opinions a corresponding decline in the percentage of decisions issued without opinion would be reflected. The number of PCAs, however, climbed from 3,095 in 1979, to 3,518 in 1980, and to 4,133 in 1981. *See infra* app. A, Figure 1. Part of this increase can be attributed to the First District's assumption of jurisdiction of workers' compensation cases. *See supra* note 3. The First District's PCAs rose from 607 in 1979 to 1,277 in 1981. *See infra* app. A, Figure 1. Of course, selective publication may not offer litigants an increased opportunity for review since the routine cases controlled by well established principles of law are generally excluded from review by the supreme court. *See supra* note 101. For an example of a case where the supreme court found an express conflict simply through an examination of the construction that the district court placed upon prior supreme court decision, see Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1042-43 (Fla. 1982).

109. *See infra* app. A.

110. *Id.*

publication.[111] In addition to per curiam opinions of no precedential value, some judge-authored opinions currently being published similarly possess no precedential value. Publication of these opinions constitutes a substantial gap in the no-opinion practice solution to the problem of the excessive production of published opinions with no precedential value.[112]

Application of Selective Publication Criticisms to PCA Practice

Many objections to selective publication the Florida Appellate Rules Committee considered when it rejected that practice would appear to apply with even greater force to Florida's PCA practice. For example, the PCA practice may have an identifiable effect on the stare decisis principle similar to the effect of selective publication. In both cases, an opinion would have been published but for the particular practice employed. Although the loss to the body of law may not be as apparent when cases are decided without opinion because they involve no issues of precedential value, the loss may be just as real as when opinions of no precedential value are not published. In fact, the loss may be greater when PCAs are employed because at least an unpublished, written opinion exposes the court's reasoning so that errors can more readily be caught.

Florida appellate judges use no formal standards to decide whether an opinion should be written,[113] although presumably standards similar to those adopted in selective publication jurisdictions are utilized. There is no way to determine, however, if judges in different districts are utilizing different standards.[114] Because of the lack of uniform written standards, the margin of error and variance of view between districts in determining precedential value should be much greater.

Both systems also permit actual conflicts and prevent the parties from citing the same court's prior decisions on the same issue. Just as critics have isolated instances of conflict between unpublished and published opinions, they have also documented such conflicts between PCAs and published opinions.[115] In addition, although PCAs officially contain no precedential value as case

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111. *See supra* note 95 and accompanying text.

112. The recent case of Kenney v. Vandiver, No. 81-335 (Fla. 4th D.C.A. May 5, 1982), masterfully illustrates this point. In a case dealing with an attorney's charging lien against a former client for services rendered, the *Kenney* court observed:

> Because we reverse the judgment, an opinion is mandated. To facilitate a better understanding of the basis of our decision, an extensive recitation of facts is necessary. Thus burdened and lacking, as it is, in foreseeable value as precedent, this opinion stands as a persuasive argument for the adoption of a rule permitting unpublished opinions on a selective basis.

Id. slip op. at 1-2.

113. *See supra* note 91 and accompanying text.

114. *Cf.* Florida Hotel & Restaurant Comm'n. v. Dowler, 92 So. 2d 832, 835-36 (Fla. 1958) (suggesting an appellate court initially reviewing a trial record should always give reasons for its decision).

115. *See* England, *supra* note 5, at 132.

law,[116] litigants still attempt to cite them with accompanying excerpts from the briefs or the record as authority in another case. PCAs are most often cited by institutional advocates who have more experience before the court and more awareness of the issues PCA decisions have resolved. Because Florida courts are concerned with maintaining internal consistency, they may find it difficult to ignore a citation to a PCA that resolved an issue identical to one involved in a pending case. Courts do not want to act inconsistently, even if the inconsistencies are exposed only to the interested parties in a single case.[117]

Since the loss in visibility of the court's reasoning in a PCA is complete, rather than simply reduced as is the case with selective publication, the appearance of arbitrariness and the danger of abuse is substantially greater. Critics of selective publication reserve their sharpest attacks for the no-opinion practice:

> It is the third category—decisions with no discernible justification—that raises the issue of judicial irresponsibility most strikingly. A decision without articulated reasons might well be a decision without reasons or one with inadequate or impermissible reasons. . . . Even if judges conscientiously reach correct results, an opinion that does not disclose its reasoning is unsatisfactory. Justice must not only be done, it must appear to be done. The authority of the federal judiciary rests upon the trust of the public and the bar. Courts that articulate no reason for their decisions undermine that trust by creating the appearance of arbitrariness.[118]

It is also true that some classes of cases, such as post-conviction relief and the like, may appear to receive a disproportionate share of PCAs. For the most part, however, these dispositions simply reflect the increased frequency of appearance of routine issues, as they do in selective publication.

Support for No-Opinion Practice

Notwithstanding these criticisms, the no-opinion practice enjoys considerable precedent.[119] In the early history of many state appellate courts, cases were often decided without an opinion.[120] By the mid-nineteenth century, however, a number of states imposed a requirement, either by provision in the state constitution or by statute, that appellate courts render written opinions providing reasons for their decisions.[121] Florida has no such constitutional or statutory requirement.[122]

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116. Acme Specialty Corp. v. Miami, 292 So. 2d 379 (Fla. 3d D.C.A. 1974).

117. The appearance of inconsistency may be less under the PCA practice when a mistake is caught since the court's reasoning is not expressed, as it is in the case of a written but unpublished opinion.

118. *See* Reynolds & Richman, *supra* note 14, at 603.

119. B. CARDOZO, *supra* note 1 and accompanying text, and Pound, *supra* note 24 and accompanying text, were two early voices that suggested opinions are unnecessary in every case.

120. Rodin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486, 490-91 (1930).

121. *Id.*

122. Interestingly, written reasons are not required when cases are tried by a judge or jury, but are when a judge grants a new trial. FLA. R. CIV. P. 1.530(f).

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Early in the twentieth century, when debates over the proliferation of appellate opinions first began in this country, many suggested that judges were simply writing too many opinions. Remarkably, over sixty-five years ago, Chief Justice Winslow of the Wisconsin Supreme Court devised a plan very similar to Florida's current PCA practice.[123] He believed no opinion should be written upon an affirmance where only questions of fact are involved. Winslow reasoned that an affirmance in such cases indicates the evidence sustains findings of fact and an opinion would add nothing to the body of case law. Similarly, he suggested that no opinion should be written upon an affirmance where the case is determined by following well-established legal principles developed by previous decisions in the same court or upon affirmance concerning issues of practice or procedure, unless the question is so important to legal administration that it should be settled by an authoritative judicial pronouncement.

Under the Winslow criteria an affirmance should receive no opinion unless the question it presents is of exceptional importance. In his view, such an opinion is necessary only when the court is required to construe a provision of statutory or constitutional law, to modify an existing principle of law, or to settle a question of conflicting authority within the jurisdiction. Winslow also believed questions of general importance to the public require an opinion. In cases of reversal however, Winslow clearly advocated a written opinion. Reversals on questions of fact, however, are valueless as precedent and only require nonpublished, written opinions for the benefit of the litigants and the trial court.[124]

Today a number of jurisdictions, including some of those practicing selective publication, decide at least some cases without opinion.[125] The Fifth Circuit has had a no-opinion rule since 1970.[126] This rule was adopted to

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123. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 161 (1915), *reprinted in* 21 J. AM. JUDICATURE SOC'Y 124, 126 (1942).

124. *Id.*

125. *See, e.g.*, ALASKA APP. R. 214. This rule authorizes the parties to request a summary disposition, which would include the possibility of no opinion. The incentive of an earlier disposition may influence the parties to waive a detailed disposition. As a further example, the Georgia Supreme Court and Court of Appeals each have a rule that authorizes an affirmance without opinion if: the evidence supports the judgment; no legal error appears and an opinion would contain no precedential value; and the judgment of the lower court sufficiently explains the decision. *See* GA. SUP. CT. R. 59; GA. CT. APP. R. 36. These rules are extremely broad and could be construed to cover most issues. Many federal courts also have rules authorizing the disposition of an appeal without opinion.

126. *See* 5TH CIR. R. 21. Rule 21 provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:
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> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
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> (b) the evidence in support of a jury verdict is not insufficient;
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> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole; and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Id. The Eleventh Circuit has a similar rule and has extended the rule to include summary judgments, directed verdicts and judgments on the pleadings "supported by the record."

cope with the sharp increase in appeals filed, and as used in conjunction with the circuit court's selective publication plan, has allowed the court to keep pace with its burgeoning caseload. Judge Godbold, now Chief Judge of the newly created Eleventh Circuit, has stated that the rationale underlying the court's adoption of the no-opinion rule stems from a court's inherent discretion to treat different cases in unique and appropriate ways.[127]

One study of the Fifth Circuit's practice has concluded that judges have been able to identify properly cases for disposition under this rule, and that the quality of written opinions has improved as a result of the time saved. The practice has also had the effect of expediting appellate review without a significant loss of precedential opinions.[128] This study appears to confirm the basic premise relied on by Florida appellate judges for use of the PCA: that the time saved by disposing of a substantial number of routine cases without

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See 11TH CIR. R. 25. *See also* D.C. CIR. R. 13; 1ST CIR. 14; 2D CIR. R. 9023; 4TH CIR. R. 18; 6TH CIR. R. 11; 7TH CIR. R. 85, 8TH CIR. R. 14; 9TH CIR. R. 21; 10TH CIR. R. 17.

127. *See* Godbold, *supra* note 58, at 864. Judge Godbold eloquently expounded this rationale by observing:

> The principles underlying our legal system, with its mixed common law and statutory heritage, require us to recognize the validity of drawing reasoned distinctions between cases. The theory of lockstep uniformity—that every appellate case either requires or deserves a full record, oral argument, a written explanation for the decision, and a published opinion—is inconsistent with acceptance of the legal system as an institution capable of making valid distinctions and operating under them.
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> . . . .
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> In performing its functions an appellate court spends much of its time and effort making distinctions and evaluating distinctions made by others. This role is familiar, expected, and indeed taken for granted. That same court can also rationally establish and apply procedures for selectively different handling of the cases before it. It may require a full record in some cases, abbreviated record in others. It may decide some cases without oral argument, schedule others for argument, and vary the time permitted for argument. Judges may confer face to face in one case and exchange views by memorandum or telephone in another. The court may enter a Grand Manner opinion in one case, a terse statement of reasons in another, and no written explanation in the next. An appellate court should not be denied the discretion to make these choices.

Id. In a telephone interview, the Clerk of the Fifth Circuit reported that for a 12-month period ending in March 1980, the court issued 1,214 published opinions, 502 unpublished and 340 no-opinion dispositions.

128. *See* Stuchman & Gelfand, *supra* note 44, at 221. The commentators conducting the study concluded:

> Critics seem to have found some instances of written but unpublished opinions that appear to have potential precedential value. Perhaps even the Fifth Circuit's practice has suppressed some affirmations that, had opinions been written, might have had precedential value. The evidence and analysis in this study, however, suggest that such instances are probably quite infrequent. If the purpose of Rule 21 is to speed the appellate judicial process without a significant loss of precedential opinions, and if that process is viewed as a group activity, adjudicating large sets of repetitive events, then the laments of the critics of Rule 21 seem more sensitive than rational.

Id.

See also Reynolds & Richman, *supra* note 11, at 630 (concluding that selective publication results in the speedier disposition of appeals).

an opinion can be effectively utilized to improve the quality of written opinions rendered in more difficult cases.

Further support for the PCA practice is evidenced by the legal community's apparent confidence in the judiciary's exercise of its discretion to issue decisions without opinions. Contrary to the clamor raised over selective publication in some jurisdictions, no similar outcry against the use or abuse of PCA practice has occurred in Florida.[129] The Appellate Rules Committee, members of which include many leading appellate lawyers, unanimously supported the motion to reject selective publication. The adoption of the 1980 constitutional amendments, which vested greater authority in the district courts, and the subsequent performance of judges in judicial polls and merit retention elections, also indicate support for the present opinion practice.[130] Although this may be only indirect evidence, it does indicate public confidence in district judges and their performance, including their PCA usage.

Finally, with the exception of publication of per curiam and judge-authored opinions of no precedential value, Florida's PCA practice also more efficiently accomplishes the main functions served by selective publication. It takes less time to write a PCA than it does to write an opinion destined for nonpublication, and no need exists to exclude PCAs from published reports because they occupy little space and possess no judicial commentary of precedential value.

Alternatives to Selective Publication and the PCA

Many who oppose the disposition of cases without an opinion agree that numerous cases do not merit detailed explication of facts and applicable law. One approach suggests such cases should be decided by a brief opinion that would occupy little space in the reporters.[131] These opinions could be selectively

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129. This is not true elsewhere. Rehdert & Roth, *Inside the Fifth Circuit: Looking at Some of Its Internal Procedures*, 22 Loy. L. Rev. 661, 676 (1977); Reynolds & Richman, *supra* note 68, at 1174. Of course, the absence of public criticism does not mean that critics do not exist. *See supra* note 105. In the author's experience, petitions for rehearing also frequently raise the lack of an opinion as an issue.

130. *See* England & Williams, *supra* note 101, at 251. Although some members of the Florida Bar were concerned with the possibility of entrusting the finality of cases to district courts, one indicator suggests that this concern was unfounded. Subsequent to the enactment of the 1980 amendment, twenty district court judges were retained through merit retention elections. Polls conducted by the Bar indicated a seventy-six to ninety-three percent acceptability rate from attorneys. These ratings were affirmed by the general populace during the merit retention elections, when all twenty district court judges were retained with approval percentages ranging from sixty-six to seventy-six percent. *Id.*

131. *See* B. Witkin, *supra* note 28, at 98. In an attempt to distinguish between cases requiring substantial opinions and cases that do not, Witkin observes:

> Where appeals are taken as a matter of right, there are bound to be cases that rise slightly above the level of the frivolous appeal but may nevertheless be roughly classified as "routine." Whether calling for affirmance or reversal, they present familiar facts, familiar issues for review, and familiar precedents to govern the decision. While it may be necessary to wade through a thousand page and several hundred pages of briefs, this does not give the routine case any greater significance and should not call

published in separate perishable reporters, rather than hardbound permanent volumes, to emphasize their reduced precedential value.[132] In this way the legal community would be encouraged to avoid researching these opinions and permanent retention of such publications would be discouraged.[133]

Some suggest increased attention should be focused upon the increased application of computer technology and miniaturization to legal research.[134] While the future of legal research probably will be channeled in this direction, this approach offers little immediate relief, since computerized research is still very costly and not yet available to all segments of the legal community. Although computerized research and miniaturization are widespread in many leading law schools,[135] most of the members of the legal community are still heavily dependent upon traditional means of legal research. For example, Florida's district courts of appeal, unlike the supreme court, still have no access to computerized research systems. Another suggestion would place more emphasis on producing extensive and simplified legal restatements in various subjects, thereby eliminating the need for constant references to older case law.[136] While this proposal, as well as the other alternatives, clearly has some merit, the problem of limited judicial resources and excessive proliferation of opinions remains with us.

Proposed Approach for Florida: The Combined Practice

Although both selective publication and the PCA practice result in fewer published opinions by identifying cases that do not present issues of substantial precedential value and apportioning less judicial time to their disposition, important differences exist between the two practices. Florida's PCA practice has perhaps been the most effective tool available to Florida appellate judges who are attempting to balance a staggering caseload. In addition, there is considerable precedent for the practice and the legal community has largely accepted it. However, the practice involves substantial costs to the parties and

for a larger or more definitive opinion than the case would otherwise warrant. In these appeals the arguments for shorter opinions and per curiam decisions are most persuasive. *Id.* An examination of many of the per curiam opinions issued by the district courts of appeal reflect that this type opinion is already in wide-spread use in Florida. *See supra* note 95 and accompanying text. Unfortunately, the use of such opinions has not proven a complete answer to the problems of the excessive production of opinions and the need to efficiently utilize judicial resources.

132. *See generally* R. Carrington, P. Meador & M. Rosenberg, *supra* note 46.

133. *Id.* There are no reports of this idea actually being practiced. A possible alternative to this approach would be for the publishers to include these cases, identified by the courts as being of no precedential value, in a completely separate section of the reporters. Although no publishing costs or shelf space would be saved, the separation of these cases from cases containing precedential value might constitute substantial time savings to the legal researcher who, as with the perishable volumes, would have little incentive to search among these cases for authority.

134. *See* Newbern & Wilson, *supra* note 33, at 58.

135. Store, *Microphobia in the Legal Profession*, 70 L. Lib. J. 31, 31 (1977).

136. *See* Keeffe, *An American Judge on American Justice*, 68 A.B.A. J. 220, 220 (1982) (quoting Judge Roger J. Traynor).

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137. *See* Narrative, *supra*
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138. *See infra* app. B (I

the appellate process. The practice forfeits a substantial means of quality control and diminishes the appearance of fairness. The practice also lacks uniform standards, discourages rather than promotes the writing of opinions, and does not prevent the publication of many opinions with no precedential value. Moreover, the lack of an opinion precludes Florida Supreme Court review.

In view of these shortcomings, selective publication would appear to constitute an attractive alternative to the PCA. Its adoption would probably result in the articulation of uniform standards that would permit opinions to be written solely for the benefit of the parties without requiring those opinions to be published in the permanent reports. This practice should enhance the quality of the decisional process and provide a more acceptable product for the parties. The fiction that unpublished judicial opinions are not law and may not be cited, however, has created considerable controversy and virtually the entire Florida appellate bench and many leading appellate bar members now oppose selective publication.[157]

There is no reason why Florida should limit itself to choosing between selective publication and the present no-opinion practice. By combining the two practices, Florida judges would acquire even greater opinion option;[158] a result that judges should like and which should enhance the appellate judicial process. Judges are presently discouraged from writing opinions solely for the parties' benefit because such opinions must be published in the permanent reports. A combined practice would allow a judge to write an opinion that would be helpful to the parties without worrying that it would clutter the lawbooks.

Sound practical reasons also support the adoption of a combined system. Presently, Florida judges are not required to write an opinion in every case and would understandably oppose a system requiring such opinions irrespective of the number of points raised on appeal and the clarity of their resolution. Judges whose backs have been forced to the wall by an unreasonably excessive caseload would naturally prefer a system that would permit, but not mandate, opinion writing. In addition, the combined practice would substantially reduce the number of opinions of little or no precedential value presently being published. Under the current practice, Florida's legal community must still absorb some 5,000 published opinions annually.

Critics may question whether Florida's judges, with their high caseload, could afford to invest the time that writing even brief opinions in all cases would require. The prevalence of per curiam opinions, however, indicates Florida judges are already mastering the task. In 1981, many of the 1,926 district court of appeal per curiam opinions were of the type usually earmarked for nonpublication in selective publication jurisdictions. Moreover, the Third District Court of Appeal has demonstrated that the use of per

157. *See* Minutes, *supra* note 11. The chief judges of the Second, Third and Fifth Districts wrote letters to the chairman of the Appellate Rules Committee indicating unanimous opposition by members of their courts. In addition, the chief judges of the First and Fourth Districts appeared at the meeting and expressed their opposition. *Id. But see supra* note 106.

158. *See infra* app. B (Proposed Court Rule on Opinion Writing and Publication).

curiam opinions can be just as effective as the PCA in dealing with heavy caseloads.

One possible problem with this option is that no bright line separates the standards for invoking the two practices except in the case of reversals. Both seek to identify cases that present no issue of precedential value.

Two possible approaches to this problem are suggested. The first approach would simply copy the Fifth Circuit's practice of recognizing that certain categories of cases usually do not present issues of substantial precedential value.[139] Under this approach, cases involving issues of fact have been particularly earmarked for no-opinion disposition. As noted by Judge Winslow, affirming such cases usually simply indicates the evidence sustained the findings of fact; an opinion would add nothing more. Florida, however, has not limited its no-opinion practice to factual resolutions, and there appears to be no reason for doing so. As Winslow indicated, the law controlling a particular issue may be well-established and clear-cut, regardless of the nature of the issue.[140]

Another approach would be to adopt a rule granting the appellate panel discretion to resolve issues of no precedential value without opinion when the lower court's rationale is apparent on the trial or appellate record's face. Implicit in most no-opinion decisions is a court's determination that the reasons for its decision are so apparent as to eliminate the need for a written opinion. These reasons may often be described in the trial court's judgment, in the trial record, in the parties' briefs, or during oral argument. The existence of an apparently sound rationale may not be sufficient to label an appeal frivolous,[141] which appellate judges are reluctant to do in any case, but may be sufficient to justify a decision without opinion.

There also appears to be insufficient justification for prohibiting the citation of unpublished opinions. Unlike PCAs, these opinions reveal the court's reasoning. In most instances, these cases will not be cited simply because they have no precedential value. The legal community should devote little attention to cases the courts have officially determined to be of no precedential value. If an opinion of precedential value, however, is mistakenly not published, it

139. For a further explanation of the Fifth Circuit's rationale for adopting Rule 21, see N.L.R.B. v. Amalgamated Cloth. Wkrs. of Am., AFL-CIO, L. 990, 430 F.2d 966, 971 (5th Cir. 1970) ("Experience again demonstrates that cases in which an opinion really serves no useful purpose falls into several well recognized groups.").

140. *See supra* notes 122-23 and accompanying text.

141. *See* Treat v. State, 121 Fla. 509, 163 So. 853 (1935). While discussing the standard for labeling an appeal frivolous, the *Treat* court noted:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. [Citation omitted.] It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error.

Id. at 510-11, 163 So. at 884.

nevertheless remains an opinion of the court, and its existence should be acknowledged, and thereafter approved, clarified, distinguished, or overruled.

Conclusion

If judicial resources were unlimited, perhaps this debate over the relative merits of selective publication and Florida's PCA practice would be moot; with unlimited resources, alternatives could be found to satisfy almost everyone. An opinion could be written in every case of arguable merit, and an efficient retrieval system could quickly select cases on point from the huge mass of published opinions. In truth, however, judicial resources are limited and will probably remain so in the foreseeable future. Given this limitation, resources must be reasonably allocated. In addition, few would deny that all appeals are not alike: some cases are more complex or more difficult to resolve than others. Given these differences, it seems apparent that greater resources should be allocated to difficult cases and fewer to cases controlled by well-established legal principles. As Judge Godbold noted, it makes little sense to deny appellate judges, who are entrusted to make much more important judgments, the authority to distinguish between cases that merit a full opinion, an unpublished opinion, or no opinion at all.[142] The ultimate disposition of cases that present no issues of precedential value should be substantially the same regardless of whether an opinion is written or published.

A decision accompanied by reasons should be the rule, rather than the exception. Adding selective publication to the list of opinion options available to Florida appellate judges will not guarantee a written opinion in every case. It will, however, remove one existing obstacle by permitting judges to write opinions for the benefit of the parties without worrying that by doing so an additional burden is being placed on the legal community.

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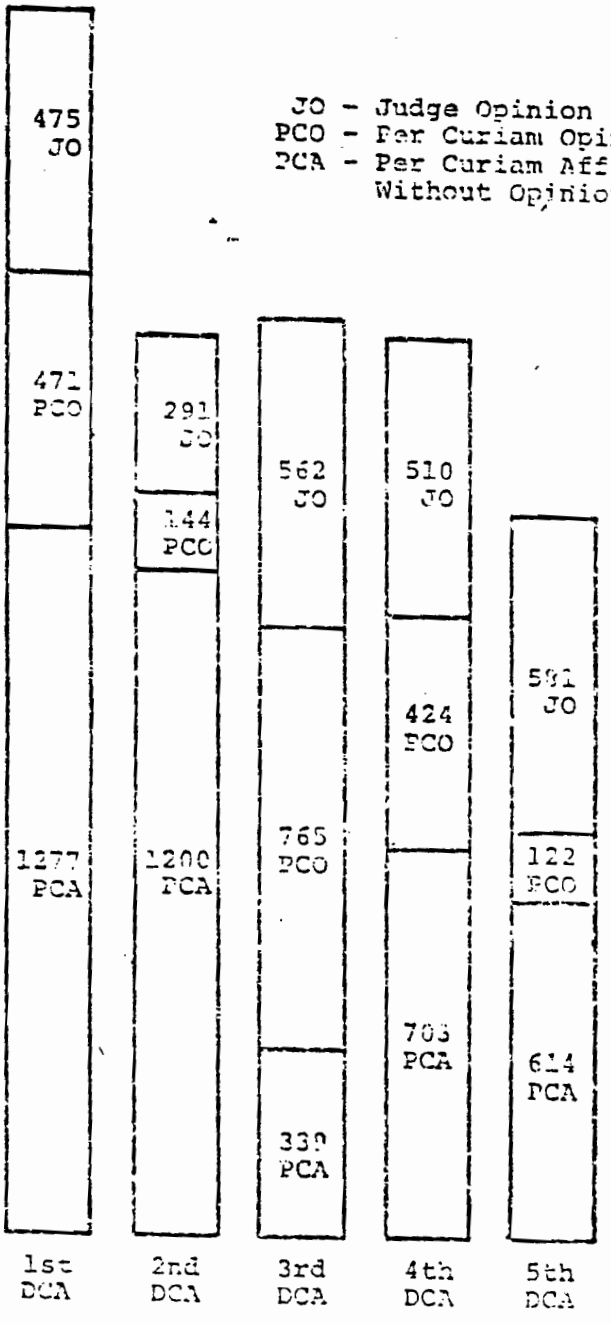
142. Moreover, the fear that such cases will be published in unofficial reporters should not prevent citation. The Fifth Circuit's experience has apparently proven the concern that unofficial collections of these cases will flourish to be unfounded. *See* Telephone Interview, *supra* note 127.

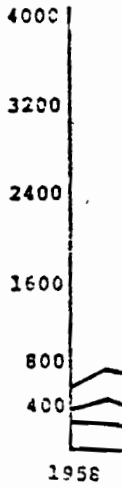
APPENDIX A

FIGURE 1[143]

DISTRICT COURT DECISIONS – 1981

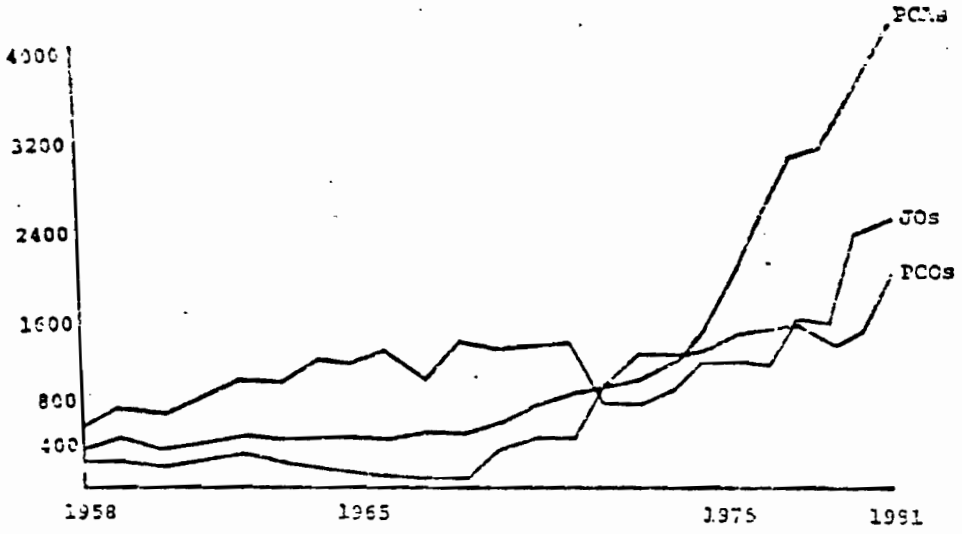


143. *See supra* note 81.



144. *Id.*

FIGURE 2[144]
DISTRICT COURT DECISIONS – 1958-1981



144. *Id.*

APPENDIX B

PROPOSED COURT RULE IN OPINION WRITING AND PUBLICATION

Writing and Publication of Opinions

1. The district court may dispose of a case by:
   a. Published opinion.
   b. Unpublished opinion.
   c. Disposition without opinion.

2. Published opinions. An opinion of the district court should be published if, in the judgment of the judges participating in the decision, it is one that:

   a. Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;

   b. Involves a legal issue of continuing public interest;

   c. Criticizes existing law;

   d. Resolves an apparent conflict of authority; or

   e. Involves an issue whose resolution is specifically enumerated as being subject to review by the Florida Supreme Court under Article V of the Florida Constitution. Concurring or dissenting opinions may be published at the discretion of the author; if such an opinion is published the majority opinion or disposition shall be published as well.

3. Citation of unpublished opinions and dispositions without opinion. An opinion which is not published may be cited only if the person making reference to it provides the court and opposing parties with a copy of the opinion. Dispositions without opinion may not be cited for any precedential purposes other than further proceedings between the same parties.

4. Unpublished opinions. If the judges participating in a decision agree that the case does not meet the criteria set out in Subsection 2, but determine that a written opinion would otherwise be of value, the court may direct that such opinion not be published.

5. Disposition without opinion. If the judges participating in a decision agree that the case does not meet the criteria set out in Subsection 2, and further agree:

   a. That the decision on review is not erroneous and should be affirmed or approved, and

   b. That the basis of the decision being reviewed, or of the court's approval of such decision, is apparent on the face of the trial or appellate record, and

   c. That a written opinion would be of no additional value, then the court may decide such case without a written opinion.

6. All dispositions of the court shall be matters of public record.

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An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*

William L. Reynolds†
William M. Richman††

In recent years, the caseload of the federal appellate courts has grown alarmingly in both the number of filings and the complexity of the issues presented for decision. In an effort to cope with the pressures created by those increases, the courts have modified the manner in which they process cases in a number of ways. Some changes, such as prehearing settlement conferences,[1] have relatively little impact on the nature of the judicial process. The effect of others, such as reduction in oral argument,[2] is more significant, for they alter the traditional method of judging appeals in ways that may substantially reduce the quality of appellate justice.

One of the most dramatic of the recent innovations is the adoption by many courts of rules that determine which opinions should be released for publication.[3] In establishing criteria for pub-

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We wish to thank a number of persons for their assistance in this project. Alan Chaset and Pat Lombard of the Federal Judicial Center and David Gentry of the Administrative Office provided us with data and the background to understand it. Toni Sommers of the University of Toledo provided invaluable assistance with statistical computation. David Aemmer of the Ohio Bar, Lawrence Haislip of the Maryland Bar, and Susan Roesler, University of Toledo College of Law class of 1982, provided research assistance. All unpublished opinions discussed in this article are on file with *The University of Chicago Law Review*.

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[1] *See, e.g.*, Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978); Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 MINN. L. REV. 1221 (1979).

[2] *See generally* 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 2-32 (1975) [hereinafter cited as APPELLATE JUSTICE].

[3] This article discusses publication only in the United States Courts of Appeals. Many state courts also have adopted positions concerning unpublished opinions, sometimes arousing a good deal of controversy. *See generally* Kanner, *The Unpublished Appellate Opinion. Friend or Foe?*, 48 CAL. ST. B.J. 386 (1973); Newbern & Wilson, *Rule 21: Unprecedent and the Disappearing Court*, 32 ARK. L. REV. 37 (1978).

On the question of publication generally, see P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31-41 (1976); Chanin, *A Survey of the Writing and Publication of*

lication the courts have been truly innovative; in spite of the pivotal role of the published judicial opinion in the development of American common law, the selection of cases for publication has rarely been the subject of publicly delineated criteria. The recent formal decisions not to publish large numbers of opinions have aroused concern that the quality of the work produced by the courts will be adversely affected. That concern has in turn led to considerable discussion of the merits and demerits of a formally organized regime of limited publication.[4] Although the discussion has been rich in theory, it has been relatively poor in data.[5]

This article attempts to fill that gap. It presents an empirical assessment of the workings of the publication plans of the eleven United States Courts of Appeals during the 1978-79 Reporting Year. This is the first system-wide analysis of these publication plans and their effect on judicial productivity and responsibility. The article begins with a review of the background of publication plans. Then, after noting the methods used in the study, we analyze the relation between the language of the plans and the publication rates of the several circuits. Next comes an empirical assessment of the costs and benefits of limited publication. Finally, we propose a Model Rule for publication, designed to realize the benefits of limited publication while avoiding some of its hazards.

Opinions in Federal and State Appellate Courts, 67 LAW LIB. J. 362 (1974); Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195 (1972).

[4] The authors of this article have written on limited publication in two other places: 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) [hereinafter cited as *Non-Precedential Precedent*]; Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 [hereinafter cited as *Limited Publication*].

A bibliography on publication in federal appellate courts would also include the following: *Hearings Before the Commission on Revision of the Federal Appellate Court System* (2d phase 1974-75) [hereinafter cited as *Hearings*]; Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice*, 61 A.B.A.J. 1224 (1975); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977).

[5] There have been several publications that, while not empirical, are at least anecdotal. They review the unpublished opinions of a particular court and argue that some or many of them should have been published. *See, e.g.*, Gardner, *supra* note 4; Comment, *supra* note 4. *Limited Publication*, *supra* note 4, is an empirical study but it is limited in scope, covering only two circuits and decisions over roughly three months. *See also* Remarks of John P. Frank, Ninth Circuit Judicial Conference (July 29, 1976) (unpublished study of 50 unpublished opinions) (on file with *The University of Chicago Law Review*).

I. Background

A. A Perspective on Publication

In order to appreciate the importance of the limited publication debate, it is necessary to understand both the role of publication in American law, and past publication practice. The reasoned, published appellate opinion is the centerpiece of the American judiciary's work. The reasons for that prominence are not hard to understand, for they inhere in the role of appellate judges in a system of common law.

The rule of precedent is fundamental to the common law.[6] In order to ensure consistency, judges explain why they decided as they did and why apparently similar cases were not thought to be controlling. Because opinions make law, these explanations must be readily accessible to interested persons. Their public availability is necessary to guide both the persons who may be affected by the law, and the judges who will apply that law to future disputes. The opinions of appellate courts naturally have special significance because of their position in the judicial hierarchy, and because the workload of nisi prius courts has made it increasingly difficult for them to issue polished opinions that contribute to the growth of the law.

Against this background, it is surprising that the expectation of a reasoned and published decision is a relatively recent one. Viewed in historical perspective, limited publication is hardly a radical idea; until recently, case reporting has been a haphazard enterprise. English cases have been officially reported only since 1865,[7] following a long history of selective reporting by legal entrepreneurs.[8] Similarly, American reporting, virtually unknown until

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[6] The propositions in this paragraph should, of course, be familiar to every American lawyer. *See generally* H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958); Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 2 (1959). One of the authors of this article has set forth his views on the subject in more detail in W. Reynolds, Judicial Process in a Nutshell (1980).

[7] *See generally* R. Walker & M. Walker, The English Legal System 139-41 (4th ed. 1976), which criticizes the entire reporting system for its "informality." Official English reporting today produces the *Law Reports* under the aegis of the Incorporated Council of Law Reporting for England and Wales. There also are unofficial reporters, the most familiar of which is the *All England Law Reports*.

[8] The first English reports are the *Year Books*, which began, perhaps as a kind of early legal newspaper, in the reign of Edward I. *See* T. Plucknett, A Concise History of the Common Law 269 (5th ed. 1956). Private reporting developed with the end of the *Year Books* in 1537. The quality of the private reports varied greatly. Holdsworth called Sir

the start of the nineteenth century,[9] was long the province of pri
vate venturers. Indeed, private reporting continued in at leas
some federal courts until well after the Civil War.[10] These publica
tions only gradually came to reflect an appreciation shared b
judge and reporter concerning the form and content of the re
port.[11] Today, of course, legal reporting is dominated by the Wes

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James Burrow (1701-1782) the "connecting link" between "old" and modern reporting be
cause Burrow strove for completeness and accuracy. 12 W. HOLDSWORTH, A HISTORY OF EN
GLISH LAW 110-12, 116 (1938).

[9] Apparently there is no general work on the history of publication in the Unite
States. Ephraim Kirby's 1789 volume of Connecticut Reports was the first reporter pub
lished in this country, *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 282 (1973), althoug
modern historians have unearthed and published reports of colonial cases. *See, e.g.*, I
BOORSTIN, DELAWARE CASES 1792-1830 (1943); PROCEEDINGS OF THE MARYLAND COURT OF AP
PEALS 1695-1729 (C. Bond ed. 1933). Hence the comment, "Historians actually know mor
about colonial case law today than could have been widely known in colonial America."
Johnson, *John Jay: Lawyer in a Time of Transition, 1764-1775*, 124 U. PA. L. REV. 1260,
1264 n.17 (1976). Another example of early publication is found in Maryland, where a cou
reporter and a young attorney began publishing colonial Maryland cases as a private ven
ture in 1809. *See* C. BOND, THE COURTS OF APPEALS OF MARYLAND: A HISTORY 111 (1928). I
contrast, publication in Massachusetts began with authorization from the legislature i
1804. W. NELSON, AMERICANIZATION OF THE COMMON LAW 168 (1975). Publication of Ne
York cases began in 1794. Johnson, *supra*, at 1264 n.17.

Publication of Supreme Court opinions did not begin until the second volume of *Da
las's Reports* was published in 1796. Even then progress lagged; although the third volum
appeared in 1799, the fourth was held up until 1807. Other sources for Supreme Court work
such as newspapers, apparently were unsatisfactory. *See* J. GOEBEL, ANTECEDENTS AND BE
GINNINGS TO 1801, at 664-65 (History of the Supreme Court of the United States, vol.
1971).

[10] Samuel Blatchford, both district and circuit judge before joining the Supreme Cour
reported Second Circuit decisions until 1887 when the *Federal Reporter*, begun severa
years earlier, put him out of business. *See* M. SCHICK, LEARNED HAND'S COURT 44 (1970).

[11] When Roger Taney became Chief Justice, for example,

> [t]here was widespread disagreement . . . as to the subject matter to be included in th
> reports . . . . The question was much discussed in law journals. . . . Reviewers varie
> all the way from those who wanted to save money for lawyers by limiting publication t
> selected opinions, to those who advocated publication of all opinions together with a
> guments of counsel and other relevant documents.

C. SWISHER, THE TANEY PERIOD, 1835-64, at 296 (History of the Supreme Court of th
United States, vol. 4, 1974).

Standards were quite lax, even for Supreme Court reporting. Errors abounded, an
sometimes the reporter failed to include dissenting opinions. *Id.* at 300-02. Justice Stor
found it commendable that reporters corrected grammatical and typographical errors. *Se
id.* at 299-300. Benjamin Howard, in the first volume of his *Reports* (1843), "resorted t
what seemed an amazing example of bad taste by advertising his availability for the argu
ment of cases." *Id.* at 308.

Uneven reporting required that both state and federal reports be regularly reviewed i
the law reviews for quality and coverage. *See, e.g.*, 8 AM. L.J. 273 (1848) (New Jersey); 1 AM
L. REG. 60 (1853) (Second Circuit).

Full and accurate reporting depended upon the development of a tradition of full an
complete judicial explication of the decision. This is a relatively recent development. Lor

Publishing Company. It routinely publishes all opinions sent to it by the circuit judges in accordance with their respective publication plans.[12]

Limited publication, then, is not new. What is new and radical is the notion that the judges themselves should be controlling access to their work by means of systematic publication plans. The publication plans of the federal courts of appeals collectively represent the most ambitious systematic effort to reconcile the conflict between the costs and benefits of full publication.

B. The History of the Circuit Plans

The movement toward the present circuit court publication plans began in 1964, when the Judicial Conference of the United States recommended that the federal courts authorize "the publication of only those opinions which are of general precedential value."[13] Eight years later,[14] the Board of the Federal Judicial Center proposed that each Circuit Council establish plans that

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Coke advised that "wise and learned men do before they judge labour to reach to the depth of all the reasons of the case in question, but in their judgments express not any." 3 Co. Rep. v (J. Thomas ed., London 1826).

A look through state reports around 1800 reveals what to the modern reader is a startling lack of explication among courts of last resort. In Maryland, for example, the Court of Appeals often decided cases without an opinion until a statute requiring them was enacted in 1832. Lower courts were more prone to give reasons in order that their decisions could be properly reviewed on appeal. C. BOND, *supra* note 9, at 139-40.

By the mid-nineteenth century, however, a number of states had imposed, either through their constitutions or by statute, a requirement that appellate decisions be rendered in a written opinion. *See* Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486 (1930). That such development might not be wholly salutary was foreseen by Jonathan Swift:

> It is a maximum [*sic*] among these lawyers, that whatever hath been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly.

J. SWIFT, GULLIVER'S TRAVELS 283 (Modern Library ed. 1931) (1st ed. London 1726).

[12] West publishes only opinions designated for publication by the several circuits. Letter to authors from James P. Corson, Managing Editor, West Publishing Co. (May 23, 1980) (on file with *The University of Chicago Law Review*). Several federal courts (*e.g.*, the Tax Court, the Court of Military Appeals) have their own reporter; the Courts of Appeals do not.

Unpublished opinions may be "published" in other sources, such as specialty reporters, or placed in the memory of a computerized legal research system such as LEXIS, *see* text and note at note 30 *infra*.

[13] [1964] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 11.

[14] Some of the circuits, in the meantime, had made some pronouncements in case law on the problem of unlimited publication. *E.g.*, Jones v. Superintendent, Va. State Farm, 465 F.2d 1091 (4th Cir. 1972).

would limit publication and forbid citation of unpublished opinions.[15] Later that year, the Judicial Conference endorsed the Center's proposal and directed each circuit to devise a publication plan.[16] In 1974, the Center published a Model Rule for publication,[17] a proposal that has been the model for the publication plans of a number of circuits. Meanwhile, the circuits, responding to the Judicial Conference directive, had each sent a proposed publication plan to the Conference. The Conference applauded the diversity of these plans, for it meant that there would be "11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience."[18] Little has changed since

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[15] BOARD OF THE FEDERAL JUDICIAL CENTER, RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972). The various groups mentioned in the text are described in more detail in *Non-Precedential Precedent*, *supra* note 4, at 1170-71 & nn. 18, 25, 26.

[16] [1972] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 33.

[17] ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES No. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973) [hereinafter cited as STANDARDS]. The development of these Standards is discussed in more detail in *Non-Precedential Precedent*, *supra* note 4, at 1170-71 & n.25. The Model Rule provides:

1. Standard for Publication

An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:

a. The opinion establishes a new rule of law or alters or modifies an existing rule; or

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard of publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

[18] [1974] JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 12. While the Judicial Conference studied publication, the Commission on Revision of the Federal Court Appellate System (chaired by Senator Hruska) also looked at the problem. Although the Hruska Com-

1974. Although the Judicial Conference left the circuits' publication plans in a state of experimentation, there has been little effort to assess the results of those experiments either by scholars[19] or the federal judicial establishment.[20]

C. The Pros and Cons of Limited Publication

The justification for limited publication rests on three premises: first, there is no need to publish all opinions; second, full publication is costly; and third, judges can effectively determine when an opinion need be published. Each of those premises can be disputed. In addition, several distinct counterarguments can be advanced against limited publication.[21]

1. *Dispute Settling and Lawmaking.* Common law opinions have two functions: they settle disputes among litigants and, in doing so, sometimes make law.[22] Not all opinions, even at the appellate level, make law. Opinions may only reaffirm well-settled principles. These, the argument runs, need not be published, for society has no real interest in them. Such decisions are important to the litigants, but not to anyone else.

This argument is flawed by its reliance on a view of judicial lawmaking as the statement of mechanical rules rather than *principles* extracted from the decisions of cases read in their factual context. When judicial lawmaking is viewed in that light, it can be seen that all decisions make law, or at least contribute to the process, for each shows how courts actually resolve disputes. Applica-

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mission recommended the adoption of limited publication and noncitation plans, the Commission deferred to the Judicial Conference concerning details. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 50-52 (1975) [hereinafter cited as HRUSKA REPORT]. The testimony of judges, lawyers, and academics before the Commission provides valuable insight on the question of selective publication and noncitation. *See Hearings*, *supra* note 4.

[19] *See* text and notes at notes 3-5 *supra*.

[20] Indeed, even the useful *Publication Plans Reports* prepared by the Administrative Office of the United States Courts for the years 1972 through 1977 have been terminated, which suggests that the plans may have come to be considered permanent. The *Publication Plans Reports* were prepared for the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States. *See Non-Precedential Precedent*, *supra* note 4, at 1173 n.34. As far as we know, these reports represent the only effort sponsored by the entire federal judicial establishment to evaluate the workings of the plans. The Ninth Circuit, however, did sponsor a limited study by John Frank of publication in that circuit. *See* Remarks of John P. Frank, *supra* note 5.

[21] More detailed discussion of the material in this section can be found in *Non-Precedential Precedent*, *supra* note 4, at 1181-85, 1187-94, 1199-1204.

[22] *See* H. HART & A. SACKS, *supra* note 6, at 396-97.

tions of general principles in specific contexts clarify the scope of the principles. At the same time, such applications demonstrate whether the principles are actually followed by judges in routine cases or are simply "paper rules," useful mainly for display. The unavailability of decisions thus reduces our ability to understand the principles relied on by the court.

2. *The High Cost of Full Publication.* The second premise of the argument for limited publication asserts that excessive costs are associated with full publication. Those costs fall into two categories, one linked to the preparation of an opinion, the other to its consumption.

Preparing opinions is a large part of a judge's workload. More time must be spent if the opinion will be published—to allow more proofreading and prose polishing, for example. More effort also is required to ensure that the opinion contains no loose language that can return to haunt the court in a later case. Eliminating these costs can help judges cope more effectively with heavy workloads with little or no diminution in the quality of justice dispensed. Or so the argument goes. Although the idea seems plausible it has never been verified empirically.[23]

The second part of the excessive cost argument focuses on the cost of full publication to the consumers of opinions. To American lawyers this is a familiar problem. "The endless search for factual analogy"[24] runs up the bill of the conscientious attorney with little or no gain in the refinement of legal principles. Law libraries and their budgets are strained to the breaking point and beyond. The bar looks with envy upon England, where the reported case law fills but a few volumes a year.[25] These are real concerns, yet it must be remembered that even cumulative opinions have value. They can suggest how firm a line of precedent may be, for example, or indicate problems in the application of articulated precedent, or even show the divergence of a rule from the expectations of those to whom it is addressed. Thus, *value* can be found in publishing any opinion; the real question is whether the associated costs are too high.

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[23] We know of only one effort to do so, and it is unreliable. *See Non-Precedential Precedent*, *supra* note 4, at 1183 n.95 (discussion of a study of time allocation in the Third Circuit); *cf.* text and notes at notes 59-67 *infra* (finding that evidence is at best inconclusive as to increased productivity).

[24] STANDARDS, *supra* note 17, at 17.

[25] In 1979, for example, the *All England Reports* comprised three volumes.

3. *The Early Decision Not to Publish.* Many of the cost savings associated with limited publication would be lost if judges made the decision not to publish only after the opinion had already been polished and made ready for public consumption. An early decision not to publish entails significant costs, however, for value inheres in the actual writing of the opinion. For many authors, writing about a subject helps them to develop their thought on the topic. Furthermore, if an opinion in support of a decision simply "will not write," the conscientious judge is forced to reconsider the decision.[26] The danger here is that the decision not to publish will affect the reasoning or even the result.

Another major problem with an early decision not to publish centers on the ability of a court to predict, early in the judicial process, that its opinion will not make law. The ability of judges to do so is by no means self-evident. If the prediction process is imperfect, the legal community will have lost access to opinions it should see.

4. *Further Arguments Against Nonpublication.* Limited publication can be attacked even if the above premises prove true. First, limited publication reduces judicial responsibility by removing the constraints that stare decisis places upon the court. The concept of precedent cautions as well as governs. If an opinion is not to be published, unwise things may be said without fear that the corpus juris will be adversely affected. Judicial responsibility also may be diminished if courts use the nonpublication list as a respository for troublesome cases presenting issues the court does not wish to address in public. Again, nonpublication may permit judges to approach their jobs more routinely, without the real thought and effort that precedential decision making requires. The final counterargument to limited publication recognizes the role played by the availability of opinions in holding judges accountable for their actions. If "[s]unlight is said to be the best of disinfectants,"[27] then limited publication may permit sores to fester.

5. *A Word on Citation Practices.* As part of their approach to limited publication, seven of the circuits prohibit citation to an unpublished opinion, and an eighth discourages the practice; only three circuits permit free citation of such opinions.[28] The prohibi-

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[26] *Hearings*, *supra* note 4, at 735 (testimony of Professor Terrance Sandalow). *See also* note 151 *infra*.

[27] L. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

[28] The seven rules prohibiting citation of unpublished opinions are D.C. CIR. R. 8(f);

tion of citation is part and parcel of the limited publication approach, for without such rules its goals could easily be frustrated. If citation were freely permitted, both litigants and judges would be unable to realize the potential time savings from not having to read unpublished opinions.[29] In addition, the prohibition on citation is necessary to prevent unfairness arising from the ability of well-heeled litigants to monitor, store, and use unpublished opinions more readily than other litigants.[30]

The perception in seven circuits that a noncitation rule is a necessary aspect of a limited publication plan therefore seems substantially accurate. We have doubts, however, about the efficacy of noncitation rules. The hidden problem is whether the judges and their staffs adhere to the rule. We have found few opinions referring to unpublished opinions, indicating at least facial compliance with the noncitation rule. Still, some uneasiness persists, based on the intuition that not everyone who is aware of how cases have been decided will refrain from using that knowledge in later litigation. Our concern centers on pro se civil rights and habeas corpus cases. To the judges and clerks who handle those appeals, reliance on unpublished decisions—"non-precedential precedents"[31]—must be inevitable. The caseload is large, and there is often a previous decision squarely on point that provides a tempting research tool. Yet many of these cases are frivolous and hence go

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1ST CIR. R. 14; 2D CIR. R. 0.23; 6TH CIR. R. 11; 7TH CIR. R. 35(b)(2)(iv); 8TH CIR. R. app., 9TH CIR. R. 21(e). Neither the Third nor the Fifth Circuit addresses the citation issue. Only the Tenth affirmatively permits citation, 10TH CIR. R. 17(c); opposing parties must be served with a copy of any unpublished opinions that will be used. The Fourth Circuit permits but discourages citation. 4TH CIR. R. 18(d)(ii)-(iii).

[29] *See Non-Precedential Precedent*, *supra* note 4, at 1186-87. This is especially true given the publication of "unpublished" opinions in unofficial specialty reporters and the recently developed computer systems such as LEXIS, making them available for general use if citation is permitted.

[30] *Id.* at 1187. The ability of courts to control circulation of unpublished opinions has been greatly diminished by the advent of computer-assisted legal research. Although the LEXIS memory bank purportedly contains only "publishable" opinions, *see* letter from Buzz Reed, Mead Data Central (Apr. 25, 1981) (on file with *The University of Chicago Law Review*), several of the unpublished opinions discussed in this article are available on the system. *See, e.g.*, Burrison v. New York City Transit Auth., No. 78-7536 [603 F.2d 211] (2d Cir. Mar. 29, 1979); Moorer v. Griffin, No. 77-3580 [586 F.2d 844] (6th Cir. Oct. 12, 1978); United States v. Vera, No. 77-5363 [582 F.2d 1281] (6th Cir. July 10, 1978). All of these cases appear in the *Federal Reporter (2d)*, but only as parts of tables of unpublished opinions. These opinions are available only to those able to pay for the service. Such limited circulation exacerbates the problem of unequal access.

[31] The phrase comes from Judge Robert Sprecher's testimony before the Hruska Commission. *Hearings*, *supra* note 4, at 537.

unpublished.[32] The result may be reliance on a substantial research library or "issues file" that is unavailable to the litigants.[33]

D. A Necessary Note on Workload

The following sections analyze various problems associated with limited publication plans. Reflection upon those issues must include consideration of the difficulties that led the courts to adopt the publication plans: the increases in the volume and complexity of the work of the federal courts.

Apocalyptic commentaries on the workload of the United States Courts of Appeals are not hard to find.[34] Their very familiarity may rob them of some of their impact. Examination of the product of the circuit courts over even a short period lends some perspective, dramatically bringing home the overload.

This study covered the year ending June 30, 1979. In that time, the eleven circuits terminated 12,419 cases following judicial action.[35] During that period there were 97 circuit judges.[36] On average, each of those judges decided about 1.2 cases per working day.[37] For each vote a participating judge must have done some

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[32] *See* text at note 148 *infra* for the tendency to permit a disproportionate number of opinions in such cases to go unpublished.

[33] *Hearings*, *supra* note 4, at 537 (testimony of Judge Sprecher).

[34] A sample of these alarming recitations can be found in NLRB v. Amalgamated Clothing Workers, 430 F.2d 966 (5th Cir. 1970); HRUSKA REPORT, *supra* note 18, at 55; Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257.

[35] That figure is obtained from statistical data supplied by the Administrative Office of the United States Courts (Sept. 24, 1980) (on file with *The University of Chicago Law Review*) [hereinafter cited as *Statistical Data*], by adding the totals from Tables 1P (total published opinions) and 5U (total unpublished opinions). *See* note 45 *infra* for explanation of the term "with judicial action." The total number here does not include consolidations, i.e., cases that have separate docket numbers but are briefed, argued, or decided with other cases in one proceeding. Including consolidations the total is 15,053. (Consolidations estimated as 17.5% of the total number of cases terminated, in accord with ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 51 [hereinafter cited as ANNUAL REPORT].)

[36] The actual number of authorized judgeships in the United States Circuit Courts was 132, but 35 judgeships were unfilled. *See* ANNUAL REPORT, *supra* note 35, at 44.

[37] The 1.2 figure was computed as follows: Because circuit judges typically sit in panels of three, in order to determine the total number of judicial votes cast to decide the 12,419 cases, that figure must be multiplied by three; thus there were 37,257 votes cast during the fiscal year. Of those votes, 77.8% were cast by active circuit judges (the others were cast by visiting and by senior circuit judges, *see id.* at 50), a total of 28,986. Assuming 250 working days for each of the 97 active circuit judges, the total number of "judge-days" in fiscal 1978-79 was 24,250. Simple division then shows that the average active circuit judge decided almost 1.2 cases per day. (It should be noted that in some proceedings, motions to reduce or

reading and research.[38] If all he read were the briefs, staff memo randa, and record in each case, his workdays would be full. In ad dition, the judge must draft opinions for publication, read th drafts of other judges' opinions, participate in conference, and hea arguments. Each judge must try to keep current on development in the law, run his staff, help administer his circuit, perhaps serv on professional committees, and so on.

The point of this fairly dreary exposition is that the object o this article is not to criticize the judges. Their dedication and in dustry is beyond question. We aim only to examine and evaluat one technique that judges have used to streamline their workload

The next three parts of the article report the empirical study We begin with a description of the methodology used in the study We then examine the relation between publication frequency an the content of the several publication plans. Finally, we discuss th costs and benefits associated with limited publication: What do th judges gain from nonpublication? Are there any drawbacks associ ated with those gains? Are there ways to minimize the costs whil realizing most of the gains?

II. The Study: Methodology

Our assessment of the impact of the publication plans on th decision-making process of the courts of appeals is based on study of the published and unpublished opinions of those court during the 1978-79 Reporting Year.[39] Reviewing the material pub

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grant bail, for example, circuit judges may act singly. This means the average stated abov is somewhat high.)

Average figures, of course, conceal peaks and valleys among the circuits. In the Fourt Circuit, for instance, 1235 cases were decided by judicial action. Multiplication by thre yields a total of 3708 votes. Reducing that figure by 20% for votes cast by senior and visi ing judges yields 2966. Seven active judges provided 1750 judge-days over the assumed 25 working days, and thus nearly 1.7 decisions per day for each active circuit judge.

In the District of Columbia Circuit, by contrast, the number of cases decided after jud cial action was 699, producing 2097 total votes. This figure must be reduced by 20.7% t account for the contribution of visiting and senior judges. The result of that reduction, 166 when divided by 2250 total judge-days (9 judges times 250 working days) yields nearly .7 decisions per judge per day. Percentages of votes cast by active circuit judges are from *id* 51. Cases decided per circuit is computed from *Statistical Data*, *supra* note 35, Tables 1 5U.

[38] Some cases naturally present fewer problems than others; many are frivolous. For conscientious judge, however, even those present demands on his time. The judge wh wishes to supervise even minimally the work of the staff attorneys and his own law cler must spend some time on even the most frivolous appeal.

[39] The Reporting Year ran from July 1, 1978 through June 30, 1979. For the statisti

lished during that period was relatively straightforward; we used all appeal-dispositive documents—"opinions"[40]—found in the *Federal Reporter (2d)* for that year.[41] Choosing the unpublished material involved somewhat more selectivity because the Administrative Office of the United States Courts (the administrative and record-keeping agency of the federal judiciary) distinguishes between appeals terminated "by judicial action" and those terminated "without judicial action."[42] We studied only the former group, because we did not want to include consent decrees, affirmances or reversals by stipulation, or out-of-court settlements.[43] Those types of dispositions present only bookkeeping problems to the judges, and do not require any real exercise of judicial ability; their inclusion in the study, therefore, would obscure the nature of what judges in fact do. Accordingly, the total population for this study included all terminations that were published,[44] and all unpublished terminations that were by "judicial action."[45] Table 1 records the population of published and unpublished opinions used in the study.

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kept by the Administrative Office of the United States Courts for that period, see ANNUAL REPORT, *supra* note 35, at A-1 to -175.

[40] "Opinion" is a generic term. The several circuits refer to their written products by many different (and at times inconsistent) labels. Included in the term "opinion" for our purposes are what some circuits would call opinions, memoranda, per curiam opinions, orders, judgments, and judgment orders.

[41] A list of "Appeals Terminations" was furnished us by the Administrative Office. All information compiled by the Office and, in turn, all the information that we used in the study was compiled from records kept by the individual circuit court clerks on a form known as "J.S. 34 Appeals Disposition—Termination Form" (on file with *The University of Chicago Law Review*) [hereinafter cited as J.S. 34]. In order to generate the list of published appeals terminations, we selected all terminations whose J.S. 34 forms contained checks in positions 1, 2, or 3 in box 13 ("Opinion").

[42] See the J.S. 34 form, boxes 9 and 10 (termination by judicial action), and box 11 (termination without judicial action).

[43] Nevertheless, we found a fair number of decisions labeled "judicial action" that were, in fact, voluntary dismissals and the like.

[44] A total of 4737 terminations were published. Thirty-eight terminated appeals were recorded as "published" but as not involving "judicial action"; we therefore excluded them from the study for reasons explained in text and note at note 43 *supra*. These inconsistent designations probably were the result of a reporting error. In any case, their number is insignificant.

[45] This procedure differs from the Administrative Office's typical record-keeping habits in one important respect. For many purposes (*e.g.*, recording reversal rates and separate opinion rates), the Office uses as its relevant total disposition population the set of appeals dispositions that occurred after oral hearing or submission upon the briefs. *See, e.g.*, ANNUAL REPORT, *supra* note 35, Table B1. For most of the same purposes, we chose the larger population of appeals terminated "by judicial action." The difference between the two populations is that many cases docketed in the courts of appeals are terminated without argument

TABLE 1

PUBLISHED AND UNPUBLISHED OPINIONS

Circuit	Published	Unpublished	Total
D.C.	194	505	699
First	214	147	361
Second	359	563	922
Third	219	991	1210
Fourth	346	890	1236
Fifth	1385	978	2363
Sixth	340	908	1248
Seventh	325	736	1061
Eighth	448	209	657
Ninth	618	1238	1856
Tenth	251	555	806
Total	4099	7320	12419

SOURCE: *Statistical Data, supra* note 55, Tables 1P, 5U.

or submission upon written briefs. Some of these nevertheless are terminations "by judicia action." Examples are motions for summary affirmance, motions for stays, and motions fo bail reductions. These cases typically involve some written argument to the court: however they are not reported as "submitted upon written briefs" unless the "brief" is the forma brief contemplated in FED. R. APP. P. 28. Telephone conversation with David Gentry, Re search Analyst, Administrative Office of the United States Courts (July 24, 1980). We rea soned that the larger population of appeals terminated "by judicial action" was more appro priate for our study than the smaller set of appeals terminated "after argument o submission" because the larger group more closely reflects the total case-terminating wor of the judges.

In the course of our study, it became apparent that the total number of opinions indi cated as unpublished on the J.S. 34 forms compiled by the Administrative Office include a few opinions that actually were published. This could be the result either of errors by th circuit court clerk in filling out the J.S. 34 forms, or of reversals of original decisions not t publish. Because it was impractical for us to verify independently that each of the nearl 8000 "unpublished" opinions on the list supplied by the Administrative Office was unpub lished, we did not correct for these factors. We have no reason to believe that excludin these opinions would significantly decrease the population size, particularly because codin

III. Results of the Study: Publication Plans and Publication Performance

The fundamental empirical question concerning the publication plans[46] is whether they have any effect at all on the decision to publish. Do the judges actually pay attention to the plans? Fortunately for the analyst, both the contents of the publication plans and the extent to which publication is limited vary widely among the circuits. Differences occur along several lines—the specificity of publication criteria, the existence *vel non* of a presumption against publication, and the maker of the publication decision.[47] This section examines the effect of those differences on the circuits' actual publication behavior. Table 2, which reports the percentage of published and unpublished opinions in each circuit, will facilitate that examination.

TABLE 2

Percentage of Opinions Published

Circuit	Published (%)	Unpublished (%)
D.C.	27.8	72.2
First	59.3	40.7
Second	38.9	61.1
Third	18.1	81.9
Fourth	28.0	72.0
Fifth	58.6	41.4
Sixth	27.2	72.8
Seventh	30.6	69.4
Eighth	68.2	31.8
Ninth	33.3	66.7
Tenth	31.1	68.9
Average	38.3	61.7

Source: Calculated from the data in Table 1 *supra*

error presumably would be randomly distributed, with approximately equal numbers of unpublished opinions coded as published and published opinions coded as unpublished.

A. Specificity

One aspect in which the plans vary widely is the specificity of the standards that guide the publication decision. Some plans establish criteria that can only be described as vague. The Third Circuit, for example, prescribes publication only where "the opinion has precedential or institutional value."[48] Other circuits have specific publication criteria. The Ninth Circuit Plan, for example, provides for publication of an opinion that

> (1) Establishes, alters, modifies or clarifies a rule of law, or
>
> (2) Calls attention to a rule of law which appears to have been generally overlooked, or
>
> (3) Criticizes existing law, or
>
> (4) Involves a legal or factual issue of unique interest or substantial public importance, or
>
> (5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or
>
> (6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.[49]

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[48] All of the circuits have limited publication plans. In addition, all but one have local rules that address the question. A circuit's position on limited publication thus can be determined only by looking at both its plan and any relevant local rules. The following are the relevant rules: D.C. CIR. R. 8(f); 1ST CIR. R. 14; 2D CIR. R. 0.23; 4TH CIR. R. 18; 5TH CIR. R. 21; 6TH CIR. R. 11; 7TH CIR. R. 35; 8TH CIR. R. 14; 9TH CIR. R. 21; 10TH CIR. R. 17. In the Second, Fourth, Seventh, Ninth, and Tenth Circuits, the publication plan consists simply of the text of the rule. In the Third Circuit, there is no relevant local rule, but only a publication plan. In the other five circuits, the publication plan is distinct from the local rule on the question. In two circuits, the First and the Eighth, the publication plans appear as appendices to the circuit's local rules.

[49] Earlier, we attempted to classify the publication plans of the Fourth and Sixth Circuits as "conservative" and "radical," respectively. Those classifications were somewhat awkward, but they did permit consideration of these factors. We hypothesized that a radical plan would produce lower publication percentages than a conservative plan. The data did not support that hypothesis. See *Limited Publication*, *supra* note 4, at 810-14, for an explanation of the terms.

[48] THIRD CIRCUIT PLAN (on file with *The University of Chicago Law Review*).

[49] 9TH CIR. R. 21(b).

The circuits can be roughly divided into two groups depending on the specificity of their publication criteria.[50] Table 3 displays the circuits in that arrangement with the percentage of published and unpublished opinions produced by each circuit. The data show little correlation between the degree of specificity of a circuit's publication criteria and its actual publication behavior. The average publication percentage for circuits with detailed standards was 36.5% while the average for circuits with vague standards was 40.4%. On the other hand, the data in Table 3 may give dispropor-

TABLE 3

PUBLICATION RELATED TO SPECIFICITY OF STANDARDS

PUBLICATION IN CIRCUITS WITH VAGUE STANDARDS		
Circuit	Published (%)	Unpublished (%)
First	59.3	40.7
Second	38.9	61.1
Third	18.1	81.9
Fifth	58.6	41.4
Sixth	27.2	72.8
Average	40.4	59.6
PUBLICATION IN CIRCUITS WITH SPECIFIC STANDARDS		
Circuit	Published (%)	Unpublished (%)
D.C.	27.8	72.2
Fourth	28.0	72.0
Seventh	30.6	69.4
Eighth	68.2	31.8
Ninth	33.3	66.7
Tenth	31.1	68.9
Average	36.5	63.5

[50] The circuits with "vague" standards, and the pertinent rules, are: 1ST CIR. R. app. B; 2D CIR. R. 0.23; THIRD CIRCUIT PLAN para. (a), 5TH CIR. R. 21. SIXTH CIRCUIT PLAN para. 2 (on file with *The University of Chicago Law Review*). The "specific" rules are: DISTRICT OF COLUMBIA CIRCUIT PLAN para. e (on file with *The University of Chicago Law Review*); 4TH CIR. R. 18(a); 7TH CIR. R. 35(c)(1); 8TH CIR. R. app. para. 4; 9TH CIR. R. 21(h); 10TH CIR. R. 17(d), (e).

tionate effect to the publication habits of the Eighth Circuit. All o the other circuits with specific standards have publication percent ages in the high 20s or low 30s, or less than half the Eighth Cir cuit's publication percentage of 68.2%. If the Eighth Circuit is ex cluded, the average percent published for the circuits with specifi standards would be 30.2%, and the percentage of opinions unpub lished would be 69.8%. These percentages would indicate that a substantially greater proportion of opinions are published in cir cuits with vague standards. Unless and until we discover some anomalous practice in the Eighth Circuit explaining the disparity however, we do not feel justified in excluding the circuit from our computations. At any rate, we cannot be as confident as the results of Table 3 might warrant that specificity of standards has no effect on publication percentage. It may well be that vague standards en hance the likelihood of publication.

B. Presumptions

Another provision that might affect the tendency to publish is a presumption against publication. Some circuits make such a pre sumption explicit. The First Circuit Plan, for instance, provides that

> While we do not presently attempt to categorize the crite ria which should determine publication, we are confident that a significantly larger proportion of cases will result in unpub lished decisions if the court adopts a policy of self conscious scrutiny of the publish-worthiness of each disposition coupled with a presumption, in the absence of justification, against publication.[51]

In other circuits the presumption is not explicit, but is inferable.[52] In still other circuits there is no presumption against publication.

Commentators generally have favored publication plans with specific publication standards. The reason for that preference is not really the hope for lower published/nonpublished ratios. Rather, the commentators have believed that vague criteria might be an insufficient guide and that precedential opinions might be lost through misclassification. *See Non-Precedential Precedent*, *supra* note 4, at 1177; Note, *supra* note 4, at 147.

[51] 1ST CIR. R. app. B(8).

[52] The Fourth Circuit, for example, before listing its publication standards provides that "an opinion shall not be published unless it meets one of the following standards for publication." 4TH CIR. R. 18(a).

A plausible hypothesis is that the circuits that have a presumption against publication (explicit or implicit)[53] would publish less than circuits without such a presumption. Table 4 shows that circuits without presumptions against publication published 44.9% of their opinions, while circuits with such a presumption published only 32.7% of their opinions. The existence of a presumption against publication, then, does seem to affect actual publication practice.[54]

TABLE 4

PUBLICATION RELATED TO PRESUMPTIONS AGAINST PUBLICATION

CIRCUITS WITH PRESUMPTION AGAINST PUBLICATION		
Circuit	Published (%)	Unpublished (%)
First	59.3	40.7
Third	18.1	81.9
Fourth	28.0	72.0
Sixth	27.2	72.8
Seventh	30.6	69.4
Ninth	33.3	66.7
Average	32.7	67.3
CIRCUITS WITHOUT PRESUMPTION AGAINST PUBLICATION		
Circuit	Published (%)	Unpublished (%)
D.C.	27.8	72.2
Second	38.9	61.1
Fifth	58.6	41.4
Eighth	68.2	31.8
Tenth	31.1	68.9
Average	44.9	55.1

[53] Six Circuits have a presumption against publication. *See* 1ST CIR. R. app. B(a) (explicit); THIRD CIRCUIT PLAN paras. 1, 2 (with regard to per curiam opinions, but not with regard to signed opinions); 4TH CIR. R. 18(a) (implicit); SIXTH CIRCUIT PLAN para. 2 (explicit); 7TH CIR. R. 35(a) (explicit); 9TH CIR. R. 21(a), (b) (implicit).

[54] There are, of course, other possible explanations for these variations. It should be noted that in general the circuits with presumptions against publication are larger than the circuits without such presumptions. (See the figures in Table 1 *supra*.) The size of the circuit and the accompanying administrative burdens may have an effect on the judges' tendency to publish. Some doubt is cast on this proposition by the high publication percentage

3. *Who Makes the Decision.* Frequency of publication also might be affected by who makes the publication decision. Some circuits require a majority decision to publish,[55] while others permit a single judge to require publication.[56] It is plausible that circuits that permit a positive publication decision by a single judge would publish a higher percentage of their opinions than circuits that require a majority. Table 5 provides only mild support for

TABLE 5

PUBLICATION RELATED TO DECISION TO PUBLISH

CIRCUITS THAT REQUIRE A MAJORITY FOR A DECISION TO PUBLISH		
Circuit	Published (%)	Unpublished (%)
First	59.3	40.7
Third	18.1	81.9
Seventh	30.6	69.4
Ninth	33.3	66.7
Tenth	31.1	68.9
Average	34.5	65.5
CIRCUITS THAT PERMIT A DECISION TO PUBLISH BY A SINGLE JUDGE		
Circuit	Published (%)	Unpublished (%)
D.C.	27.8	72.2
Second	38.9	61.1
Fourth	28.0	72.0
Fifth*	58.6	41.4
Sixth	27.2	72.8
Eighth	68.2	31.8
Average	41.4	58.6

* Although 5TH CIR. R. 21 does not explicitly address the issue, it has been construed as requiring a unanimous decision not to publish. *See* NLRB v. Amalgamated Clothing Workers, 430 F.2d 966, 972 (5th Cir. 1970).

that the largest circuit, the Fifth, displays. Because the Fifth Circuit is also the only one of the six largest circuits without a presumption against publication, its high publication percentage seems to support the conclusion in the text.

[55] *See* 1ST CIR. R. app. B(b)(4); THIRD CIRCUIT PLAN paras. 1, 2; 7TH CIR. R. 35(d)(1); 9TH CIR. R. 21(d); 10TH CIR. R. 17(c).

[56] *See* DISTRICT OF COLUMBIA CIRCUIT PLAN; 4TH CIR. R. 18(b) (author or majority de-

that hypothesis. The one-vote circuits publish an average of 41.4% of their opinions, while majority-vote circuits publish 34.5%. It is difficult to assume any sort of causal connection from such a small differential.[57]

IV. Results of the Study: An Empirical Assessment of Costs and Benefits

A. Benefits

The major impetus for the limited publication movement has been the dramatically increasing caseload of the circuit courts. Limited publication can help the judges to deal with the glut, it is argued, because an unpublished opinion takes much less judicial time and effort to prepare than a published opinion.[58] If nonpublication does result in significant savings, those savings should be revealed in two ways: swifter justice and increased judicial productivity.

1. *Swifter Justice.* If justice delayed is justice denied, then swifter justice obviously is an important goal. At the appellate level, the speed of justice can be measured by the number of days between the time at which the record was complete and the date of

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cides); Sixth Circuit Plan para. 2; 8th Cir. R. app. para. 3. *See also* 2d Cir. R. 0.23 (requiring a unanimous decision not to publish).

[57] There are two other related issues. First, four circuits permit a judge who writes a separate opinion to publish even if a panel majority votes not to. District of Columbia Circuit Plan, 7th Cir. R. 35(d)(2) (permitting, but advising against such publication); 8th Cir. R. app. para. 3; 9th Cir. R. 21(b)(6). Those four circuits publish slightly more frequently than do the other seven (40% to 37.3%, computed from the percentages in Table 2 *supra*). Because of the extreme scarcity of unpublished separate opinions, *see* text at note 131 *infra*, it is not surprising that these provisions have no significant effect on publication percentages. They may be useful, however, because they help ensure against arbitrariness on the part of a majority.

Second, two circuits will entertain requests by persons outside the court for publication of certain decisions. 7th Cir. R. 35(d)(3), 9th Cir. R. 21(f). This, too, is a useful concept. Although we have suggested previously that the practice may favor institutional litigants, *Non-Precedential Precedent*, *supra* note 4, at 1178-79, that may not be the case. In the Seventh Circuit, 21 requests for publication from outsiders were received by the Seventh Circuit. The Court honored most of the requests, which came from a disparate group. Letter to authors from Thomas Struble, Clerk (Oct. 7, 1980) (on file with *The University of Chicago Law Review*). The Ninth Circuit has a variation authorizing staff law clerks to recommend the publication of appropriate decisions. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 Calif. L. Rev. 937, 949-50 (1980). This practice appears to lead to a minimal increase in publication rates, if any. The two circuits allowing it publish 32.5% of their opinions, while the other nine publish 39.7%.

[58] Standards, *supra* note 17, at 5.

the final judgment—turn-around time, for short. Table 6 suggests that nonpublication promotes swifter justice. As the table shows, turn-around time is considerably shorter if an opinion is not published. One out of every five unpublished opinions took no longer than three months to resolve, for example, but only one out of every thirty-three published cases was decided that quickly. Almost half of the unpublished opinions had a turn-around time of half a year or less; the comparable figure for published opinions was one-fifth.

TABLE 6

TIME FOR DECISION

Turn-Around Time (Days)*	Published (%)	Unpublished (%)
0-10	0.3	3.8
11-30	0.4	3.0
31-60	1.0	6.4
61-90	2.2	7.4
91-120	3.8	7.8
121-150	6.0	10.0
151-180	6.9	9.9
181-360	36.7	31.1
360 or more	42.6	20.7

SOURCE: Compiled from data on 11,487 cases disposed of during the 1978-1979 Reporting Year for which data were available. *Statistical Data*, *supra* note 35, Tables 6P, 6U.

* Measured by the interval between the day the record was complete and the date of final judgment.

Although there can be no doubt that cases culminating in unpublished opinions are resolved more quickly, it is impossible to determine how much of that saving can be attributed to limited publication. Much may be because unpublished litigation is easier to decide. By definition, it contains nothing that requires the creation of precedent. Whether published or not, it can be disposed of without the extra work needed to justify the creation and explain the application of new law.

Nevertheless, anyone who reads even a small number of unpublished opinions must conclude, given their brevity and informality, that considerable effort has been spared in their prepara-

tion. Of course, one can then ask whether too much effort was spared. That is, does the quality of decision making suffer when the judges determine that an opinion need not be published and therefore that only a truncated opinion need be written? Before asking that question, however, the relation between publication and productivity must be examined.

2. *Increased Productivity.* If saving time and judicial effort in order to improve the courts' ability to handle a heavier caseload is the major goal of limited publication, the practice presumably should increase judicial productivity.[59] It is easier to determine whether this is so if we limit ourselves to an investigation of the correlation between each circuit's use of limited publication and its relative judicial productivity. In other words, do the circuits that publish a comparatively small portion of their opinions have a comparatively good record of productivity?[60] Before that question can be addressed, the concept of productivity must be defined.

Typically, judicial productivity is measured in terms of dispositions per authorized judgeship.[61] That technique is unsatisfactory for two reasons. First, measuring productivity by authorized, but unfilled, judgeships does not produce very instructive comparisons. This is particularly true given our data, because authorized judgeships were increased from 97 to 132 during the study year.[62] Because none of the new judgeships was filled during the study year,

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[59] Of course, it is entirely possible that limited publication saves time but that the savings do not result in increased productivity. For example, instead of being spent in writing more decisions, the extra time could be invested in fashioning better-crafted opinions, or in more thought on the most difficult cases on the court's docket.

[60] Whether there is any relation between changes in a circuit's limitation of publication from year to year and increases or decreases in productivity is, of course, also relevant to determining limited publication's impact on productivity. That question is beyond the scope of our study because we have data from all the circuits but for only one fiscal year. In other words, we have investigated the horizontal question, but not the vertical one. Both methods of attack are pursued by Professor Daniel Hoffman of the University of Vermont in an unpublished article, D. Hoffman, Nonpublication of Federal Appellate Court Opinions 12 (1978) (on file with *The University of Chicago Law Review*). Professor Hoffman's instructive work differs from ours in two other respects as well: (1) In determining publication/nonpublication rates, he used a population of "cases decided after argument or submissions." For reasons given in note 45 *supra*, our test population is the larger group of "cases decided with judicial action." (2) He used "dispositions per authorized judgeship" as a measure of productivity. For reasons given in text at notes 61-63 *infra*, we have used "corrected dispositions per judge" as the measure.

[61] *See, e.g.*, ANNUAL REPORT, *supra* note 35, at 45.

[62] *Id.* at 44.

using the traditional measure could skew the results significantly. Accordingly, we chose to evaluate productivity by using the number of active circuit judges instead of the number of authorized judgeships. A second difficulty with the standard measure of productivity is that the circuits use visiting and senior circuit judges to decide cases.[63] That practice tends to skew productivity comparisons because the several circuits use visiting and senior judges to varying extents. Furthermore, if not compensated for, it would make total dispositions per active judgeship an inflated measure of productivity. We have corrected for these difficulties by subtracting from a circuit's total number of dispositions the share attributable to visiting and senior judges. Combining these two innovations, we measure productivity not by dispositions per authorized judgeship, but by dispositions per active circuit judge, corrected for the participation of senior and visiting judges: "corrected dispositions per judge," for short.

We now return to the central question: Is productivity positively correlated with nonpublication? The first column of Table 7 lists the circuits in order of productivity, from most corrected dispositions per judge to least. The second lists each circuit's corrected dispositions per judge. The third column gives the percentage of each circuit's total opinion production that was not published. Columns two and three show a positive correlation[64] of 0.097, indicating that there is scant tendency for circuits that publish less to produce more.

Our data thus provide no support for the hypothesis that limited publication enhances productivity.[65] It must be borne in mind, however, that limiting publication is only one of a host of variables that may affect productivity. The low productivity figures for the District of Columbia Circuit and the Second Circuit, for example, might well be attributable more to the great variety and complexity of the regulatory and commercial appeals that those courts must decide than to their publication habits. Other variables in-

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[63] *Id.* at 50-51.

[64] A correlation is a report of the coincidence of two phenomena: *x* and *y*. A positive correlation coefficient indicates that the value of the *x* variable increases in proportion to the value of the *y* variable. The correlation coefficients discussed in this article were computed with the Spearman Rho formula. Significance was tested with standard significance tables. *See generally* D. Harnett & J. Murphy, Introductory Statistical Analysis ch. 12 (2d ed. 1980).

[65] Professor Hoffman's study also found essentially no relationship between nonpublication and productivity. *See* D. Hoffman, *supra* note 60, at 11-26.

clude the percentage of cases that are argued orally,[66] the extent to which central staff is used to prepare opinions, and the geographical size of the circuit.[67] Absent the ability to control or even quantify some of those variables, it is impossible to be certain of the effect of limited publication on productivity.

TABLE 7

PRODUCTIVITY AND PUBLICATION

Circuit	Productivity (Corrected Dispositions per Judge)[a]	Unpublished Opinions (%)
Fourth	140.9	72.0
Fifth	138.6	41.4
Sixth	113.2	72.8
Third	108.4	81.9
Seventh	106.4	69.4
Tenth	101.4	68.9
First	99.2	40.7
Ninth	84.7	66.7
Second[b]	76.0	61.1
Eighth	72.0	31.8
D.C.	61.6	72.2

[a] Calculated from dispositions per circuit in Table 1 *supra*; participation by senior and visiting judges in ANNUAL REPORT, *supra* note 35, at 51; and number of active circuit judges in *id.* at 45.

[b] Because only the Second Circuit issues an appreciable number of oral opinions, its total dispositions from Table 1 were increased by 195 oral opinions. Calculated by the authors from data supplied by the Administrative Office of the United States Courts.

[66] Oral argument takes time, of course. In addition, it can be a bottleneck in the appellate process, because a court operating by traditional procedures cannot decide more cases than it can hear, and there are physical limitations on the number of cases it can hear. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 3, at 19. Some courts have reported dramatic increases in output after establishing a system of curtailed oral argument. *See* Huth v. Southern Pac. Co., 417 F.2d 526 (5th Cir. 1969).

[67] Geography plays an important role in relative judicial productivity. Travel time is much greater in some circuits than in others.

B. Costs of Limited Publication

The sections that follow examine the costs of limited publication. Two of those costs, suppression of precedent and diminished quality, accompany the benefits of swifter justice and savings of judicial effort. A third is the disparate impact of nonpublication, leading to the concern that some classes of litigants may be denied equal access to the courts. A final cost is systemic: the ultimate effect of limited publication is to transform the courts of appeals into certiorari courts in some instances.

1. *Opinion Quality.* Anyone who has read a large number of unpublished opinions must conclude that they are, as a group, far inferior in quality to the opinions found in the *Federal Reporter.* Although judgments about quality are largely subjective, some quantification of the differences between published and unpublished opinions is possible.

a. *Length.* Proponents of limited publication argue that time can be saved in the preparation of opinions that will not be published because they need not contain complete recitations of the facts or exhaustive discussions of the relevant legal principles.[68] Hence, unpublished opinions should be considerably shorter than their published counterparts.[69] This is confirmed by Tables 8 and 9. In every circuit, more than 55% of all unpublished opinions

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[68] *See* STANDARDS, *supra* note 17, at 5.

[69] For obvious reasons, we were unable to perform evaluations on the total of nearly 6000 unpublished opinions produced during the Reporting Year, *see* text and notes at notes 42-45 *supra*. Accordingly, we chose a stratified sample of about 10% of the unpublished opinions for that portion of the study; the population of that sample is shown in Table A.

The sample was "stratified" in this sense: For each termination reported by the Administrative Office there is also a "Method of Disposition" reported. It can be (1) written opinion, (2) memorandum decision, (3) decided from the bench, (4) by court order without opinion, (5) by consent, or (6) other. *See* J.S. 31, box 12. We stratified our sample by ensuring that the 10% of the total population included 10% of the cases decided by each of methods 1, 2, 4, and 6. We did so because we believed that there might be differences in quality based on method of disposition. We eliminated cases decided by methods 3 and 5 because they did not result in written case-dispositive orders resulting from judicial action, and hence could not be evaluated for quality or measured for length.

Our sample was not exactly 10%. It varied from circuit to circuit for three reasons. First, the selections were made from a preliminary list of terminations—really docket numbers—prepared for us by the Administrative Office. Not every docket number represents an opinion; because some cases are consolidated for argument or opinion, several docket numbers may produce only one opinion. Hence, our original selection of 10% of docket numbers actually produced a sample of opinions that typically was closer to 12% of the total opinion population. Second, some of the opinions that we requested from the circuit court clerks were never sent. Third, some opinions originally listed as unpublished were later published.

TABLE 8

LENGTH OF UNPUBLISHED OPINIONS

Circuit	Below 50 Words (%)	50-99 Words (%)	100-299 Words (%)	300-499 Words (%)	500- Words (%)
D.C.	45.2	28.6	16.7	7.2	2.4
First	25.0	12.5	43.8	16.3	12.6
Second	45.4	20.4	23.4	7.8	3.2
Third	70.3	19.4	5.6	1.1	3.3
Fourth	42.9	15.6	21.5	9.6	10.8
Fifth	62.5	7.0	17.2	9.1	4.0
Sixth	6.0	22.6	61.9	8.4	1.2
Seventh	7.6	15.1	37.6	11.3	29.0
Eighth	15.8	21.0	31.6	10.6	21.1
Ninth	43.2	9.1	18.0	14.4	15.4
Tenth	13.0	22.3	20.4	11.2	33.4

SOURCE: Stratified sample of the 7720 unpublished opinions in *Statistical Data*, *supra* note 35, Table 5U. *See* Table A and note 69 *supra*.

NOTE: Figures for each circuit may not add up to 100% because of rounding.

(footnote 69 continued)

TABLE A

SAMPLE POPULATION

Circuit	Number of Unpublished Opinions Analyzed	Percentage of Total Unpublished Dispositions
D.C.	61	12.1
First	17	11.6
Second	71	12.6
Third	123	12.4
Fourth	92	10.3
Fifth	101	10.5
Sixth	96	10.6
Seventh	92	12.5
Eighth	25	12.0
Ninth	146	11.8
Tenth	67	12.1
Total	891	

TABLE 9

LENGTH OF PUBLISHED OPINIONS

Circuit	Below 500 Words (%)	500-999 Words (%)	1000-2999 Words (%)	3000-4999 Words (%)	5000- Words (%)
D.C.	3.3	15.0	50.0	15.0	16.7
First	2.7	26.0	52.1	15.1	4.2
Second	11.1	12.4	51.7	18.0	6.7
Third	4.2	14.9	50.0	17.6	13.6
Fourth	23.4	29.9	33.8	9.1	3.9
Fifth	18.8	24.2	43.6	7.3	6.0
Sixth	30.1	16.4	39.8	11.0	2.7
Seventh	4.5	11.4	73.9	4.5	5.7
Eighth	16.8	29.8	48.1	4.6	0.8
Ninth	18.5	24.6	44.7	10.6	1.8
Tenth	3.2	28.1	61.0	7.9	0.0

SOURCE: Calculated from all opinions reported in volumes 595-600 of *Federal Reporter (2d)*. Those six volumes contained substantial numbers of opinions from the survey year.

NOTE: Figures for each circuit may not add up to 100% because of rounding.

were shorter than 300 words. In six circuits, more than 40% of the unpublished opinions were shorter than 100 words. Published opinions, by contrast, are considerably longer. In nine of the eleven circuits more than 80% of all published opinions exceeded 500 words. In all eleven circuits, the largest group of published opinions was the group between 1000 and 3000 words. If we can safely assume that a relatively long opinion takes more time to prepare than a relatively short one, the claim that limited publication saves time is justified.[70]

b. *Minimum standards.* Not only are unpublished opinions shorter, they are so short that they raise serious questions concern-

[70] If limited publication in fact saves time, but is not correlated with increased productivity, *see* text and notes at notes 64-65 *supra*, we are left with two alternate hypotheses: (1) the judges do not translate the time saved into extra dispositions, *see* note 59 *supra*; or (2) the other variables that affect productivity, *see* text and notes at notes 66-67 *supra*, conceal the effect of limited publication.

ing the exercise of judicial responsibility. Does an opinion shorter than fifty words, often only a sentence or two, satisfy the court's institutional obligation?

To answer that question one must first consider the essential characteristics of the judicial opinion. At rock bottom, it must announce the result to the parties and explain to them the court's reasoning.[71] It should also explain the result to a higher court and thus facilitate review.[72] A final purpose is to "provide the stuff of the law":[73] rules of law, interpretations of statutes and constitutions, and declarations of public policy. Because the opinion publication plans clearly indicate that unpublished opinions are not designed to accomplish the "lawmaking" function, the present inquiry can be limited to whether unpublished opinions perform the first two functions satisfactorily.

A substantial consensus exists concerning the minimum standards that an opinion must meet if it is to perform those two functions adequately. One formulation states that even a memorandum decision must contain at least three elements: (1) the identity of the case decided; (2) the ultimate disposition; and (3) the reasons for the result. In addition, it is often desirable that the issues be stated explicity.[74] How well these standards were met by our sample is shown in Table 10.[75]

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[71] *See* STANDARDS, *supra* note 17, at 2.

[72] *Id.* at 2-3.

[73] The phrase is from Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319 (1971).

[74] P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 3, at 34. In addition, the American Bar Association recommends that

> [e]very decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing court should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.

ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 58 (1977). Karl Llewellyn said much the same thing:

> The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published "opinion" which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise.
>
> This opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a *fair* break.

K. LLEWELLYN, THE COMMON LAW TRADITION 26 (1960). One survey of attorneys found that more than two-thirds of the respondents believed that "the due process clause of the Constitution should be held to require courts of appeals to write 'at least a brief statement of the reasons for their decisions.'" HRUSKA REPORT, *supra* note 18, at 49 (quoting a survey undertaken by the Commission).

[75] An opinion was listed as meeting minimum standards if it gave some indication of what the case was about and some statement of the reasons for the decision. Often a single

TABLE 10

SATISFACTION OF MINIMUM STANDARDS IN UNPUBLISHED OPINIONS

Circuit	Reasoned Opinions (%)	Decided on the Basis of the Opinion Below (%)	No Discernible Justification (%)
D.C.	34.1	4.9	61.0
First	68.8	6.3	25.0
Second	45.3	23.4	31.3
Third	13.6	1.1	85.2
Fourth	46.0	41.0	13.0
Fifth	36.0	5.0	59.0
Sixth	71.5	7.0	21.5
Seventh	77.5	1.3	21.3
Eighth	57.9	5.3	36.8
Ninth	65.8	0.0	34.2
Tenth	79.6	13.0	7.4

SOURCE: Compiled by the authors from the stratified sample in Table A *supra*. *See* note 75 *supra*.

NOTE: Figures for each circuit may not add up to 100% because of rounding.

Three circuits recorded double-digit percentages in the second category, cases decided on the basis of the opinion below. That sort of opinion provides a satisfactory explanation of the result to the parties, at least to the extent that the opinion below gives reasons for the result. By and large, the explanation is adequate only with respect to the parties, because most district court and administrative agency decisions are not published or readily accessible. Thus, the bar and the general public rarely will be able to oversee appellate decisions that culminate in a decision by reference. Another drawback to a decision by reference is that it may leave litigants

citation of precedent was considered satisfactory if the precedent was narrowly directed to the problem at hand; a citation to the general standard of review of an administrative or district court decision was not considered sufficient. Also considered insufficient to meet minimum standards were baldly conclusory opinions such as "appellant's contentions are frivolous and without merit," or "the conviction is supported by substantial evidence."

The reliability of the coding of opinions was established as follows: Each of the authors, using the coding method described above, applied it independently to all of the opinions in the sample. We agreed on 88% of the opinions for all circuits.

with the feeling that the appellate court never really gave the case a fresh look. A short statement of the reasons for the decision in the appellate court's own words provides more evidence that serious thought has gone into the decision than does a blanket approval of the opinion below.

It is the third category, decisions with no discernible justification, that raises the issue of judicial irresponsibility most strikingly.[76] A decision without articulated reasons might well be a decision without reasons or one with inadequate or impermissible reasons. That is not to suggest that judges will be deliberately arbitrary or decide cases without adequate grounds. The discipline of providing written reasons, however, often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate result. Even if judges conscientiously reach correct results, an opinion that does not disclose its reasoning is unsatisfactory. Justice must not only be done, it must appear to be done. The authority of the federal judiciary rests upon the trust of the public and the bar. Courts that articulate no reasons for their decisions undermine that trust by creating the appearance of arbitrariness.

The decision without discernible justification takes various forms in the several circuits. Perhaps the most flagrant failure to provide reasons occurs in the Fifth Circuit. A substantial number of unpublished decisions by the court read simply "Affirmed. See Local Rule 21."[77] The District of Columbia Circuit decides some cases "substantially upon the basis of the opinion below," a prac-

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[76] The practice of deciding cases with no articulated reasons has been roundly condemned by commentators, lawyers, and judges. *See, e.g., Hearings, supra* note 4, at 451-52 (testimony of Edward Hickey, President, Bar Association of the Seventh Circuit); *id.* at 555 (testimony of Willard Lassers on behalf of the American Civil Liberties Union and the Chicago Lawyers Committee for Civil Rights Under Law); *id.* at 826 (testimony of Judge Doyle of the Tenth Circuit); *id.* at 933 (testimony of Professor Haworth); *id.* at 951 (testimony of Professor Carrington); *id.* at 1107 (testimony of Judge Skelton of the Court of Claims); Note, *supra* note 4, at 134-35.

[77] 5TH CIR. R. 21 authorizes such a truncated order when the court finds

> (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Affirming under this rule thus is not a decision by reference, but simply a declaration that the decision below was not wrong. Furthermore, the failure even to refer to the opinion below adds another layer of obscurity to the decisional process.

tice even less satisfactory than the usual decision by reference because it does not indicate which portions of the opinion below are accepted and which are rejected. The Third Circuit produces a large number of opinions that simply list the appellant's contentions and then order that the judgment be affirmed. That practice, although perhaps more instructive than a one-word affirmance, gives no indication why each contention was rejected, nor does it give any indication that the court gave any serious thought to the appellant's brief. Several circuits employ what might best be described as form orders or judgments.[78] These orders recite that "after due consideration" or "upon a review of the record and the briefs of the parties," the "appeal is dismissed as frivolous" or "appellant's contentions are without merit."

C. Quality and Productivity

The percentage of below-standard unpublished opinions varies greatly among the circuits, from a high of 85% in the Third Circuit to a low of 7% in the Tenth Circuit. It might be expected that those circuits with the highest percentage of below-standard unpublished opinions are the most overworked. That is, short opinions may be necessary in order to permit those courts to keep up to date. The data in Table 11, however, suggest that such is not the case.

The first column lists the circuits in order of productivity.[79] The second displays the percentage of below-standard unpublished opinions.[80] The data show no positive correlation.[81] In other words,

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[78] The Second, Third, Fifth, and Sixth Circuits make some use of the formula type order.

[79] *See* Table 7 *supra*.

[80] *See* Table 10 *supra*

[81] In fact the correlation was negative: -.140. Another way to test the hypothesis that very short opinions are necessary to high productivity is to correlate productivity with the percentage of minimum standard opinions produced. That would remedy a possible defect in Table 11. The Second Circuit and the Fourth Circuit show relatively low percentages both of below-standard opinions and of minimum standard opinions. *See* Table 10 *supra*. This is the result of high percentages of decisions by reference. It may be that the lack of correlation in Table 11 is caused by the fact that the most productive circuit, the Fourth, relies to a large extent on decisions by reference. This difficulty can be eliminated by correlating the percentage of minimum standard opinions with productivity. If the hypothesis that short opinions are necessary to productivity is correct, we should find a strong negative correlation. Once again the hypothesis is not proved. As shown in Table B, there is a negative correlation, but it is quite weak: -.047.

TABLE 11

PRODUCTIVITY AND BELOW-STANDARD UNPUBLISHED OPINIONS

Circuit	Productivity (Corrected Dispositions per Judge)	Percentage of Unpublished Opinions That Are Below Standard
Fourth	140.9	13.0
Fifth	138.6	59.0
Sixth	113.2	21.5
Third	108.4	85.2
Seventh	106.4	21.3
Tenth	101.4	7.4
First	99.2	25.0
Ninth	84.7	34.2
Second	76.0	31.3
Eighth	72.0	36.8
D.C.	61.6	61.0

SOURCE: Tables 7, 10 *supra*.

(footnote 81 continued)

TABLE B

PRODUCTIVITY AND MINIMUM STANDARD OPINIONS

Circuit	Productivity (Corrected Dispositions per Judge)	Percentage of Unpublished Opinions That Meet Minimum Standards
Fourth	140.9	46.0
Fifth	138.6	30.0
Sixth	113.2	71.5
Third	108.4	13.6
Seventh	106.4	77.5
Tenth	101.4	79.6
First	99.2	68.8
Ninth	84.7	65.8
Second	76.0	45.3
Eighth	72.0	57.9
D.C.	61.6	34.1

SOURCE: Tables 7, 10 *supra*.

the most productive circuits were not the ones that produced the most substandard opinions.[82]

The use by the circuits of excessively brief opinions with no discernible justification cannot be supported. The cost of this practice is high; use of such opinions subverts many of the goals of appellate justice. The benefit of the practice is doubtful at best; the data reveal no correlation between productivity and the use of cryptically short opinions.

2. *Suppressed Precedent.* The lower quality of unpublished opinions may be the most important of the costs of limited publication, but it has not been the most controversial. That role has been played by the question of suppressed precedent.[83] By suppressed precedent, we mean a case that ought to have been pub-

[82] Nor did the most productive circuits produce the most very short unpublished opinions, as is shown in the table below:

TABLE C

PRODUCTIVITY AND VERY SHORT OPINIONS

Circuit	Productivity (Corrected Dispositions per Judge)	Percentage of Unpublished Opinions That Are Shorter than 50 Words
Fourth	140.9	42.9
Fifth	138.6	62.5
Sixth	113.2	6.0
Third	108.4	70.3
Seventh	106.4	7.6
Tenth	101.4	13.0
First	99.2	25.0
Ninth	84.7	43.2
Second	76.0	45.4
Eighth	72.0	15.8
D.C.	61.5	45.2

Source: Tables 8, 10 *supra*

Again the correlation is weak: .151.

As might be expected, there is a high positive correlation between the percentage of below-standard opinions and the percentage of opinions shorter than 50 words: .758, as is shown in Table D.

For an explanation of how correlations are calculated and their significance, *see* note 64 *supra*.

lished but was not.[84] Our examination has convinced us, however, that suppressed precedent is not an insuperable problem of limited publication. The discussion that follows examines the problem of suppressed precedent generally and in the specific contexts of reversals and separate opinions.

a. *Generally.* Our sample of unpublished opinions[85] revealed a number of instances of suppressed precedent. It is difficult to estimate how widespread the phenomenon was. An opinion that relies on no authority, for example, could be said to be breaking new ground, or it may only be that the issue is so well settled that citation would be superfluous.[86] To determine with any certainty whether an opinion makes new law requires a familiarity with the substantive law of the circuits that is far beyond the scope of this study. The problem of identifying suppressed precedent becomes even more acute when one considers that discussions of "settled" law in novel settings may in fact shift the moorings of the "settled" principles. Detection of such nuances is difficult. Nevertheless, some conclusions can be drawn with reasonable assurance.

(footnote 82 continued)

TABLE D

BELOW-STANDARD OPINIONS AND VERY SHORT OPINIONS

Circuit	Percentage of Unpublished Opinions That Are Below Standard	Percentage of Unpublished Opinions That Are Shorter than 50 Words
Third	85.2	70.3
D.C.	61.0	45.2
Fifth	59.0	62.5
Eighth	36.8	15.8
Ninth	34.2	43.2
Second	31.3	45.4
First	25.0	25.0
Seventh	21.3	7.6
Sixth	21.5	6.0
Fourth	13.0	42.9
Tenth	7.4	13.0

SOURCE: Tables 8, 10 *supra*.

[84] *See, e.g.*, Gardner, *supra* note 4; Comment, *supra* note 4.

[85] Our use of the word "suppressed" is not intended to connote in any way that these cases are being deliberately concealed.

[86] *See* note 69 *supra* for a description of the sample.

[87] Or, to put the last point differently, the case may have provided materials for changing the law but the court refused to play the role of artisan.

We discovered no widespread "hiding" of law-declaring opin ions—that is, opinions that clearly broke new ground on importan issues. There were, to be sure, some exceptions.[87] One example *Trible v. Brown*.[88] There a Congressman sought to compel the De partment of Defense to file a report on two shipyard programs The litigation raised interesting questions of standing,[89] jus ticiability, and remedy. In spite of its obvious importance, th Fourth Circuit did not publish the opinion.[90]

Cases like *Trible* were unusual.[91] More frequent examples o suppressed precedent involved questions of state law, often in rela tion to federal statutory or constitutional law. Such opinions cer tainly should be published if they resolve novel issues. In *DeBon v. Vizas*,[92] for example, the Tenth Circuit decided that two police men had not been denied due process when their positions wer terminated. The decision turned on whether a Colorado statut created a protected property interest,[93] and apparently it was case of first impression. The importance of the court's resolution o the problem was increased because the state statute involved ha not been construed since 1900. In those circumstances, the resolu tion of the due process claim deserved general circulation.[94]

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[87] Eyes more attuned than ours to the subtleties of criminal procedure might hav spotted more "clear" precedent. But the point is there were few cases that grabbed th attention of the alert general reader. Others who have done more limited studies, particu larly in state appellate courts, report reading unpublished opinions that begin, in effec "This is a case of first impression in our state." *See, e.g.*, Kanner, *supra* note 3, at 39 Newbern & Wilson, *supra* note 3, at 48-56. We have few such stories to tell.

[88] No. 79-1228 (4th Cir. May 2, 1979).

[89] Plaintiff argued that he needed the reports in order to exercise his oversight rol effectively. *Compare* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (alleged interfer ence with exercise of legislative power gives Congressmen standing) *with* Harrison v. Bush 553 F.2d 190 (D.C. Cir. 1977) (no standing where Congressman's interest in enforcement o statute is no greater than that of an ordinary citizen).

[90] It may have been held back from publication because it originally was an oral opin ion. That does not detract, however, from its status as a law-declaring opinion. It was judicial expression on important legal issues.

[91] Often an opinion that at first appeared clearly to warrant publication seemed les important on closer examination. AT&T v. Grady, No. 78-2316 (7th Cir. Dec. 14, 1978) provides an example. The issue there, whether a nonparty, the federal government, shoul be granted a modification of a protective order so it could gain access to discovered docu ments, was said by the court to have been resolved in different ways by trial courts and t be "a case of appellate first impression." *Id.*, slip op. at 5. The opinion turned on the partic ular facts of the case at bar, however, considerably reducing its value as precedent. Althoug the discussion probably was significant enough to warrant publication, it was not as imp-o tant as the court's statements might have led the reader to believe.

[92] No. 77-1299 (10th Cir. Dec. 18, 1978).

[93] [illegible]

Suppressed precedent can also be found in cases resolving novel questions of state law. The federal courts' reluctance to publish opinions on state law questions is understandable. Still, such opinions can provide useful guidance in areas where no state precedent exists. An example is *Grant Square Bank & Trust Co. v. Magnavox Co.*,[95] a contract case where the court relied in part on promissory estoppel, but cited no state cases accepting that doctrine.[96]

Although nonpublication of law-declaring opinions does occur, our review of the opinions in our sample has convinced us that it is not a major problem with limited publication. The handful of examples we discovered constituted less than 1% of the nearly 900 opinions in our sample.[97]

Perhaps more common than unpublished law-declaring opinions were cases that were of public interest because they revealed defects in the law or its administration.[98] Those opinions deserved wider circulation in order to reveal these flaws to a large audience, which is the best way to ensure their correction.

The Longshoremen's and Harbor Worker's Compensation Act,[99] for example, was designed to provide employees with "swift compensation for work-related injuries, regardless of fault, and the cost of resolving disputes relating to such compensation would be kept to a minimum."[100] Unfortunately, the plan does not always

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(4th Cir. Sept. 6, 1978). The question there was whether timely notice was given under the Miller Act, 40 U.S.C. § 270(b) (1976). The court's sensible construction of the statute was not supported by any citation. If *Aurora Pump* was a case of first impression, it should have been published.

Another example is Hale v. Walker, No. 78-1443 (10th Cir. Mar. 12, 1979) (no cause of action under 42 U.S.C. § 1983 (1976) for failure to expunge an arrest record; court cited no authority for its holding).

[95] No. 77-1070 (10th Cir. Sept. 6, 1978).

[96] *See also* Gard v. United States, 594 F.2d 1230 (9th Cir. 1979), which applied the Nevada sightseer statute, NEV. REV. STAT. § 41.510 (1967), in a case of first impression. Although originally unpublished, the case subsequently was ordered published, which indicated a commendable, if belated, awareness of the importance of cases of this type.

[97] *See* note 69 *supra* for a description of the sample.

[98] Several circuits provide expressly for publication of such opinions. The Fourth, Seventh, and Ninth Circuits, for instance, call for publication of an opinion that "criticizes existing law." 4TH CIR. R. 18(a)(iii); 7TH CIR. R. 35(c)(iii); 9TH CIR. R. 21 (b)(3). The District of Columbia, Fourth, Seventh, Eighth, and Ninth Circuits require publication of an opinion that "involves an issue of continuing public interest." DISTRICT OF COLUMBIA CIRCUIT PLAN para. e; 4TH CIR. R. 18(a)(ii); 7TH CIR. R. 35(c)(ii); 8TH CIR. R. app. ¶ 4(d); 9TH CIR. R. 21(b)(4).

[99] 33 U.S.C. § 901 (1976).

[100] Universal Terminal & Stevedoring Corp. v. Norat, No. 78-1029, slip op. at 2 (3d Cir.

work that well, as the Third Circuit noted in one unpublished opinion that described in detail one longshoreman's continuing efforts—eight years after an accident—to obtain relief.[101] The court reluctantly remanded to the agency. Publication of this story might have helped bring about change; certainly its suppression will not help achieve that goal.

In similar fashion, *American Bankers Association v. Connell*[102] described problems associated with fund transfers by financial institutions. The court noted that it was "convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer authorized by the existing statute."[103] Such a statement from an influential court could have stimulated reform. Instead, it was not published.

Courts are uniquely situated to spot problems in the application of a statute or the workings of an agency. Their comments on the subject can enlighten those in a position to act. There is no reason not to publish those expressions.

A closely related type of case contains commentary by judges on the workings of their own courts. The judiciary has an institutional obligation to set its own house in order. Judges should not be permitted to sweep their peers' shortcomings under the rug by nonpublication. Those who have the duty to supervise the judiciary should see the whole picture, warts and all. Further, public exposure of the faults of judges may have a salutary effect on performance. Reversal in public is a far different matter than what amounts to a private reprimand in an unpublished opinion.

Several unpublished opinions in our sample involved mistakes made by district judges that led to reversal or at least admonition by the circuit court. We believe that these cases should have been made public. Elementary mistakes in routine cases deserve public attention; judicial accountability cannot exist if no one but the circuit court is aware of judicial errors. When an appellate court must remind a district judge of the necessity of subject matter jurisdiction,[104] for instance, something is seriously amiss. The same can be said when a court must reinstate a complaint because it was "dismissed pursuant to a procedure this court reviewed and found defi-

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[101] *Id.*

[102] No. 78-1337 (D.C. Cir. Apr. 20, 1979).

[103] *Id.*, slip op. at 2.

[104] *See* Bergeron v. Exxon Corp., No. 78-2318 (5th Cir. Apr. 19, 1979).

cient [the preceding year]."[105] Pressure through publicity should be brought to bear on such trial judges.

The nonpublication of opinions that reveal problems transcending mere mistake is even more objectionable. Such cases give rise to a strong suspicion that the court does not care to wash its dirty linen in public. A prime example is *United States v. Ritter*,[106] where the full Tenth Circuit vacated an order issued by Chief Judge Willis Ritter of the District of Utah. The order in question prohibited the judge's "court reporter from carrying out the duties imposed upon him by law."[107] The decision came at a time when Congress was considering a proposal to create a procedure, short of impeachment, to hold federal judges accountable; the problems of Chief Judge Ritter figured in the debate.[108] The scope of the problems he had created clearly should have been revealed to a directly interested Congress and legal community.

Suppression of law-declaring opinions does not appear to be a major problem of limited publication. That is not surprising, given our findings concerning the quality of decision making in unpublished opinions. The concern should not be the suppression of precedent; instead, it should be whether the judges examined the cases closely enough to see if precedent should be made.[109] The major danger we see is that the early decision not to publish an opinion means that not enough care will go into its preparation to stimulate the thought necessary to an adequate consideration of whether precedent should be created. That basic issue of judicial responsibility should be the concern of the judiciary and of the public.

More troublesome than the suppression of law-declaring opinions was the nonpublication of decisions suggesting that statutes, agencies, or the courts themselves are not performing up to par. Appellate courts should recognize that they have a unique vantage point from which to observe the workings of our society. Observations from that point are of interest to all.

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[105] McGruder v. Jeansonne, No. 78-3226 (5th Cir. May 27, 1979). *See also* Moorer v. Griffin, No. 77-3580 (6th Cir. Oct. 12, 1978), where the District Court dismissed the complaint for failure to prosecute. The Sixth Circuit reversed because the plaintiff was in jail and the court had not directed that his body be produced for argument.

[106] No. 77-1491 (10th Cir. Aug. 11, 1978).

[107] *Id.*, slip op. at 1.

[108] S. REP. No. 1035, 95th Cong., 2d Sess. 4 (1978).

[109] Some observers have worried that the Seventh Circuit, for example, has suppressed too many law-declaring opinions. *See Hearings*, *supra* note 4, at 556 (statement of Willard

b. *Separate opinions.* Nonpublication presents a spec problem when an unpublished opinion contains a concurring dissenting opinion. Two major factors argue for publication cases that generate separate opinions. First are the stated premis of limited publication, which is a treatment supposedly reserv for cases that do not implicate the lawmaking function of t court[110]—routine, uncontroversial cases. Cases that contain d sents or concurrences are, by definition, controversial; the cou disagrees either about the result to be reached or about t method used to reach it. Accordingly, few decisions with separa opinions should go unpublished.

Second is the role played by the separate opinion in our jud cial system.[111] Separate opinions serve to restrain judical advocac Like all advocates, the judicial advocate can lose sight of the othe side. The separate opinion restricts the judicial advocate because assures him of a public airing of a contrary view of the same fac and law.[112] The separate opinion also performs an important co rective function, for it criticizes the result and reasoning of the ma jority, appealing for correction by a higher court, a future court, a legislature. It is "an appeal to the brooding spirit of the law, t the intelligence of a later day."[113]

In order to perform these functions adequately, the separa opinion must be published.[114] The judicial advocate will not be re

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Lassers). *See also* Comment, *supra* note 4. Our review convinced us that, instead, the Se enth Circuit has a commendable record of explaining its decisions. Some incidental suppre sion of precedent in that process seems a legitimate price to pay; it is preferable to a court avoiding any risk of suppressing a law-declaring opinion by not providing any reasons for i unpublished decisions.

[110] *See* STANDARDS, *supra* note 17, at 1-2.

[111] *See generally* W. REYNOLDS, *supra* note 5, at 23-27; Fuld, *The Voices of Dissent*, COLUM. L. REV. 923, 926-28 (1962); Stephens, *The Function of Concurring and Dissentin Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394 (1952).

[112] Stephens, *supra* note 111, at 403-04.

[113] C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928) (describing dis sent in courts of last resort).

[114] One important function of the separate opinion can be accomplished even if th opinion goes unpublished. Judge Fuld wrote that "the dissent is an assurance that the cas was fully considered and thoroughly argued by the bench as a whole and was not merel adopted as written by one member." Fuld, *supra* note 111, at 927. An unpublished disse or concurrence may still provide that assurance, at least to the parties and the lower cour It can, however, fail even that limited function. Consider National Treasury Employee Union v. United States Dep't of the Treasury, No. 78-1222 (D.C. Cir. May 15, 1979). Th opinion reads as follows:

> This cause came on to be heard on the record on appeal from the United States Di trict Court for the District of Columbia, and was argued by counsel. While the issue

strained by a dissent that never sees the light of day. An appeal for correction is largely useless if the appeal is not disseminated to those with the power to correct the majority's errors.[115]

Thus, both the criteria for cases that should remain unpublished and the functions of the separate opinions lead to the conclusion that few cases that generate separate opinions should go unpublished. The data from the survey year, as illustrated by Table 12, confirm that hypothesis. The frequency of separate opinions among the circuits' published opinions ranged between 2.8% and 21.1%; in the unpublished opinions it ranged from a low of 0% to a high of 1.5%. Taking all the circuits together, the average frequency of separate opinions in published opinions was 12.4%, in unpublished opinions 0.5%. Divided courts thus were more than 20 times more common in cases decided by published opinions than in those decided by unpublished opinions.

The important question, however, is whether any case that is sufficiently controversial to generate a separate opinion should go unpublished. Of the separate opinions in our sample, two had little to offer to the legal literature.[116] One was too short to evaluate.[117] The other two, however, should have been published.

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presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this case is hereby affirmed.

To that informative recitation, which consists of a printed form with the words "judgment" and "affirmed" written in, is added the equally terse "Chief Judge Wright dissents." That sort of opinion complete with dissent not only fails to accomplish the restraining and correcting functions but also fails to assure "that the case was fully considered by the bench as a whole." It takes 83 words to say to the appellant "you lost 2-1."

[115] Another reason to publish opinions with dissents is to ensure that the majority cannot suppress the views of a dissenting judge. We are not aware of any federal cases where that has occurred. The problem has arisen in some state cases, however. In People v. Pera, No. CRA 17889 (Cal. Ct. App. Aug. 1979), Judge Jefferson wrote in dissent:

> Initially, it appeared that the majority felt the same as I do regarding the fact that the majority opinion merited publication in the Official Reports. When circulated to me, the majority opinion was approved by the two justices making up the majority and was marked for publication in the Official Reports. It was only after I had circulated my dissenting opinion to the two justices who make up the majority that they decided to reverse their original position regarding publication in the Official Reports. I do not think this reversal of position is justified.

Id. at 34.

[116] In Costello Publishing Co. v. Rotelle, No. 79-1019 (D.C. Cir. May 17, 1979), the district court dismissed the counterclaim under FED. R. CIV. P. 19(b) because the action "in equity and good conscience" should not proceed among the present parties due to the

TABLE 12

Separate Opinions

Circuit	Total Opinions	Dissenting	Concurring	Concurring & Dissenting	Separate Opinions (%)
Published					
D.C.	194	21	12	8	21.1
First	214	2	4	0	2.8
Second	359	28	34	9	19.8
Third	219	26	10	4	18.3
Fourth	346	53	6	8	19.4
Fifth	1385	62	55	9	9.1
Sixth	340	13	5	6	7.1
Seventh	325	30	9	8	14.5
Eighth	448	21	10	2	7.4
Ninth	618	14	2	9	4.0
Tenth	251	16	12	4	12.7
Average					12.4
Unpublished					
D.C.	505	2	1	1	0.8
First	147	0	0	0	0.0
Second	563	1	0	0	0.2
Third	991	4	1	0	0.5
Fourth	890	1	1	0	0.2
Fifth	978	0	1	0	0.1
Sixth	908	2	2	0	0.4
Seventh	736	4	6	1	1.5
Eighth	209	1	0	0	0.5
Ninth	1238	2	0	1	0.2
Tenth	555	3	2	1	1.1
Average					0.5

Source: *Statistical Data*, *supra* note 35, Tables 1P, 2P, 3U, 5U.

American Textile Manufacturers Institute, Inc. v. Bingham (ATMI)[118] surely deserved public dissemination. It involved an issue that, although arcane, has broad implications. The Occupational Safety and Health Act[119] provides for judicial review by the circuit courts of safety and health standards.[120] Often petitions for review will be filed in more than one circuit; the case is then heard in the circuit in which the first petition was filed.[121] A petition filed before the issuance of the regulation is considered premature.[122] In *ATMI*, the challenged regulation was delivered to the *Federal Register* at 9:00 A.M. and made available to the public at 11:53 A.M. Several labor organizations filed petitions for review in the District of Columbia Circuit at 8:45 A.M. and 11:55 A.M. ATMI filed at 8:45:01, 11:00:00 A.M., and exactly noon in the Fourth Circuit.[123] Clearly, the venue for the appeal will be determined by whether 9:00 A.M. or 11:53 A.M. was the time the regulation was issued. The dissent, relying on a provision in the statutory authorization for the *Federal Register*,[124] thought that ATMI had filed first. The majority, relying on an interpretive regulation issued by OSHA,[125] held that the unions had filed first.

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court's lack of jurisdiction over a foreign firm that possessed evidence essential to determining the merits. The court of appeals reversed on the theory that the dismissal was premature because FED. R. CIV. P. 28(b) permits discovery in foreign countries. The correct time for dismissal, said the court, would be after such efforts at discovery had failed. Judge MacKinnon concurred; his opinion essentially is a message to the district judge indicating those factors mentioned in Rule 19(b) that Judge MacKinnon considered especially important.

United States v. Vera, No. 77-5363, (6th Cir. July 10, 1978), is another case in which the separate opinion is of only marginal import. The issue that generated Judge Merritt's concurrence was defendant's motion to transfer the case from Kentucky to Texas. Defendant was engaged in a scheme to distribute marijuana in Kentucky when his airplane crashed and was captured in Texas. The District court denied the motion to transfer and was affirmed. Judge Merritt concurred even though he would have felt "more comfortable" had the case been transferred. *Id.* at 2. The relevant standard is "for the convenience of parties and witnesses, and in the interest of justice." FED. R. CRIM. P. 21(b). *Vera* is an unremarkable application of that standard.

[117] *See* note 114 *supra*.

[118] No. 78-1378 (4th Cir. Oct. 3, 1978).

[119] 29 U.S.C. §§ 651-678 (1976).

[120] *Id.* § 655(f).

[121] 28 U.S.C. § 2112(a) (1976).

[122] *See* Industrial Union Dep't v. Bingham, 570 F.2d 965, 968-69 (D.C. Cir. 1977).

[123] The statement of the facts is taken from Respondent Secretary's Motion to Dismiss and to Transfer, ATMI v. Bingham, No. 78-1378 (4th Cir. July 11, 1978) (on file with *The University of Chicago Law Review*).

[124] 44 U.S.C. § 1503 (1976) (documents to be publicly available immediately after filing).

[125] 29 C.F.R. § 1911.18(d) (1980).

The majority and dissent, then, disagreed upon a rule
law—a rule that could be settled one way or the other withou
shaking the legal firmament, but a rule that should be settle
Publication would have advanced the ultimate national resolutio
of this issue.

Another case that should have been published is *Burrison*
New York City Transit Authority,[126] which revealed a longstand
ing disagreement within a circuit. The issue was the res judicat
effect of findings in a state criminal or quasi-criminal proceedin
upon a subsequent federal civil rights litigation. In *Burrison* an
other cases, Judge Oakes has consistently favored a much narrowe
scope for the doctrine of res judicata than has the majority.[127] Th
issue has also caused a split between the Second Circuit and th
Sixth Circuit,[128] and it has been the subject of scholarly dispute.[1
It seems odd that, faced with such a controversial question, th
court should not treat the issues in comprehensive fashion[130] an
publish that treatment. Nonpublication surely is inappropriate fo
cases concerning such a persistently troublesome issue.

It might be argued that the controversial issues in *Burriso*
had already been treated by the court in published opinions. Add
tional publication of dissenting views arguably is unnecessary, a
well as damaging to the collegiality of the court. But frequent pub
lic airing of disagreement is the only way to settle such stubbor
disputes, and it may be the only way to attract sufficient attentio
from the Supreme Court to provoke a grant of certiorari.

After considering the principles underlying limited publicatio
and separate opinions, it seems clear that the circuits should adop

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[126] No. 78-7536 (2d Cir. Mar. 29, 1979).

[127] *See* Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.) (in which Judg
Oakes disagreed with the majority, but concurred in the result because he felt he was boun
by the "law of the circuit," *id.* at 522), *cert. denied*, 434 U.S. 934 (1977); Thistlethwaite
New York, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 419 U.S. 109
(1974); Tank v. Appellate Div., 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), cer
denied, 416 U.S. 906 (1974).

[128] *See* Getty v. Reed, 547 F.2d 971 (6th Cir. 1977).

[129] *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 101-02 & n.113 (1973
Theis, *Res Judicata in Civil Rights Act Cases. An Introduction to the Problem*, 70 Nw. U
L. REV. 859 (1976).

[130] The problem here is really more serious than nonpublication; the court's opinio
contains about 120 words. The facts are omitted entirely and the entire legal discussio
consists of three case citations. Judge Oakes joined the majority opinion, limiting his dis
greement to the statement that he adhered to his position in *Turco*. This may well be a
instance where nonpublication led to a case receiving less attention than it merited.

the rule that all cases containing separate opinions should be published. Such a rule would cost little. In the survey year, only thirty-eight separate opinions went unpublished—0.5% of the total unpublished product of the circuit courts.[131] In return for the minimal cost of publishing these few decisions, the courts would be able to ensure publication of a group of opinions that should be available to guide litigants and planners, provoke critical commentary, and perhaps interest the Supreme Court in resolving a controversial question.

c. *Reversals.* About one in every seven unpublished opinions did something other than affirm the opinion below (see Table 13).

TABLE 13

FREQUENCY OF NONAFFIRMANCE

Circuit	In Published Opinions (%)	In Unpublished Opinions (%)	Number of Nonaffirming Unpublished Opinions
D.C.	44	14	67
First	32	12	17
Second	37	9	51
Third	50	8	77
Fourth	43	14	121
Fifth	36	11	109
Sixth	41	12	111
Seventh	38	16	118
Eighth	28	17	35
Ninth	28	19	231
Tenth	29	15	81
Total	36	14	1018

SOURCE: Calculated from *Statistical Data*, *supra* note 35, Tables 1P, 5U.

NOTE: Dismissals for want of prosecution and cases transferred were excluded from both numerator and denominator in computing the percentages of nonaffirmance. The former figure comprised all instances in which the appellate court did anything other than affirm the opinion below or dismiss the appeal. Opinions coded "affirmed in part and reversed in part" thus were classified as nonaffirmances.

[131] *See* Table 12 *supra*

It should not be surprising that the rate of nonaffirmance in pul lished cases is nearly three times that figure. With few exception when one court reverses another, it means that the system has n worked properly. Almost by definition, the opinion on appeal is sufficient interest to warrant publication.

Some reversals reflect mistakes in routine matters on the pa of district judges. The inability of judges to apply commonpla law correctly should be a matter of concern to all.[132] Including suc reversals among the unpublished opinions conceals the problen Earlier, we discussed several examples of unpublished opinion correcting plain error by the trial judge.[133] Another is *Wesley Green*.[134] The trial court had dismissed a complaint because venu was improperly laid, without establishing in the record the partie residences. Any such error, however embarrassing, should not b kept from public scrutiny.[135]

Reversal on routine matters may signify more than poo craftsmanship by the trial judge. It may, for example, point to un certainty about the content of governing law. The court of appeal may not publish a reversal because, to it, the governing law wa clear; such may not be the perception of others. Put differentl the unpublished opinion may clarify precedent to such a degre that the opinion should be published. *Sanchez v. Califano*[136] wa such a case. Its outcome turned on the allocation of the burden o proof in Social Security disability cases. The court of appeal thought the issue determined by its own published precedent. A though the court probably was correct, the precedent was hardly

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[132] The major concern, of course, is a general interest in the quality of justice beir dispensed. There may also be a more specific concern, however. An example would be a tri judge under consideration for elevation to a higher bench: if his reversal rate were abno mally high it might cause second thought. A high reversal rate was one of the problems tha plagued Judge Carswell when he was nominated to the Supreme Court. See N.Y. Time Mar. 6, 1970, at 21, col. 5.

[133] See text and notes at notes 104-108 *supra*.

[134] No. 77-2269 (4th Cir. Oct. 17, 1978). *See also* Dawn v. Wenzler, No. 76-3457 (9t Cir. Dec. 5, 1978) (failure to permit plaintiff to amend complaint once, which is a matter right under Fed. R. Civ. P. 15(a)).

[135] A similar analysis applies to mistakes by federal law enforcement officials. Even remand based on confession of error by the United States Attorney can be interestin enough to warrant publication. United States v. Martin, No. 79-5057 (5th Cir. June 7, 197 contained not only such a confession, but also an observation that departures from Fed. R. Crim. P. 11 were "very great." *Id.* That is a most informative comment for anyone inte ested in the workings of our criminal justice system.

[136] No. 77-1900 (10th Cir. Jan. 11, 1979).

model of clarity.[137] Publication of *Sanchez* would have helped avoid similar difficulties in the future.

Reversals in routine cases may also reflect a continuing battle over the correct legal standard to apply. That is especially likely in areas where a large number of frivolous cases arise. The finder of fact naturally will seek to dispose of these quickly; the appellate court, faced with different pressures, may not be so keen. In *Kidd v. Mathews*,[138] for example, the Sixth Circuit, in reversing a denial of black lung benefits, noted that the "Secretary [of HEW] has again used conflicting medical tests to prevent the establishment of the [statutory] presumption."[139] The Secretary's evident unhappiness with the governing legal standard should be exposed, so that others will be aware of the dispute and have the opportunity to comment on its merits.[140]

Finally, for all the reasons discussed above, reversals are quite likely to create law. Many of the decisions discussed in the analysis of separate opinions and suppressed precedent also were reversals. That observation should come as no surprise; where the reversal does not turn on correction of plain error, it is likely that the court below could not possibly have known the "true" state of the law, because it had never been declared. Thus the circuit court is forced to make law. If it does not publish its opinion, it creates a suppressed precedent.

All of the phenomena just discussed weigh strongly in favor of publication of all reversals. They tell us interesting things about the workings of our legal system, they provide helpful discussion of legal concepts, and they sometimes create—or at least clarify—precedent. Furthermore, reversal is an easy criterion to apply. Unlike most of the criteria used to select opinions for publication, reversal requires no subjective evaluation. Publishing all reversals, however, would entail a heavy cost. If all 1018 unpublished nonaffirmances in the survey year[141] had been published, the number of published opinions would have increased by one-fifth.[142]

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[137] *See* Keating v. Secretary of HEW, 468 F.2d 788, 790 (10th Cir. 1972).

[138] No. 76-2530 (6th Cir. Aug. 24, 1978).

[139] *Id.*, slip op. at 2.

[140] *See also* Lykins v. MacIntosh, No. 79-6228 (4th Cir. Apr. 27, 1979) (district court erred in granting summary judgment in a prisoner's civil rights action). The standard for summary judgment in civil rights cases has been a subject of dispute in the Fourth Circuit for some time now. *See Limited Publication*, *supra* note 4, at 829 n.84.

[141] See Table 13 *supra*.

[142] There were 4699 published dispositions during the study year. *See* Table 1 *supra*.

It may be, however, that some middle ground can be found beginning with the observation that not all nonaffirmances deserve publication. One case, for example, raised questions concerning Michigan's regulation of abortion clinics under a 1974 statute.[143] After the decision below and oral argument in the Sixth Circuit Michigan revised the statute. The Sixth Circuit remanded for consideration of the constitutionality of the new law. Because remand was based upon an intervening event, passage of a new law, the opinion sheds no light on judicial practice. It is the paradigmatic opinion without value to anyone other than the litigants.

Similarly, a "pass-through" of a Supreme Court remand has such little value that its publication would be hard to justify.[144] A decision not to publish a remand in light of a Supreme Court opinion in another case would be more questionable.

Finally, there is no need to publish a reversal based upon an intervening change in the law of the circuit. In that situation, the reversal tells us nothing about the quality of decision making in either court. It may not even reflect a disagreement over the content of the substantive law.[145]

It is impossible to tell from our sample the number of reversals whose publication would not be called for under almost any criteria.[146] A rough guess, however, is that about half of the nonaffirmances center on reasons unrelated to the workings of the judiciary and the application of precedent.[147] We believe that the remainder should be published. Although that would entail a significant public cost, the game should be worth the candle. To ensure proper handling, we recommend that all reversals be published unless the reversal is based upon a standard or fact not known to the tribunal below at the time that court or agency made its decision. We believe that rule will best square cost with benefit.

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[143] Abortion Coalition v. Michigan Dep't of Pub. Health, No. 77-1223 (6th Cir. Sept. 19, 1978).

[144] A different case would be presented by substantive consideration of a Supreme Court opinion before remand to the trial court. That unquestionably should be published.

In *Limited Publication*, *supra* note 4, we recommended publication of all remands of Supreme Court decisions. *Id.* at 839. We now believe publication of a "pass-through" unnecessary.

[145] *See, e.g.*, Gardner v. Zahradnick, No. 77-1870 (4th Cir. Sept. 29, 1978) (case held in abeyance pending decision in Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978); remand in *Gardner* required by rule established in *Gordon*).

[146] The major problem is the cryptic nature of so many of the opinions.

[147] One-half is a rough estimate by the authors after reading all nonaffirmances in the sample.

d. *Summary of apparent costs.* Far and away the major problem we have identified in connection with limited publication is that created by opinions that do not satisfy minimum standards. Such opinions do not give the appearance that justice has been done. More important, perhaps, shoddy opinions may reflect the quality of thought that went into the decision itself. Thoughtless opinions are a danger to be guarded against resolutely, especially given the lack of correlation between productivity and below-standard opinions. We believe every opinion can satisfy minimum standards.

Suppressed precedent is a much less significant problem. If the courts of appeals were to recall that opinions of public interest should be published, the problem would be lessened. In addition, the publication of all decisions with separate opinions, as well as many reversals, would help both to avoid suppressed precedent and to ensure the circulation of opinions that are independently of interest to the public.

3. *A Hidden Cost: Disparate Impact and Certiorari Courts.* A third cost, the disparate impact of limited publication, may be more pernicious, for its full effect stems from the cumulation of various devices adopted by the courts of appeals over the last decade or so to cope with their increasing caseload. An appreciation of the problem requires consideration of the interaction between limited publication and three related phenomena: (1) the disproportionately low rate of publication of opinions for some types of litigation, such as prisoners' petitions, Social Security cases, and appeals in forma pauperis; (2) the decision by the courts of appeals of a substantial number of cases without oral argument; and (3) the use by the circuit courts of central staffs of attorneys to aid in research and decision making.

Table 14 displays the subject matter of the appeals terminated during the 1978-79 Reporting Year. Most interesting among the items in the table is the comparatively high nonpublication percentages of prisoner civil rights cases, Social Security cases, and prisoner petitions in general. Such high nonpublication rates should come as no surprise, however, for those subject matter areas are the most likely to produce frivolous litigation because of the absence of disincentives to appeal. In addition, cases in those categories often involve emotional issues, pursued by litigants who seek personal vindication without any realistic expectation of legal rem-

edy. Finally, such claims often turn on factual rather than legal issues; hence, there is less that an appellate court can do to review the decision below.

TABLE 14

NATURE OF APPEAL

Subject Matter of Appeal	Number of Published Opinions	Number of Unpublished Opinions	Opinions not Published (%)
United States, Plaintiff			
Civil Rights	11	8	42.1
Tax	16	50	75.8
Land Condemnation	6	9	60.0
Other	110	102	48.1
subtotal	143	169	54.2
United States, Defendant			
Prisoner Petitions	167	456	73.2
Civil Rights	94	176	65.2
Social Security	92	305	76.8
Tort	68	116	63.0
Other	339	417	55.2
subtotal	760	1470	65.9
Private Cases			
Prisoner Petitions	290	1038	72.7
Civil Rights	398	708	64.0
Securities	68	75	52.4
Labor	91	116	56.0
Tort	272	357	56.8
Other	696	786	53.0
subtotal	1815	3080	62.9
Criminal	1020	1623	55.1
Total	4038	6342	61.1

SOURCE: *Statistical Data*, *supra* note 35, Tables 7, 19.

Another problem is the relatively high percentage of unpublished appeals that were filed in forma pauperis. Among unpublished opinions the in forma pauperis rate was 32%, while among published opinions the rate was only 20%.[148] Once again, the dis-

[148] These percentages are from *Statistical Data*, *supra* note 35, Tables 1P, 3P, 4U, 5U.

crepancy can be explained by the higher proportion of frivolous in forma pauperis appeals because of the absence of disincentives to appeal. Nevertheless, both phenomena—the disparate publication treatment of certain types of litigation and the relatively high incidence of in forma pauperis cases on the unpublished list—give rise to concern for two reasons.

First, the disparate impact of nonpublication arguably supports a claim of denial of equal treatment by the courts. The issue has been raised before the Supreme Court, but was passed over by the Justices.[149] Before this study, however, there was no hard evidence that certain classes of litigants were most likely to suffer because of limited publication. Nevertheless, even with empirical confirmation, the constitutional claim is at best colorable, because the circuit courts' practices would almost certainly pass present equal protection tests. The statistical frivolity of certain types of appeals surely provides a rational basis for the disparity, and none of the types of litigation is based on a currently recognized suspect classification justifying strict scrutiny.

Whether constitutionally justified or not, litigants in the affected classes still will believe that they have received second class justice. That is a problem, for the appearance of justice is nearly as important as the fact.[150] The federal courts, which view themselves as the guardians of equal justice under law, should be uniquely sensitive to claims that their own house may not be in order.

Second, the danger of routine treatment is another threat to judicial responsibility. It is possible that a judge's mind subconsciously will run along these lines: "This is a prisoner civil rights action appealed in forma pauperis; past experience tells me there is nothing to such cases. Therefore, I don't have to think about it, and if I don't publish an opinion I won't have to sift through a meaningless record to prove the frivolity of this appeal to an uncaring public." We believe that judges zealously guard against such irresponsible decision making. But there is a danger of a judge developing a conditioned response to the surface characteristics of

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[149] An equal protection challenge to the Seventh Circuit's limited publication practice was made in Brief Amicus Curiae of the Chicago Council of Lawyers at 15-19, Browder v. Director, 434 U.S. 257 (1978). The Supreme Court's opinion in *Browder*, however, did not address that issue.

[150] That may partly explain the relatively high percentage of criminal appeals (44.9%) that are published. Many of those appeals are, no doubt, frivolous and in forma pauperis. Yet is is hard to uphold a conviction without some attempt at explanation, and once that attempt has been made there is an incentive to publish the fruits of the labor.

certain classes of recurrent and annoying litigation. Requiring a judge to justify a decision to the public is one way to minimize that danger.[151]

All of the circuits provide that oral argument need not be heard for some appeals. The idea is to expedite disposition and conserve judicial resources in cases where the issues are so plain that oral argument is most unlikely to add to the quality of decision making.[152] Because such "clean" cases are likely to result in routine dispositions without precedential impact, we should expect a substantial coincidence of nonpublication and denial of oral argument. In the survey year, this hypothesis proved true. Only 3?% of unpublished cases were argued orally, as compared to 81% of published cases.[153]

Although those figures are not surprising, they lend force to the concern that nonpublication reduces the incentive for judges to probe beyond the surface of the case. That concern is particularly acute in cases submitted for decision on the briefs, for oral argument may show a court that the case has depths not apparent from the paper record. Decision without argument, coupled with the prospect of nonpublication, removes two safeguards that might lead a court to notice that the case is not in fact "routine."

Finally, there is the role played by central staff in the formulation of opinions. Over the past decade, many courts, including the United States Courts of Appeals, have added large numbers of staff law clerks to assist in preparation for argument and later disposition.[154] The Ninth Circuit, for example, employed thirty staff clerks in 1978.[155] Although the use of staff clerks varies widely

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[151] Judge Coffin addressed this point eloquently in his recent book:

> A remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes . . . . Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight . . . . [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

F. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57 (1980).

[152] APPELLATE JUSTICE, *supra* note 2, at 2-32.

[153] STATISTICAL DATA, *supra* note 35, Tables 1P, 1U, 4P, 4U.

[154] *See generally* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); Hellman, *supra* note 57; Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973); Thompson, *Mitigating the Damage--One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975).

[155] Hellman, *supra* note 57, at 946.

from court to court, in some the clerks are heavily involved in preparing preargument memoranda and draft opinions. Such procedures present an obvious danger of delegation of judicial responsibility either to the presiding judge of a panel or to the staff itself, leading to what one state judge styled the "one judge" or "no judge" decision.[156]

That danger increases with the concentration of staff law clerks in areas of the law where the high volume of cases makes specialization possible—even desirable, given the possibility of economies of scale. Those high-volume areas, of course, are most likely to be the ones where frivolous appeals are the most common—criminal, prisoner, and social security cases, and appeals in forma pauperis. If, as seems likely, those cases frequently are decided on submission, it can be seen how markedly the process by which many appeals are "heard" differs from the general perception of an appellate decision as based on a collegial exchange of views, marked by multiple drafts and developing ideas.[157]

That ideal may not often be attained. In fact, when the cumulative impact of limited publication, central staff, and the associated phenomena is assessed, it can be seen that the courts of appeals often behave much like courts with discretionary jurisdiction—like certiorari courts, in short. Suppose a petition for a writ of habeas corpus is denied by a lower court. The case is reviewed by a staff member, who makes recommendations and submits draft opinions. It is disposed of without argument by the court. That process could equally well describe a denial of certiorari by the Supreme Court or the disposition of a "routine" case by a circuit court. They certainly cannot be distinguished on the ground that denials of certiorari are unpublished and nonprecedential; so are most such "routine" circuit court decisions. A plausible distinction is that denials of certiorari typically are not accompanied by a statement of reasons, but our findings show that many of the circuit courts' unpublished opinions are similarly bereft of justification. A formal difference exists, of course, in that discretionary jurisdiction in the Supreme Court has been authorized by Congress,[158] while the appellate jurisdiction of the circuit courts is mandatory.[159] But when washed in the "cynical acid,"[160]

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[156] Thompson, *supra* note 154.

[157] The best description of the ideal process is Hart, *The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959).

[158] 28 U.S.C. § 1254 (1976).

[159] *Id.* § 1291.

[160] Holmes, *supra* note 6, at 462.

this formal difference evaporates. For the realist, the processes are the same. The conclusion is inescapable that, with regard to a large part of their caseload, the circuit courts have transformed themselves, contrary to congressional mandate, into certiorari courts.

Perhaps such a transformation is the necessary result of an overwhelming caseload. It may be that little has been lost, and that the quality of justice has not been diminished appreciably. Certainly some such steps are necessary to allow the continued operation of the system. Yet the cost of a changed appellate process must be recognized for what it is in order that the final price of judicial overload can be fully reckoned.

V. Conclusion

A. A Model Rule

Our survey of the publication habits of the circuit courts confirms that the principal benefit of limited publication is swifter justice; in addition, there may be savings in judicial efforts that in turn may be translated into gains in productivity. We have also identified two major costs: suppressed precedent and, more seriously, a marked number of low-quality opinions. Those findings challenge the critic to fashion a rule that maximizes the benefits of limited publication while avoiding as many of its costs as possible. The Model Rule that follows attempts to meet that challenge.

Rule ___. Opinions.[161]

1. Minimum Standards:[162]

Every decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the dis-

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[161] We first proposed a Model Rule for publication in *Limited Publication*, *supra* note 4, at 837-40. The version in the text reflects lessons learned in the present study.

The Model Rule does not mention the noncitation corollary to limited publication because this study did not include any findings relative to citation. We have briefly summarized our view of noncitation rules in text and notes at notes 28-33 *supra*. For a more detailed analysis of noncitation rules, see *Non-Precedential Precedent*, *supra* note 4, at 1194-99. Similarly, this study did not focus on the circulation of unpublished opinions, so the Model Rule does not address the problem. Our views on circulation are expressed in *Limited Publication*, *supra* note 4, at 813-14.

[162] Inclusion of a section on minimum standards was designed to focus judicial attention on the need to provide a minimally satisfactory explanation of why the court reached a given result.

position can be understood from the opinion and the authority cited.

If the decision is based on the opinion below, sufficient portions of that opinion should be incorporated into the opinion of this court so that the basis for this court's disposition can be understood from a reading of this court's opinion.

2. Publication of Opinions:

a. Criteria for Publication: An opinion will be published if it:

(1) establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;[163]

(2) applies an established rule of law to facts significantly different from those in previous applications of the rule;[164]

(3) explains, criticizes, or reviews the history, application, or administration of existing decisional or enacted law;[165]

(4) creates or resolves a conflict of authority either within the circuit or between this circuit and another;[166]

(5) concerns or discusses a factual or legal issue of significant public interest;[167]

(6) is accompanied by a concurring or dissenting opinion;

(7) reverses the decision below, unless:

a) the reversal is caused by an intervening change in law or fact, or

b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;[168]

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[163] The first clause of this rule was included in the guidelines for opinion publication suggested by the Federal Judicial Center. *See* STANDARDS, *supra* note 17, at 15. It was included in some form in several circuit plans. *See* DISTRICT OF COLUMBIA CIRCUIT PLAN para. a; 4TH CIR. R. 18(a)(i); 7TH CIR. R. 35(c)(1)(i); 8TH CIR. R. app. ¶ 4(c); 9TH CIR. R. 21(b)(1). The last clause, the resurrection rule, seems to be the unique property of the Ninth Circuit. 9TH CIR. R. 21(b)(2).

[164] *See* DISTRICT OF COLUMBIA CIRCUIT PLAN para. c; 8TH CIR. R. app. ¶ 4(c).

[165] *See* DISTRICT OF COLUMBIA CIRCUIT PLAN para. c; 4TH CIR. R. 18(a)(iii); 7TH CIR. R. 35(c)(1)(iii); 9TH CIR. R. 21(b)(3).

[166] *See* DISTRICT OF COLUMBIA CIRCUIT PLAN para. d; 4TH CIR. R. 18(a)(v); 7TH CIR. R. 35(c)(1)(iv)(C); 8TH CIR. R. app. ¶ 4(b), (f); 10TH CIR. R. 17(d)(1).

[167] *See* DISTRICT OF COLUMBIA CIRCUIT PLAN para. b; 4TH CIR. R. 18(a)(ii); 7TH CIR. R. 35(c)(1)(ii); 8TH CIR. R. app. ¶ 4(d); 9TH CIR. R. 21(b)(4).

[168] Elsewhere we recommended the publication of all reversals. *See Limited Publication, supra* note 4, at 639. Here we withdraw that recommendation because it would unnec-

(8) addresses a lower court or administrative agency decision that has been published;[169] or
(9) is an opinion in a disposition that
a) has been reviewed by the United States Supreme Court, or
b) is a remand of a case from the United States Supreme Court.[170]

b. Publication Decision: There shall be a presumption in favor of publication. An opinion shall be published unless each member of the panel deciding the case determines that it fails to meet the criteria for publication.

3. The court recognizes that the decision of a case without oral argument and without publication is a substantial abbreviation of the traditional appellate process and will employ both devices in a single case only when the appeal is patently frivolous.

Many of the provisions of the Model Rule were suggested by existing circuit court rules. We provide textual discussion only of those provisions that were suggested primarily by the empirical study.

The most striking finding of the study is the extremely high cost of nonpublication in terms of opinion quality. Nine of the eleven circuits produced twenty percent or more below-standard opinions. In six circuits the figure was above thirty percent.[171] Section 1 of the Model Rule should remedy that situation. The need for the provision is all the more apparent given that opinion quality is not correlated with productivity.[172] In other words, by adopting section 1, the courts could remedy the most serious drawback of nonpublication—poor opinion quality—without reducing productivity. The case for the provision thus is very strong.

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essarily increase the courts' published opinion totals by including pass-throughs and other opinions of limited precedential value.

[169] *See* 4TH CIR. R. 18(a)(vi); SIXTH CIRCUIT PLAN ¶ 1, 7TH CIR. R. 35(e)(1)(v); 8TH CIR. R. app. ¶ 4(e); 9TH CIR. R. 21(h)(5).

[170] A case that has generated a full United States Supreme Court opinion clearly should be published at the circuit court level—even if the publication order is retroactive. A circuit court opinion following a remand from the Supreme Court also should be published. However, if the opinion is simply a reference back to the district court, there is no need for publication.

[171] *See* Table 10 *supra*.

[172] *See* Table 11 *supra*.

Section 2 of the Model Rule includes detailed publication criteria. Six of the eleven circuits currently use such detailed criteria.[173] Our findings showed no positive correlation between specificity of publication criteria and the percentage of opinions published.[174] Nevertheless, we favor specific criteria on the theory that the publication decision will be made in a more intelligent and consistent manner if the judges have detailed criteria to guide them. The result should be fewer cases of suppressed precedent. Additionally, our figures do not disprove the effect of specificity on publication percentages; they simply fail to prove it.

Three of the criteria warrant individual discussion. Section 2(a)(3) tries to ensure publication of opinions that reflect problems in the administration of justice or the working of case or statutory law. Judges are in a unique position to observe such problems. Any opinions that result from that advantage should be made generally available.

Section 2(a)(6) of the Model Rule calls for publication of all opinions that are accompanied by concurring or dissenting opinions. The results of the study provide strong evidence that such opinions are likely to deserve public dissemination. Of the four such opinions that we evaluated, only two were correctly left unpublished.[175] Furthermore, the cost of such a provision is negligible. In the entire survey year, only thirty-eight such opinions went unpublished—about 0.5% of the total of unpublished opinions.[176] This balance of costs and benefits strongly supports section 2(a)(6).

The situation is not so clear with regard to section 2(a)(7)—publication of reversals. Our findings indicate that many unpublished reversals should have been published. Some were law-declaring opinions and others revealed important information about the performance of lower courts and administrative agencies. On the other hand, some reversals, for instance those caused simply by an intervening change in the facts or law, should not have been published. An addition to the equation is the high cost of publishing all reversals. In the survey year, such a move would have increased the total of published opinions by twenty per-

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[173] *See* Table 3 *supra*.

[174] *See* text and notes at notes 48-50 *supra*.

[175] *See* text and notes at notes 116-121 *supra*.

[176] *See* text at note 131 *supra*.

cent.[177] Accordingly, section 2(a)(7) is a compromise that attempts to secure the publication of only those reversals that are likely to be significant.

Section 2(b) of the Model Rule calls for a presumption in favor of publication. Our results indicate that such a presumption is likely to affect actual publication behavior, because circuits with a presumption against publication actually did publish less than circuits without such a presumption.[178] Increased publication is likely to diminish the problems of suppressed precedent and poor opinion quality. Although there may be some loss in the area of swifter justice, our results do not suggest that productivity is likely to suffer.[179] Section 2(b) also requires a unanimous decision of the panel in order not to publish.

The language of Section 3 is entirely precatory. It simply calls for judges to recognize the dangers inherent in combining several judicial "shortcuts" in a single case. There is some temptation to call for publication in all cases in which there is no oral argument or vice-versa, but the cost of such a provision is high. In the survey year, it would have more than doubled the total of published opinions.[180] Our hope is that the precatory language of Section 3 will call the judges' attention to the possibility that they may be transforming their courts, without statutory authority, into certiorari courts.

B. Summing Up

The discussion of limited publication has produced numerous claims concerning the harms and benefits of the practice. This study permits an empirical evaluation of many of these claims. It is clear that limited publication produces at least one significant benefit—swifter appellate justice. The claimed benefit of savings of judicial time and effort is less clear. It is difficult to read many unpublished opinions without concluding that relatively little time and effort was spent in their production. Yet we found no positive correlation between a circuit's tendency not to publish and its pro-

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[177] The number of published opinions for the survey year in all circuits was 4699. *See* Table 1 *supra*. There were 1918 unpublished nonaffirmances. *See* Table 13 *supra*.

[178] *See* text and notes at notes 51-53 *supra*.

[179] *See* text and note at note 65 *supra*.

[180] If the 73% of all unpublished opinions decided without oral argument, *see* text and note at note 153 *supra*, had been published, the number of published opinions would have shot up from 4699 to 10,721. *See* Table 1 *supra*.

ductivity. Other variables may obscure the relationship between nonpublication and productivity. Alternatively, the judges may be using the time saved to perform important but not case-related functions. Although we suspect that the time-savings hypothesis is true, we are unable to verify it empirically.

Our examination of the circuits' work has provided little to justify major concern about the problem of suppressed precedent. We did, however, find a number of cases where valuable discussions of difficulties with the law or its administration were submerged. The circuit courts could substantially remedy the problem by adhering to several of the provisions of our Model Rule.

The more significant drawback to the system is its pernicious effect on judicial responsibility. In many circuits, large percentages of the unpublished opinions failed to satisfy even minimum standards. Further, when nonpublication is combined with denial of oral argument, the result may curtail the appellate process in a way inconsistent with the mandatory appellate jurisdiction of the courts of appeals. Once again the Model Rule provides a way to reduce those costs substantially.

Perhaps the greatest danger of any procedural reform is that it will be adopted without sufficient reflection or continued without sufficient study. Although the publication plans received ample thought before their adoption and during their first several years of operation, study of the effects of the plans has almost entirely ceased. From 1973 until 1977, the plans were the subject of annual reports by the Administrative Office of the United States Courts to the Judicial Conference of the United States. The reports are no longer being made: since 1977 the study of the plans has come largely from outside of the judicial system. Clearly the courts themselves have no facilities to conduct such inquiries. The proper agency is the Administrative Office. Data on the workings of the publication plans (and other recent appellate court reforms) should be included as a regular part of the Annual Report. Perhaps after several years of such reporting, more ambitious statistical studies will be possible and will provide more conclusive answers to the questions arising out of the limited publication debate.

CINCINNATI LAW REVIEW

PUBLISHED QUARTERLY BY THE BOARD OF EDITORS

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HIDE AND SEEK PRECEDENT: PHANTOM OPINIONS IN OHIO

Robert L. Black, Jr. *

I. INTRODUCTION

No one seriously questions the advisability of publishing most decisions of the highest court of any jurisdiction. Because this court of last resort exercises ultimate authority, its pronouncements should receive the widest circulation that circumstances will allow. This is particularly true when, as is most often the case, it has the option to select for decision issues of broad public significance extending beyond the interests of the litigants.

Opinions of lower courts are of a different nature, and the publication of these opinions is an area that invites regulation. Not every appeal has great public significance and a number will have no lasting effect beyond the concerns of the parties to the litigation. Others, however, will extend the application of established principles to new factual situations, develop new rules of law or modify old rules under the tradition of evolution characteristic of Anglo-American jurisprudence. These deserve publication.

Publication of court opinions, however, is a mixed blessing. Beginning more than 300 years ago, commentators expressed apprehension about the flood of legal publication.[1] Both production and retrieval of opinions require enormous expenditures of time, human energy and money, and overpublication occurs when production costs rise to a

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* Presiding Judge, Ohio Court of Appeals, First Appellate District, Cincinnati, Ohio; B.A., Yale University, 1939; LL.B., Harvard University, 1942. The author is deeply indebted to Mark J. Stopanak, J.D., for invaluable assistance throughout the evolving course of the research, preparation and writing of the Article. Thanks also to John Holmes, Clerk of the United States Court of Appeals for the Sixth Circuit, and to William M. Richman, Associate Professor of Law, University of Toledo, for their help in gathering materials.

1. D. MELLINKOFF, THE LANGUAGE OF THE LAW 146 (1963). McCuskey stated that Sir Matthew Hale, Lord Chief Justice in 1671, was reported to have said:

> Thus, as the rolling of a snowball, it [published law] increaseth in bulk in every age, until it become utterly unmanageable. . . . Every age did retain somewhat of what was past, and added somewhat of its own. . . . And this proclaimeth mistakes. . . . It must necessarily cause ignorance in the professors and profession itself; because the volumes of the law are not easily mastered.

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level no longer commensurate with the benefits.[2] For these reasons, a 1973 report by the Advisory Council on Appellate Justice suggested the establishment of criteria for publication.[3] Eleven United States courts of appeals and sixteen states have adopted plans that regulate in varying degrees the publication of court opinions.[4]

Ohio has not. Every decision of the Ohio Supreme Court is required by constitutional mandate to be published, but there is no clearly defined publication plan for the intermediate courts of appeals.[5] In 1979 less than 3% of courts of appeals decisions were published although those courts made final disposition of 98% of their caseload in that year.[6]

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2. As technology makes retrieval of specific items from a general mass more feasible economically, the ability to manage the mass is enhanced, provided that the new system can be operated by the average professional.

3. ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (FJC Research Series No. 73-2, 1973) [hereinafter cited as STANDARDS 1973]. The Advisory Council on Appellate Justice is supported by the Federal Judicial Center and the National Center for State Courts. An early evaluation of the result of the movement toward more limited publication is Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIB. J. 262 (1974).

4. See 1st Cir. R. 14; 2d Cir. R. 9, 23; 3d Cir. PUBLICATION PLAN; 4th Cir. R. 18(e); 5th Cir. R. 21; 6th Cir. R. 11; 7th Cir. R. 35(b), 52(e)(iv); 8th Cir. PUBLICATION PLAN; 9th Cir. R. 21(c), 19th Cir. R. 17(c); D.C. Cir. R. 8; 1 ABAJ R. SUP. CT. 4(8)(e); ARK. R. SUP. CT. 2-4; CAL. R. CT. 976; COLO. APP. R. 35(f); CONN. GEN. STAT. § 51-21 (1977); DEL. SUP. CT. R. 41(3); IND. R. APP. P. 15 A(3); IOWA SUP. CT. R. 10(b); KAN. R. APP. CT. No. 7.04; KY. R. CIV. P. 76.28(4); MD. R.P. 1092(b); N.Y. JUD. LAW § 431 McKinney 1968); OKLA. STAT. ANN. tit. 20, § 30.5 (West Supp. 1980); TEX. R. CIV. P. 452; WASH. REV. CODE § 2.06.040 (1974); WIS. R. APP. P. 809.23. The federal circuit court plans have been reviewed and discussed in detail in 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) [hereinafter cited as *Non-precedential Precedent*], and in Reynolds & Richman, *Limited Publication in the Fourth, and Sixth Circuits*, 1979 DUKE L.J. 507 [hereinafter cited as *Limited Publication*].

5. Section 2(C) of Article IV of the Ohio Constitution provides in full: "The decisions in all cases in the supreme court shall be reported, together with the reasons therefor."

6. The following table shows the number of filings, the number and percentages of total terminations, terminations by opinion, and the number and percentages of opinions published for the Ohio courts of appeals for the years 1975 through 1979.

Year	Filings	Total Terminations*		Terminations by Opinion**		Opinions Published	
	Number	Number		Number		Number	
1975	7,204	6,435	89.33	4,974	69.20%	195	3.92%
1977	7,492	7,729	92.22	5,367	67.31%	218	4.06%
1978	7,546	7,366	97.61	5,047	68.50%	181	3.59%
1979	7,991	7,776	98.32	5,336	70.29%	157	2.84%

Sources: For the first three columns, OHIO COURTS SUMMARY, published by the Administrative Director of the Supreme Court of Ohio; for the number of opinions published, an actual count of cases reported in 45 Ohio App. 2d through 60 Ohio App. 2d.

* "Total terminations" includes all cases brought to an end, whether by voluntary dismissal or withdrawal, involuntary dismissal, transfer to another court, signed opinion or per curiam decision.

This Article will review the current Ohio practice regarding publication of court opinions, evaluate it in light of the experience of jurisdictions that regulate publication and discuss alternatives to the Ohio practice in those areas in which it is perceived as deficient.

II. The Ohio Practice

A. *Organization of Ohio Courts and Their Jurisdictions*

Ohio has a three-tiered judicial system, not unlike the federal judicial system. Points of entry are the trial courts and administrative agencies. The intermediate level consists of the courts of appeals, and the supreme court stands at the pinnacle of the judicial hierarchy.

The trial courts include a court of general and unlimited jurisdiction—the court of common pleas—and special courts of limited jurisdiction—the municipal and county courts. Ohio has a number of administrative agencies, both statewide, such as the Public Utilities Commission, and local, such as the municipal civil service commissions.

The court of appeals is divided into twelve appellate districts with jurisdiction limited to the county or counties comprising the district.[7] No district has precedence over any other district, nor is there a policy or practice for coordination of opinions on the same issue among districts. The concept is that the supreme court will resolve conflicts of judgment between districts.

The workload of the courts of appeals is fixed by law. They have no control over the filing of appeals, because every litigant claiming prejudicial error in a trial court or an administrative agency has a right to appeal.[8] Three judges must hear and dispose of all cases on the merits,[9] and all errors assigned and briefed must be passed upon, whether or not dispositive of the appeal.[10] Further, the courts of appeals are required to state in writing their decisions and the reasons therefor.[11] Unlike some other states, Ohio has no procedure to allow litigants to by-pass the court of appeals level, and no procedure for courts of appeals to transfer a case to the supreme court so as to

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7. Ohio Rev. Code Ann. §§ 2501.01, .02 (Page 1954). The twelfth district court was authorized in 1980 and began operations Feb. 9, 1981. Some appeals can be made only to the Court of Appeals for the Tenth Appellate District, whose jurisdiction is Franklin County, the site of the state capital (e.g., appeals from the court of claims, Ohio Rev. Code Ann. § 2743.20 (Page Supp. 1980)).

8. Ohio Rev. Code Ann. § 2505.03 (Page Supp. 1980).

9. Ohio Const. art. IV, § 3.

10. Ohio R. App. P. 12(A).

11. *Id.*

present promptly to the supreme court broad questions of judicial policy or interpretation.[12] The vast majority of cases terminate at the court of appeals level: official reports demonstrate that the courts of appeals terminate 97% to 98% of court actions filed in the two lower levels.[13]

The supreme court has original jurisdiction in certain matters, including applications for the high peremptory writs.[14] Appeals as of right from the courts of appeals also lie in a limited number of cases.[15] The supreme court must hear cases certified to it by a court of appeals that finds its judgment is in conflict with a judgment on the same question by another court of appeals.[16] By statutory mandate the supreme court must hear appeals from the Board of Tax Appeals,[17] the Public Utilities Commission[18] and the Power Siting Commission.[19] All other appeals are discretionary.

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12. See, e.g., ARK. R. SUP. CT. 29-3; CAL. CONST. art. 6, § 4(c); WIS. R. APP. P. 809.60-.61.

13. The statistics for the years 1976 through 1979 show that recent terminations by the Ohio Supreme Court of appeals from lower courts, and terminations by opinion or dismissal in the courts of appeals were as follows:

Year	Supreme Court*	Courts of Appeals	Percentage in Courts of Appeals
1976	193	6,313	97.03%
1977	139	7,929	98.28%
1978	229	7,366	96.98%
1979	154	7,876	98.08%
			97.59% MEAN

Source: OHIO COURT SUMMARY issued by the Administrative Director of the Supreme Court for the years in question. The 1980 figures were unavailable when this Article went to press.

* The Ohio Supreme Court terminated cases other than those coming from the courts of appeals, including appeals from the Board of Tax Appeals, Public Utilities Commission, Power Siting Commission and cases originally filed in the supreme court for the high peremptory writs. See note 14 *infra* for a list of the high peremptory writs. These terminations are not included in the above figures.

Over the same four year period, the percentage of opinions of the courts of appeals that were published steadily decreased while productivity increased. See note 6 *supra* for a comparison of filings, terminations and published opinions.

14. OHIO CONST. art. IV, § 2(B)(1)(a)(iv). The high peremptory writs include writs of warranto, mandamus, habeas corpus, prohibition and procedendo. The Ohio Supreme Court also has original jurisdiction of matters involving admission to the practice of law, discipline and regulation of the practice of law. *Id.* § 2(B)(1)(g).

15. Appeals as of right lie in cases that originate at the intermediate level, cases that affirm the imposition of the death penalty and cases that involve questions under the United States and Ohio Constitutions. *Id.* § 2(B)(2)(a).

16. *Id.* § 2(B)(2)(e).

17. OHIO REV. CODE ANN. § 5717.04 (Page 1980).

18. *Id.* § 4905.13 (Page 1977).

19. *Id.* § 4906.12 (Page 1977).

B. *Publication of Court Opinions*[20]

The constitution requires that every opinion of the Ohio Supreme Court be published.[21] It provides that laws may be passed for the reporting of cases decided in the courts of appeals.[22] Publication of intermediate court opinions is mentioned in one Ohio statute, one of several that set forth the duties and powers of the Reporter of the Supreme Court. The statute directs the Reporter to "prepare for publication and edit, tabulate, and index those opinions and decisions of any court of appeals furnished him for publication by any such court."[23] While the language may seem to create a duty to publish whatever is submitted by "any such court," the practice is otherwise.

The number of terminations by the courts of appeals has increased in recent years, but the percentage of their opinions that are published steadily has decreased.[24] The percentage of published opinions declined from 4.81% in 1976 to 2.84% in 1979, while judicial output rose 36.56%, from 4,054 opinions to 5,536.[25] Otherwise stated, in 1976 one opinion in twenty-one was published, while in 1979 one in thirty-five was published. By way of comparison, the percentage of published opinions of total terminations in the eleven United States courts of appeals for the fiscal year ending June 30, 1979 was 38.3%.[26]

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20. The following are the official reports in Ohio: Ohio State Reports and Ohio State Reports, Second Series, for the supreme court; Ohio Appellate Reports and Ohio Appellate Reports, Second Series, for the courts of appeals; and Ohio Miscellaneous Reports, for the trial courts.

The following are the unofficial reports in Ohio: Ohio Opinions, published by Anderson Publishing Co., Cincinnati, Ohio, reporting all the officially reported opinions as well as some unofficial Ohio appellate opinions and some federal cases construing Ohio law (the editors' headnotes are now keyed to Ohio Jurisprudence, published by The Lawyers Cooperative Publishing Company, Rochester, New York); and North Eastern Reporter and North Eastern Reporter, Second Series, published by West Publishing Company, St. Paul, Minnesota, reporting all officially reported appellate opinions as well as some unofficial trial court opinions (these reports include headnotes prepared by West and indexed under West's key number system).

For comprehensive [illegible] of official and unofficial [illegible] & [illegible] *Ohio's Reported Decisions* [illegible] *survey*, [illegible] Ohio St. L.J. [illegible] (1970); [illegible] *on Ohio Judicial Reporting*, [illegible] Ohio St. L.J. 677 [illegible]

In addition, the following computer systems store [illegible] Cases: Lexis, operated by Mead Data Central, which stores [illegible] opinions that are officially published; and Westlaw, operated by West Publishing Company, which stores only the opinions reported in North Eastern Reporter and North Eastern Reporter, Second Series.

21. *See* note 5 *supra*.

22. Ohio Const. art. IV, § 3(C).

23. Ohio Rev. Code Ann. § 2503.20 (Page 1981).

24. *See* note 6 *supra*.

25. *Id.*

26. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform* (unpublished article prepared in 1981 for the Federal Judicial Center).

The decline in the number of Ohio courts of appeals opinions published is due in part to the manner in which publication of opinions is funded. By long-standing arrangement, opinions for official reporters are typeset by The Law Abstract Publishing Company, a corporation wholly owned by the Ohio State Bar Association (OSBA), for its weekly journal *Ohio Bar*, without cost to the courts.[27] This printing is, in effect, the advance sheet of Ohio's official reports because the official reports are printed by The Law Abstract Publishing Company from this original typesetting. The advantages are mutual: the courts are freed from the cost of typesetting, and OSBA has exclusive control over distribution of the official advance sheets.

Ohio Bar is distributed to all OSBA members as a benefit of membership, and through it OSBA also disseminates a broad range of material in addition to court opinions.[28] *Ohio Bar* is supported through advertising and a subsidy from the OSBA. It receives no state funds. The result is that the size of the publication is limited. The priorities for publication are not announced, but clearly the top priority must be given to supreme court opinions under the constitutional mandate.[29] Opinions of lower courts tend to compete for space with the information of interest to bar members.

C. *Status of Unpublished Court Opinions*

The unpublished opinion in Ohio is launched onto a sea of ambiguity where it is difficult to say whether it sinks or swims. The key publication statute requires that "[o]pinions for permanent publication in book form shall be furnished to the [R]eporter and to no other person."[30] It continues, "[A]fter August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court."[31] The pur-

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27. Letter from Lucien F. Sotter, then President, Ohio State Bar Association (OSBA), to Honorable Gilbert Bettman, then Presiding Judge, Ohio Court of Appeals, First Appellate District (Aug. 28, 1968).

28. Through Ohio Bar, the OSBA distributes new procedural rules such as the new Rules of Evidence, amendments to existing rules, reports of OSBA committees, information concerning the supreme court docket, summaries of Ohio Attorney General opinions, summaries of selected courts of appeals decisions and announcements of all various sorts.

29. See note 5 supra. The constitutional purpose for publication of lower court opinions appears to be that "an opinion will not be reported if the supreme court accepts the case for review, nor if exceeds fifteen typewritten printed pages, or if it fails to determine an unsettled or ambiguous point, to establish a new and important principle or to conflict with, reverse or modify an established principle."

30. Ohio Rev. Code Ann. § 2503.20 (Page 1968).

31. *Id.* At the request of the supreme court, West Publishing Company publishes only those opinions that are approved for publication by the reporter. Letter from Charles D. Nelson,

pose of this "no sanction" statute was to ensure that there would be one publisher of official reports, just as similar rules in other jurisdictions prohibit the citation of unpublished opinions.[32]

It may fairly be said that this purpose has been subverted by actual practice. The apparently mandatory nature of the "no sanction" rule has twice been held to be directory only.[33] Lower courts constantly refer to their own unpublished opinions as having precedential value and cite the unpublished opinions of other courts. Unreported cases are cited in Ohio law review articles and in Ohio law treatises.[34]

There are several systems of summarizing unpublished cases. Each week *Ohio Bar* reports summaries of selected civil cases from the courts of appeals, as prepared and copyrighted by Advocates' Research, Inc. Summaries of criminal cases are published by the Ohio Public Defenders' Association and by the state public defenders' office.[35] Other professional associations regularly report unpublished opinions either in summary form or in full.[36] The courts of appeals have their own methods of retrieval. An "Ohio Unreported Courts of Appeals Cases Service" has been proposed for use by law libraries, law publishers and law offices, which is designed to make available on microfiche the opinions from all appellate districts.[37] Another proposal would furnish an index for this service.[38]

None of these sources of information about Ohio's unpublished judicial opinions makes them available in the national arena, however. The summaries are indexed according to individual systems developed by each publisher; they are not coordinated, and none is capable of being keyed to any of the widely used national research tools, such as those published by The Lawyers' Co-Operative Publish-

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Editorial Counsel of West Publishing Company to the Honorable Gilbert Bettman, Chief Presiding Judge, Ohio Court of Appeals, First Appellate District (Sept. 22, 1980).

32. See, e.g., *The Legal Significance of the Unpublished Court of Appeals Opinion*, [illegible] Case L. J. Rev. 203 (1977); 2 Ohio St. L. J. 137 (1935).

33. Cleveland Stock Exchange Co., 154 F. 2d 364 (1946); Sidney v. George, 56 Ohio App. 2d 207, 382 N.E. 2d 1223 (1977); compare Ohio Sup. Ct. R. Prac. XV, § [illegible] (appendix to an appellant's brief may contain "complete copies of any unreported [illegible] cited"). See also Ohio St. Disc. Ct. App. R. 19.

34. Letter from Paul Richter, Law Librarian, University of Akron School of Law, to Ohio law librarians (Sept. 10, 1980). Richter stated that in the last three years Ohio law reviews cited unreported courts of appeals opinions 115 times; Ohio treatises cited unreported opinions 214 times.

35. Richter, *supra* note 2[illegible], at 61 St.

36. See, e.g., 16 Ohio Assoc. for Civil Trial Attorneys

37. Letter from Paul Richter, Law Librarian, University of Akron School of Law, to Ohio law librarians (Sept. 11, 1980).

38. Letter from P.J. Lucier, President of Banks-Baldwin Law Publishing Company, to Honorable Ralph D. Cole (Sept. 11, 1980).

ing Co., West Publishing Co. or Shepards/McGraw-Hill. Thus, although an unpublished opinion is obviously enforceable between the litigants, and although it is open and available for inspection at all reasonable times by the general public as a public record, the mass of Ohio decisional law does not exist on the national scene.[39]

III. Deficiencies in the Ohio System

A. *Publication of Supreme Court Opinions*

Supreme court opinions that establish judicial policy for the state clearly should be published. It also makes good sense to publish opinions of those cases that the court selects for review, opinions of cases that interpret the United States and Ohio Constitutions, opinions that resolve conflicts between appellate districts and opinions that involve the review of an affirmed death penalty. The mandatory publication requirement, however, makes less sense in other areas of mandatory jurisdiction, such as actions filed originally in the supreme court for the high peremptory writs or actions appealed from cases originally filed in the courts of appeals. Not all of these cases raise novel issues or have precedential value. In addition, it may not be necessary to publish every appeal from administrative agencies.

Relief from having to prepare publishable opinions in these matters would free the supreme court to concentrate on cases worthy of publication— those of public interest. This could be provided by routing such administrative appeals to a special statewide court of administrative review or to one or more of the existing courts of appeals, so that the supreme court could select administrative cases for review with the same criteria that it does in all other litigation. An alternative method of relief would be to give the supreme court discretion to select which original actions and administrative appeals shall be given the full treatment of a published opinion.

B. *Publication of Courts of Appeals Decisions*

The intermediate appellate level has a function different from that of the supreme court, delineated by the following four characteristics:

> (1) The courts of appeal have no control over what cases or how many are filed, whether original actions or appeals from lower jurisdictions. (2) They are, in effect, the court of last resort in 97% to 98% of the cases originating at this or the trial level.

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39. Ohio Rev. Code Ann. § 1701.[illegible] Law Sec'y Disc.

(3) Less than 3% of their opinions are currently being published.
(4) This level of publication is brought about not by the choice of the judges or by any requirement of the constitution, the statutes or the court rules, but by the limitations on available space arising from the economics of publication.

The first two characteristics disclose a court that may be described as a "97% court of last resort," because it establishes judicial policy for all lower courts and agencies in its district. The court must, of necessity, review many cases without precedential value, and this brings into focus the need to differentiate between those cases that speak only to the litigants and those that speak both to the present litigants and to future litigants. The latter should, in the interest of efficiency and fairness, be decided by opinions well publicized and available to all.

The "one report only" and "no sanction" rules adopted in 1919 were designed to eliminate the proliferation of unofficial reports.[40] The statutes had the desired effect. However, there is now a growing volume of verbatim and summary reports of unpublished opinions, and these sources of unpublished opinions undermine the effectiveness of the "one report only" and "no sanction" rules.

In addition, the current practice is also subject to the same criticism to which the "limited publication-no citation" rules of other jurisdictions are subject—selective publication of precedent destroys the concept of stare decisis.[41] It lessens judicial responsibility and accountability, and eventually erodes or destroys public confidence in the judicial system.[42]

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40. 1 Ohio St. L.J. 135, 136 (1935). The "one report only" and "no sanction" rules are codified at Ohio Rev. Code Ann. § 2503.20 (Page 1981), the predecessor of which, Ohio Gen. Code § 1483, was adopted in 1919.

41. P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal 35 (1976) (hereinafter cited as Carrington); Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 Cal. St. B.J. 386 (1973); Newbern & Wilson, *Rule 21: Precedent and the Disappearing Court*, 32 Ark. L. Rev. 37 (1978); *Limited Publication*, supra note [illegible]; Note, *Unprecedented Precedent*, *supra* note 3; Silverman, *The Unpublished Opinion: A Dilemma*, 51 Cal. St. B.J. 33 (1976); Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A.J. 1245 (1978); Note, *Unreported Decisions in United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977) (hereinafter cited as *Unreported Decisions*).

42. See articles cited in note 41 *supra*. The doctrine of stare decisis is that each court decision is a precedent for the future and shall be the guiding principle until modified or overturned in the course of the evolution of the law. On the one hand, stare decisis serves to take the capricious element out of law and to give stability to a society. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). It represents an element of continuity in the law, and is rooted in the psychologic need to satisfy reasonable expectations so that people can act in reliance on known rules of conduct. Helvering v. Hallock, 309 U.S. 106, 119 (1940). The doctrine keeps our system from being degraded into an ad hoc rule of men. On the other hand, stare decisis is not a mechanical formula that requires the courts to follow the prior decision blindly. What qualifies as

Further, the "limited publication-no citation" rule tends to create two bodies of law: one that is published and generally available, and another that is not published and available only to special groups. It splits the bar, because only those who have the necessary resources in time, money and personnel can make arrangements to gather, store and retrieve unpublished cases; those who can tend to be public legal offices (the attorney general and the county and municipal prosecutors) and the large urban law firms.

Limited publication and the resultant suppression of precedent have a clear and present effect on the quality of the judicial product. A decision that is limited in distribution to the litigants and the court's own files does not receive the attention and effort equivalent to that received by the full opinion prepared for publication. Judges whose product is constantly relegated to dusty shelves in specialized libraries, when that product has potential usefulness far beyond the parties and the situations addressed, tend to lose enthusiasm.

Worst of all, the confidence of the profession and the general public will undoubtedly be shaken by accounts of clear inconsistencies between results on the same question,[43] of slipshod work,[44] of suppressed precedent[45] and of denial of further review because the case is not sufficiently explained.[46]

IV. Alternative Plans for Publication

Ohio is fortunate in being able to take advantage of the experience of other jurisdictions that have grappled with the issue of drawing the line between the publishable and the unpublishable by a visible, uniform and realistic process. At the risk of oversimplification, these

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binding precedent are principles that are rationally evolved, intrinsically sound and verified by experience. People v. Hobson, 39 N.Y.2d 479, 488, 348 N.E.2d 894, [illegible], 384 N.Y.S.2d [illegible] (1976); State v. [illegible], 13 Ohio [illegible] 125, 1 N.E. [illegible] 154 (1885); see Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 414 (1924). [illegible] allow the courts to be [illegible] through the [illegible] affairs of men by the [illegible] of justice [illegible] calls for a consistency in the law that will be modified or overruled only by decisions carefully made, reduced to writing and open[illegible] available.

43. [illegible], supra note [illegible], at 3[illegible]; Newbern & Wilson, supra note 41, at 50-51.

44. *Limited Publication*, supra note 4, at 816-21.

45. Kanner, supra note 41; Newbern & Wilson, supra note 41, at 54-55; *Limited Publications*, supra note 4, at 827.

46. Newbern & Wilson, supra note 41, at 53. There are few empirical studies on the erosion of confidence. One study reviewed a survey of counsel of record in unpublished cases and disclosed that while about half of the respondents considered non-publication to have no effect on the confidence in the court of the bar or of the general public, a sizable minority was estimated to believe that the effect was somewhat bad to very bad. *Id.* at 43-56. This is not surprising, because any suppression of publication of court decisions runs counter to the widely accepted tenets of an open society.

publication plans fall into two groups: those that define the line in very general terms, such as "has precedential (or institutional) value," and those that spell out in detail a number of specific factors for determining publication.[47]

The creation of a visible, uniform and realistic policy for determining what is publishable is not simply a matter of setting standards for publication. A publication plan necessarily brings into focus other aspects of appellate administration, because publication and precedent stand at the very center of a system of law that promises reliability, stability and durability. Five areas of concern are involved:[48]

> (1) What types of dispositive writings are allowed? Summary order? Memorandum decision? Opinion, whether signed or per curiam?
> (2) What are the minimum writing standards for a memorandum decision? For an opinion?
> (3) Shall the presumption be in favor of or against publication?
> (4) What are the standards for publication of decisions or opinions? Who makes the decision about publication, and when?
> (5) What is the status of unpublished decisions and what is the required distribution or circulation of them?

A. *Types of Dispositive Writings and Minimum Writings Standards*

A precedential decision should be in a form sufficiently complete so that both the dispositive action and its basis can be understood from a reading of the opinion. On the other hand, a non-precedential decision speaks only to the litigants and may be expressed in summary terms. Therefore, a complete publication plan will state what should be the form and minimum content of an opinion intended to be published. For opinions not intended to be published, the complete publication plan may permit summary disposition or a minimal ruling and rationale on each assignment of error, all without reciting the procedural posture or the facts.

B. *Presumption For or Against Publication*

Creating a presumption for or against publication facilitates the determination of whether to publish a decision. If the presumption is against publication, an opinion will be required to meet certain standards before it will be published. The publication plans of four United States courts of appeals state explicitly that the presumption is against

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47 For an example of specific factors, see text accompanying note 59 *infra*

48 The concepts underlying the discussion in this section draw extensively from the Model

publication.[49] Two others imply that the presumption is against publication.[50]

Creating a presumption against publication is a means of holding down the costs of publishing and retrieving cases. Although publication cost always will be an important factor in determining which opinions are published, alternatives to the present Ohio publication plan should be considered lest the monetary factor continue to stand as a bar to the attainment of the important societal benefits that more widespread publication would serve.

State funds could be appropriated to enlarge publication, and in the interest of governmental economy, this should be done under a carefully managed plan. The use of public funds is advanced as a solution because the benefits of expanded publication will accrue not only to the legal profession but to the public generally. Wider publication would reduce, if not eliminate, the waste of time, money and human effort that is expended daily in pursuing, administering and terminating fruitless appeals, whose points of law already have been decided in prior unpublished opinions. Hopeless appeals occur most often in the criminal field, where experience demonstrates that the same points are raised again and again with mindless repetition. The disadvantages of using state funds stem from the current disfavor with which expanding government is viewed and from the high priority accorded to meeting basic needs for human survival. On the other side, it may be said that fundamental to our form of government is the maintenance of the judicial branch as one of three essential functions of self-government. Publication of judicial opinions is necessary for that branch's survival, and the amount of money needed for this purpose represents a small percentage of the total state budget.

Two other alternatives are based on finding the necessary resources in the legal profession, the constituency most directly benefited by improved publication. The profession has always absorbed those costs that make for greater efficiency in the practice of law; it has, for instance, moved far beyond quill pens and letterpresses. For one alternative, *Ohio Bar* could be expanded to print more opinions, either by accepting more advertising or by allocating more OSBA funds to it. The disadvantage of this course of action is that its success depends on general economic conditions affecting the advertising industry, the ability of OSBA to sell advertising space and the financial

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49. 1st Cir. Public Notice Plan para. (a); 3d Cir. Public Notice Plan (presumption favors publication of signed opinions and disfavors publication of per curiam opinions); 6th Cir. Public Notice Plan para. 2, 7th Cir. R. 35(a).

50. 4th Cir. R. 18(a); 9th Cir. R. 21(b).

health of *Ohio Bar*. The other alternative is to raise the price of bound volumes of official reports. There is a limitation to raising the cost of membership in OSBA and the cost of buying the official reports. however, because neither should be priced out of the reach of the profession.

Another method of expanding publication would be to establish a secondary level of printing and distribution. wherein opinions not selected for the permanent official reports are printed separately in relatively impermanent forms. such as paperback. which are less expensive to print and distribute.[51] In this condition they could be citable. and if an opinion of the secondary level proved to be significant as precedent. it could later be published in the permanent official reports.

There are two final suggestions which do not fill the whole bill because they do not necessarily expand the official reports. One is to use the privately owned publishing companies to publish lower court opinions. such as West Publishing Company on the national scene and the W. H. Anderson Company or Banks-Baldwin Law Publishing Company on the regional scene. As organizations for profit. they of course are self-supporting and do not draw on public funds. Twenty states have designated the National Reporter (West) as their officially approved publisher. and three others rely on West without official designation. having discontinued the publication of state reports.[52] The national and regional reports have the advantages of being widely used and readily available. The other suggestion is to construct the proposed system of collecting. indexing and making available all unpublished lower court decisions on a statewide basis.[53] The end result would be to furnish the bench and bar complete copies of each and every unpublished opinion. but this would require the assembly of all unpublished opinions in one place or in one device. together with systems for indexing and retrieving cases.

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51. Comparison, *supra* note 41 at 1341; Smith, *The Selective Publication of Opinions: Ohio Courts' Experience*, 32 Ohio St. Bar J. 27, 33-41 (1957).

52. West Publishing Company has been designated as official publisher of reports in the following states:

Alabama	Iowa	Missouri	Pennsylvania
Alaska	Kentucky	New Jersey	South Dakota
Delaware	Maine	New Mexico	Tennessee
Florida	Minnesota	North Dakota	Wisconsin
Idaho	Mississippi	Oklahoma	Wyoming

West Publishing Company is used as the only publisher of opinions in the following states, without official designation: Louisiana, Texas and Utah. Letter from Charles D. Nelson, Editorial Counsel, West Publishing Company, to the Honorable Robert L. Black, Jr. (April 6, 1980).

53. See note 37 *supra* and accompanying text.

C. *Standards for Publication*

The publication standards adopted by the United States courts of appeals and the sixteen states that have adopted publication plans are generally of two types. The first simply expresses a general policy. Examples include publishing an opinion only if it has a jurisprudential purpose[54] or precedential value,[55] or if the court and future litigants would be likely to benefit from reading or citing the opinion.[56] Adopting a general policy leaves considerable discretion to the decisionmaker to determine whether an opinion will be published. This may be undesirable because important decisions may not be published, and there is a danger of inconsistency.

The second type of publication standard is specific.[57] The following example is a model rule published by Reynolds and Richman that contains the criteria of publication standards already in use and recommends other criteria designed to build confidence in the appellate system.[58]

Depending on the presumption, the standard begins, "[A]n opinion will be published if . . ." or "[A]n opinion will not be published unless . . ." it:

> 1) establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law which appears to have been generally overlooked;
>
> 2) applies an established rule of law to facts significantly different from those in previous published applications of the rule;
>
> 3) explains, criticizes or reviews the history of existing decisional or enacted law;
>
> 4) creates or resolves a conflict of authority either within the district or between districts;

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54. 2d Cir. R. 0.23.

55. 3d Cir. Publications Plan, para. 1; 7th Cir. R. 53; 9th Cir. Publication Plan, para. 2; Conn. Gen. Stat. § 51-214 (1977); Del. Sup. Ct. R. 11; Md. R. P. 1092-b; N.Y. Jud. Law § 431; McKinney 1968; Tex. R. Civ. P. 452; Wash. Rev. Code § 2.06.040 (1974).

56. 1st Cir. Publication Plan, para. 3a.

57. D.C. Cir. Publications Plan; 4th Cir. R. 18(a); 7th Cir. R. 53(c); 8th Cir. Publications Plan para. 4; 9th Cir. R. 21(b); Ariz. R. Sup. Ct. R. 21-1; Cal. R. Ct. 976 (b); Ind. R. App. P. 15 A(2); Neb. Rev. Stat. § 24-208 (1975); N.J. R. Gen. Applic. 1:36-2 (appropriate standards to be fixed by the supreme court); Okla. Stat. Ann. tit. 20, § 30.5 (West Supp. 1980); and Okla. R. Civ. P. New Policy on Publication of Appellate Opinions (effective Sept. 21, 1978); Wis. R. App. P. 809.23(1).

58. *Limited Publication*, *supra* note 4, at 837. Their model rule was amended in Reynolds & Richman, *supra* note 26. Additions were made to the language of clauses (3) and (7), the presumption in favor of publication was clearly stated, and an express limitation was placed on dispositions of appeals both without oral argument and without publication.

5) concerns or discusses a factual or legal issue of significant public interest;
6) is accompanied by a concurring or dissenting opinion;
7) reverses the decision below or affirms it upon different grounds;
8) addresses a lower court or administrative agency decision that has been published; or
9) is an opinion in a disposition that
(a) has been reviewed by the United States or the Ohio Supreme Court, or
(b) is a remand of a case from the United States or the Ohio Supreme Court.[59]

The advantages of adopting a specific standard of publication are that it defines precedential value and that it guides the decisionmaker and limits his discretion.

The publication standard also must specify who will determine which opinions will be published. Jurisdictions have entrusted the publication decision to various groups, including the unanimous decision of the panel hearing the appeal,[60] a majority of the panel with the possibility of an option in a single judge to make the opinion available for publication,[61] or a committee of judges comprised of one from each appellate district and the chief judge of the court of appeals.[62] Four jurisdictions allow a concurring or dissenting judge to publish his opinion (in which event the entire opinion is published).[63] Two states provide that the supreme court shall decide whether the opinions of intermediate courts will be published.[64] Some plans provide that any

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59. *Limited Publication*, *supra* note 4, at 838-39. The author has taken the [illegible] of changing "circuit" to "district" in (1) and of adding the words "or the Ohio" in [illegible]. For another model rule, *see* ABA Comm'n on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.37 (1977).

60. 2d Cir. R. 0.23.

61. D.C. Cir. Publication Plan [illegible]; 1st Cir. Publication Plan para. [illegible]; 5th Cir. Publication Plan para. 2 [illegible]; 7th Cir. R. [illegible] available for publication although he is expected ordinarily to [illegible] the majority's decision regarding publication); 8th Cir. Publication Plan para. [illegible] judge may make any of his decisions available for publication); 9th Cir. R. 21(d); 10th Cir. R. 17(e); Ark. R. Sup. Ct. 21-2; Cal. R. Ct. 976(c) ([illegible] to an order to publish from state supreme court).

62. Del. Code Ann. tit. 10, § 1061 (1974); N.J. R. Gen. Applic. 1:36-2; Wis. R. App. P. 809.23(2).

63. 9th Cir. R. 21(b)(6); Ark. R. Sup. Ct. 21-2; Ind. R. App. P. 15(A)(2); Kan. R. App. Ct. No. 7.04.

64. [illegible] R. Civ. P. 7[illegible] 28(f)[illegible]; Okla. Stat. Ann. tit. 20, § 30.5 (West Supp. 1980).

litigant or other person be permitted to request that an opinion be considered for publication.[65]

While the simplest solution is to impose the publication decision on the panel responsible for the opinion (to be exercised by a majority, as are other questions before the panel), the creation of a special committee of judges to govern publication on a statewide basis would ensure that the decisions are consistent. The disadvantage of such a scheme is that it imposes additional duties on judges already fully occupied with their regular tasks, but that burden might be ameliorated by relieving them of other duties.

Providing the "safety valve" of allowing persons other than the judges who make the publication decision to move the court for the publication of an unpublished opinion has the real advantage of keeping an open door available to the profession and the public. The motion should be accompanied by a memorandum explaining the reasons in favor of publication.

D. *Status of Unpublished Opinions*

Ohio Revised Code section 2503.20 provides that unpublished opinions cannot be recognized or given sanction.[66] In actual practice Ohio courts recognize their existence and attempt to make them known to the bar. Whether or not the state adopts standards of publication, the status of unpublished opinions should be clarified.

There are four alternative ways of treating unpublished decisions. Some jurisdictions are silent on their status.[67] The great disadvantage of this treatment is that the unpublished decisions generally are unavailable to individuals who are without the resources necessary to utilize this source of law, a circumstance that eventually may erode public confidence in the judicial system. The judicial product also tends to lose quality, because the judges' motivation to be careful may be reduced dramatically.

Some jurisdictions have adopted a "no citation" rule. This rule has two forms. Some jurisdictions absolutely prohibit all use, reliance or citation.[68] Other jurisdictions recognize the existence of the first circle of impact and permit the unpublished decision to be used to

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65. 7th Cir. R. 53; 6th Cir. R. 24(c); Cal. R. Ct. 976; Wis. R. App. P. 809.23(3).

66. See note 61 supra.

67. The United States Courts of Appeals for the Third and Fifth Circuits are silent on their status, as are a majority of the states.

68. *E.g.*, 1st Cir. R. 14; 2d Cir. R. 0.23, 6th Cir. R. 11; Colo. App. R. 35(f); Ky. R. Civ. P. 76.28(4)(c); Okla. Stat. Ann. tit. 20, § 30.5 (West Supp. 1980).

establish res judicata, estoppel or the law of the case.[69] Both forms of the "no citation" rule are corollaries to the rule of limited publication, because they reduce the number of printed decisions and prohibit the development of secondary publications. Although subject to some review, a judge's decision that an opinion lacks precedential value and should not be published should be respected. The rule, however, raises the possibility of suppressing precedent if the judge fails to see the importance of the decision.

A third treatment of unpublished decisions is to permit unlimited citation.[70] The advantage is that the doctrine of stare decisis is allowed full room to operate. Those judicial products that are incomplete will have little precedential value, because they fail to set forth the procedural posture of the case, the facts, the arguments and the court's decision and reasoning in sufficient detail to inform the reader. Those opinions meeting the standard of quality will have continuing effect under stare decisis. The disadvantages are those that arise from the existence of two bodies of law, the official and the unofficial.[71]

The fourth alternative is the adoption of a modified citation rule, whereby citation of an unpublished opinion is permitted provided the attorney citing it serves a copy on the court and all other counsel, with disclosure of any disposition by higher courts of any appeal therefrom that has come to the attention of the citing counsel.[72] In addition, the citing counsel might be required to certify that the cases he cites include all cases on point of which he is aware, whether favorable to his position or not, in order to protect the general bar against unfair advantages taken by large offices that have the capability to retrieve unpublished opinions. The advantage of the modified rule is that unpublished law is recognized as having that precedential value on which the doctrine of stare decisis is based. The disadvantages derive from the creation of two sets of law, but these disadvantages are ameliorated by requiring full disclosure of the unpublished sources.

If the fourth alternative were adopted, it would be advisable to develop a statewide inventory of unpublished opinions, adequately

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69. *E.g.* D.C. Cir. R. 8(c), 7th Cir. R. 35(b)(2) (ex., 5th Cir. Publication Plan, para. 2, 6th Cir. R. 24(c), Ariz. R. Civ. App. P. 28(c), Ark. R. Sup. Ct. 2(f), Cal. R. Ct. 977, Iowa Sup. Ct. R. 19(f), Ind. R. App. P. 15(A), Kan. S.R. App. Ct. No. 7(e), Wis. R. App. P. 809.23(3).

70. Research has disclosed no statute or rule expressly allowing unlimited citation.

71. *See* text accompanying notes 32-46 *supra*.

72. 4th Cir. R. 15(d), 10th Cir. R. 17(e), 11th Unif. Ord. and I.O.P., Ariz. Civ. R. 28(i). *See also* Ohio Sup. Ct. R. Prac. V, *supra* note 33, Ohio 8th Dist. Ct. App. R. 19, ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.37(e) (1977); R. Leflar, Internal Operating Procedures of Appellate Courts 58-59 (1976).

indexed for ease of retrieval, and to make this service available to the bench, bar and general public at a reasonable cost.

V. Conclusion

This Article's examination of Ohio's policy and practice for publication of appellate cases is the first attempt to measure them against standards that have been deemed worthy of adoption by the federal courts of appeals and by sixteen states. The most serious problems in the Ohio system are the creation and continued growth of unpublished decisional law throughout the state and the ambiguity surrounding the precedential status of this accumulated mass. The results are that the bench is not aware of what is being decided on the same or similar questions in other jurisdictions, the bar is distracted by the existence of two bodies of law, and unpublished law is accessible only to those who have the necessary resources. Further, the State of Ohio is excluded from that communication within the legal profession that forms the means by which, in American jurisprudence, the law evolves and develops.

This Article did not have the benefit of a detailed examination of the unpublished Ohio opinions upon which to base more in-depth analyses of the effects of the Ohio system.[73] Thus it could not inquire into the depth and extent of the unpublished law in Ohio, the extent to which upward review is or is not blocked by inadequate treatment in the lower courts, the extent to which quality generally is or is not lower in unpublished than in published opinions or the extent of inconsistencies and conflicts not only between appellate districts but also within individual districts. It also has not measured the erosion of confidence in the Ohio judicial system, if any.

The Article has had a limited purpose: to explain Ohio's policy and practice of publication in its present form and to evaluate it against widely accepted criteria, with the expectation that this exposition will generate moves toward the improvement of Ohio justice.

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73. See the analyses of unpublished opinions produced in *Limited Publication*, *supra* note 1; Newbern & Wilson, *supra* note 41; Reynolds & Richman, *supra* note 20. The last article uses standards and methods of evaluating the unpublished product of the eleven federal courts of appeals that could be applied advantageously to examine the unpublished opinions of any state intermediate court that serves in large measure as the court of last resort.

STATE BAR OF TEXAS Rule 452

May 3, 1983

To John Feather

From Jack Eisenberg

John, I would greatly appreciate your chairing a subcommittee to look into the question you raised in your letter of March 25 regarding Rule 452.

The following are asked to serve as members of the committee:

Michael A. Hatchell
William V. Dorsaneo, III
Richard W. Mithoff, Jr.
Luther H. Soules, III

Please let me know if you will be in position to report on this matter at the June 4 meeting.

Thank you for your help.

Jack

JCE

Enclosure

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PATENT, TRADEMARK, COPYRIGHT & UNFAIR COMPETITION MATTERS

TELEX:
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MICHAEL E. MARTIN
U. S. PATENT AGENT

JOHN M. CONE
U. S. AND EUROPEAN
PATENT AGENT

March 25, 1983

Mr. Jack C. Eisenberg
Chairman
Administration of Justice Committee
P. O. Box 4917
Austin, Texas 78765

RE: Rule 452, Texas Rules of Civil Procedure

Dear Jack:

Although the current Rule 452 has only recently become effective, a number of instances of suggested abuse have come to my attention. It would seem without question that the only ability of the public and the bar to monitor the quality of appellate judges is through review of written opinions. I am beginning to suspect that quality is being sacrificed for expediency. The most recent edition of Litigation, the Journal of the Section of Litigation, American Bar Association, contains an article which touches on this subject and which prompted this letter.

Please place the continued propriety of Rule 452 on the Committee's agenda for consideration in due course of the Committee's considerations.

Thank you very much.

Sincerely,

John Feather

sfa
enclosure

cc: Michael A. Hatchell
William V. Dorsaneo, III
Richard W. Mithoff, Jr.
Luther A. Soules, III
Evelyn A. Avent

From the Bench

Judging by Fiat

by Bernard S. Meyer

Judge, New York Court of Appeals

Our courtroom in Albany is one of the most beautiful in the world—hand-carved from solid oak. The work of fashioning this artistry, we are told, was done more than 100 years ago, by prisoners. One of my colleagues, Judge Sol Wachtler, likes to tell how that proved to be a source of embarrassment to us.

It seems that while this work was being done, one of the prisoners had an appeal before our court. His cause was a compelling one—in fact, there was little question but that his conviction should have been reversed. But one of the judges observed: "If we reverse—who will finish the rotunda?" It was at that point that the entry "affirmed, no opinion" came into being.

That story illustrates my topic, which is—Should judges come out of the closet? The story is, of course, apocryphal but there are many, including seasoned members of the profession, who are uncomfortably unsure that it is not factual. A recent New York Times story about a book by Professor Alan Dershowitz of Harvard Law School, respected as both an academic and a practitioner, quotes his manuscript as stating that, "A conspiracy of silence shrouds the American justice system." But in a recent television documentary on the criminal justice system, the statement with which Anthony Prisendorf closed the program was: "As its name implies, the criminal justice system works—for the criminal."

The answer to the Prisendorf comment is in John Donne's famous line ". . . never send to know for whom the bell tolls; it tolls for thee." Unless the constitutional rights of criminals are protected, none of us has constitutional rights of any meaning. But how has it come to pass that this truism escapes so many members not only of the public but of the profession as well? And how can it be true, as Prisendorf says, that the system favors the criminal, if as Dershowitz says, the system is in truth a conspiracy to put criminals behind bars?

The answer is partly in the eye of the beholder but primarily the fault of, if I may coin a word, the "beholdee." Much of our early law developed through the use of legal fictions; for example the artificial ejectment actions, the title of which began Doe on the Demise of Roe. The early theory of judicial decision was that the judge did not make law, he simply declared or found the law as it existed, and presumably always had existed. We have come a great distance in the direction of realism, progressing, for example, from the limited tort concept of an injury to a person to whom a direct duty was owed; through *McPherson*'s abandonment of privity in favor of the concept that duty extends beyond contract and includes not only purchasers but bystanders; to the abandonment of negligence in favor of strict liability as a burden that should be borne by the manufacturer to spread the risk; and now to what appears to be a growing recognition of industry or enterprise liability without regard to who the actual manufacturer was. The imaginative minds and articulate pens of such judicial greats as New York's Cardozo and Breitel, California's Traynor, and Illinois' Schaeffer have evolved and expounded upon the reasons supporting that progression.

The fact remains, however, that a very large part of judicial business is disposed of by what to many is no more than an incantation, a mouthing of words without explanation of reasons. The problem of which I speak arises not from malice but be-

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This article has been adapted from a speech to the American Law Institute.

cause the sheer volume of material that passes before courts, both trial and appellate, results in the courts being too hurried and harried to do any better.

There is, however, an aphorism that courts must not only do justice, but also that it must appear that justice is being done. There are many reasons for this, the most important of which, of course, is that the parties and the public are entitled to know on exactly what basis the judge or judges acted. As Judge Ruggero Aldisert of the Third Circuit Court of Appeals put it to a seminar for appellate judges, "A judge's writing must be free from obscurity, ambiguity, and the danger of being misunderstood; its meaning must be quickly and easily recognized."

Of equal importance is a truth to which I can personally attest: The first impression is not always the correct impression. Decision is a process of reasoning; the attempt to articulate reasons sometimes exposes a fallacy that results in a conclusion diametrically opposed to that of first impression. As Professors Carrington, Meador, and Rosenberg have pointed out in their book *Justice on Appeal*, this is the reason courts have required administrative agencies to write opinions. It is, therefore, paradoxical for the courts not to "go and do likewise."

There are additional ways in which the failure clearly to state reasons undermines the judicial process. One is at the root of the federal-state conflict resulting from federal habeas corpus review of state criminal cases. We can all agree that something is awry with a system that carries a criminal case first through one state trial, two state appellate courts, and a denial by the Supreme Court of certiorari, and then a second trip by way of post-conviction remedy through the same three state courts, before at length being considered on habeas corpus by a federal district court and reviewed on federal appeal, only to be thrown back, sometimes as much as a decade later, to the state trial court for retrial because the federal court has found what it believes to be error of federal constitutional proportion. A public reaction of incredulity and a state court reaction of resentment and friction are natural concomitants of such a system.

Yet the state court system contains an important and often unused key to solution. Though federal judges are not bound by a state court's findings of fact in deciding constitutional issues, there is little likelihood that a writ will be granted when there is evidentiary support in the record for the state judge's holding, provided, and this is a very important proviso, that he has articulated the holding in terms of supporting facts rather than as a bald conclusory statement. Yet the latter is too often the form the state trial judge's decision takes. The current furor about whether the federal statute should be amended to limit habeas corpus review to questions of fundamental unfairness may well have been avoided had state court judges been more explicit in the past in stating the factual basis for their decisions.

Reasoning

What can be done about it? *Justice on Appeal* tells us that "every decision of an appeal (and I would add at trial level as well) should be accompanied by a statement of reasons, however brief." This means not only abolishing the "affirmed, no opinion" entry, which Judge Wachtler's story highlights and a number of courts still use, but requiring that findings of essential facts and reasons for the decision be stated. It also means not only articulation of reasons rather than simply stating conclusory euphemisms, but further, being candid about both the derivation of judicial powers and deviations from previously declared substantive rules.

The incorporation doctrine, by which the provisions of the Bill of Rights have been made applicable through the Fourteenth Amendment to state as well as federal legislation, has been the subject of intense discussion in both Supreme Court opinions and academic writings. The question has been whether all, and if not all, which of the first Ten Amendments to the Constitution are thus made applicable. Little of the discussion and almost none of the explication deals with the how, rather than the what, of incorporation.

Yet vastly different conclusions can be supported or destroyed depending on exactly how incorporation takes place through the due process clause. True, had the vehicle been more clearly explained, some state legislation that has succumbed to incorporation may have survived even though similar federal legislation was invalidated. But that inconsistency would be more than offset by the substitution of an articulated set of principles concerning incorporation for what appears to many to be no more than judicial fiat.

The same observation applies to judicial policies as well as powers. It is often said, as though it were gospel declared from on high, that courts do not render advisory opinions. That may be true in an absolute sense, but the number of times that courts declare legal principles extending far beyond the facts of the case at hand (*Brown v. Board of Education*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973), are but two among many possible examples) strongly suggests judicial application of Archimedes's principle of the lever. The principle, you will remember, was, "Give me a place to stand and I can move the world."

There are many situations in which advisory opinions are highly desirable, not only because of the saving of judicial resources that results, but because the social importance of the controversial issue requires decision now rather than several years from now. Would legal decisions not be given acceptance more readily if we developed standards indicating when opinions can and should go beyond the facts of the case at hand, so that courts could practice what they preach?

The principle of judicial articulation of which I speak means, finally, writing with an eye on public sentiment concerning the point in issue. I am not suggesting, as did Mr. Dooley, that courts should follow the "iliction retoorns." Public clamor should have no part in the making of judicial determinations. But I firmly believe that the furor created by the Supreme Court's decision in the prayer case, with headlines across the country screaming that the court had thrown God out of the schools, would not have occurred had the Court's statement of its contrary intention ap-

(Please turn to page 56)

rules and statutes plainly say that a lawyer must pay if he "multiplies the proceedings" and escalates the "costs unreasonably and vexatiously."

How unfortunate that it takes litigation as bankrupt as the *Muigai* case before the courts impose sanctions against lawyers. There is no surer deterrent. But will these rules be used against hometown lawyers and their clients? Why not extend the rules then to the lawyers who plead "on information and belief" when they have neither, but merely want to raise the specter of litigation to coerce a settlement? When will sanctions fall on lawyers who obstruct discovery by asserting waived privileges or object to questions to propel the proceedings into court?

Courts that decline to use these rules might run to the other extreme with sanctions. Despite the fear, every new judge should read the *Muigai* decision, and every trial lawyer too.

From the Bench

(Continued from page 6)

peared in the body of the opinion rather than in a footnote.

But, the judges will ask, how in view of the ever increasing caseloads of trial and appellate courts can judges do what you suggest? My thesis is that if judicial decisions are to retain their credibility, quality cannot be sacrificed on the altar of quantity. My answer therefore, is that we must find ways to hold down, if not cut back, the tasks that are constantly being thrust on the courts and to make the process of decision systematic so that judges will have more time for decision and can use that time more productively than has been the case to date.

The proper function of courts in our society is being studied by the Council on the Role of the Courts and has been studied by the Advisory Council on Appellate Courts and, with respect to federal and state division of jurisdiction, by the American Law Institute. That field is far from fallow, but the much more fertile project in my view is to study how judicial time can be more productively used.

Management techniques have found their way into courts on the level of administration with computerized calendars and record-keeping and the like. But they are seldom applied to decisional work. I do not believe that the day of computer justice has yet arrived, or indeed will ever arrive, for the amorphous concepts in which the law deals—the concepts of reasonable men, reasonable doubt, due process, best interests of a child, and public policy, among others, contain nuances incapable of assessment by even so refined a tool as a jeweler's scale. They require the reflective thinking of a professionally trained mind.

That does not mean, however, that nothing can be done through systems methodology to improve the process. By way of example only, I note that in Nassau County we were able to reduce the time between the hearing of an uncontested divorce case and the signing of the judgment from a period of six weeks or more to signing of the judgment on the day of the hearing. By first adopting a rule setting forth, for each of the various types of actions, forms of findings, conclusion, and judgment with appropriate blanks to be filled in by the judge, and then directing the plaintiff's attorney to prepare findings, conclusions, and judgment in accordance with what he expected to prove to hand up to the trial judge in advance of the hearing, the Nassau Board of Judges made it possible for the trial judge to check off the various items as they were proved and sign the judgment at the end of the hearing instead of having to wait for the stenographic transcript and the clerk's review before judgment could be entered. The process is now detailed in the rules.

What I am suggesting is not justice by the numbers, but the modernizing of judicial techniques to give judges, both trial and appellate, the time to prepare and the method for preparing reasoned decisions, and then to insist, in the interests of judicial credibility, that such decisions be the rule without exception.

Our courts have been in trouble for the past 20 years or more because they have concentrated too much upon the *what*, and paid too little attention to the *why* and *how*, of judicial decision. I suggest that the goal of the courts should be to assure that every judicial decision includes a clear explication of the reasoning on which it rests. We must find methods for ordering the decisional process—and the materials that are its grist—to make available the time without which that goal can never be realized.

Ignore the Rules

(Continued from page 22)

decisions in legal trials. Those safeguards are absent in arbitration proceedings.

But that is what arbitration is all about; it consciously abandons many judicial safeguards that improve the rationality and the predictability of a result. These include not only procedures such as formalized pleading and pretrial discovery and inspection, but also substantive rules. Arbitrators are not required to follow rules of substantive law or adhere to any precedent, legal or otherwise, in making their award.

Irrationality and lack of predictability are compounded because arbitrators generally do not set forth their findings of fact, their conclusions of law, or their reasons for making an award. Indeed, they are encouraged not to do so. The American Arbitration Association's *Manual for Commercial Arbitrators* says that arbitrators need not and should not write opinions setting forth the reasons underlying their award, but should merely announce their decision. The *Manual* explains that "One reason for such brevity is that written opinions might open avenues for attack on the award by the losing party." The discipline of setting forth reasons on paper imposes an obligation on a judge to render a justifiable and rational decision. When a court of law renders an opinion, it deliberately sets out a legally established standard of conduct to which others will be expected to adhere. In an arbitration, there is no comparable discipline.

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June 26, 1984

Chief Justice Jack Pope
The Supreme Court of Texas
P. O. Box 12248
Capital Station
Austin, Texas 78711

Dear Mr. Chief Justice:

This letter is meant to call your attention to a problem that has become apparent with current practice under the Texas Rules of Civil Procedure, specifically Rules 456 and 457. This problem does not involve a case currently pending before any court. As you are aware, these rules require several notices of judgment to go to the attorneys involved in a case at the Court of Appeals. Rule 457 requires immediate notice of the disposition of the case. Rule 456 additionally requires a copy of the opinion to be sent out within three (3) days after rendition of the decision, in addition to a copy of the judgment to be mailed to the attorneys within ten (10) days after rendition of the decision. As you can see, the Rules contemplate three (3) separate notices to be mailed out by first class letter, which should, in this most perfect of all possible worlds, result in at least one of them getting through to an attorney to give him notice of the Court of Appeal's decision.

The problem arises when, as has been done, the office of the Clerk of a Court of Appeals decides to mail a copy of the judgment and the opinion together in one envelope to, in their minds at least, satisfy the combined requirements of Rules 456 and 457. With this as a regular practice, it takes very little in the way of a slip-up by a clerk or the post office to result in no notice at all being sent to an unsuccessful party.

The combination of Rules 21c and 458 as interpreted by the Supreme Court make jurisdictional the requirement that any Motion for Extension of Time to File a Motion for Rehearing be filed within thirty (30) days of the rendition of judgment. It can happen, and has happened, that because of failure of the Clerk of the Court to mail notice of the rendition of judgment the party can be foreclosed from pursuing Application for Writ of Error to the Texas Supreme Court.

While strict adherence to the requirements of the Rules for three (3) separate notices would go far to eliminate the problem, there are no adequate sanctions or protections for the parties when the clerks fail to provide the proper notices. One possible solution that may create some additional burden upon the staff of the Clerk of the Courts of Appeals, but would go far to protect the appellate attorney from clerical missteps, would be to amend the Rules to require at least one of the notices to be sent registered mail, return receipt requested. The second step could take one of two forms. One method would be to require proof of delivery of the notice by registered mail before the time limits for the Motion for Rehearing would be used to foreclose a party from further pursuant of their appeal. A second alternative would require the clerk of the court to follow up by telephone call if the green card is not returned within, say, fifteen (15) days. An amendment to the rules along these lines would help to push towards the goal expressed by the Supreme Court in B.D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 8680 (Tex. 1982), when it said that the Texas Rules of Civil Procedure had been amended "to eliminate, insofar as practical, the jurisdictional requirements which have sometimes resulted in disposition of appeals on grounds unrelated to the merits of the appeal."

A second, more unwieldy alternative would be to make it explicit that Rule 306a(4) also applies to judgments by the Courts of Appeals. This would allow an attorney to prove lack of notice of the judgment of the Court of Appeals to prevent being foreclosed from filing a motion for rehearing and subsequent appeal to the Supreme Court.

Because of the problem outlined in this letter, we have now made it a practice, as a part of our appellate work, to call the clerk's office every week, after oral argument, to see if a decision has been rendered. If this becomes standard practice by all attorneys, it will add significantly to the work load of our already overburdened clerks.

We certainly appreciate your consideration of these suggestions made above.

Yours very truly,

Charles M. Jordan

I. Nelson Heggen

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216,458

June 7, 1985

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

AND

Honorable Luke Soules
800 Milam Building
San Antonio, Texas 78205

Gentlemen:

At the meeting of the Supreme Court Advisory Committee last week it was suggested that I transmit in writing the request for an amendment to Rule 216 of the Texas Rules of Court, and I am accordingly transmitting same.

It appears that the multi-county districts have difficulty in arranging their dockets, especially for jury trials when a demand and payment of a jury fee can be done "not less than ten days in advance." I can understand their predicament and the suggestion is that the requirement of the rule be that the request and payment of a demand for jury in a civil case be 30 to 45 days in advance.

Another suggestion for a change that had been made to me concerned a time limit on the Court of Appeals in ruling on a "motion for rehearing." Some time limit should be placed on it that if it is not ruled on, it is automatically overruled by operation of law.

I trust that the Committee will find these suggestions favorable to recommend to the Supreme Court.

Sincerely,

Solomon Casseb, Jr.

SCJR:dng

cc: Judge Robert R. Barton
216th District Court
Kerr County Courthouse
Kerrville, Texas 78028

OFFICE: 512-257-5945
RESIDENCE: 512-895-3636

COUNTIES:
BANDERA
GILLESPIE
KENDALL
KERR

ROBERT R. BARTON
DISTRICT JUDGE
216TH JUDICIAL DISTRICT COURT
KERR COUNTY COURTHOUSE
KERRVILLE, TEXAS 78028

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MARY BROOKS
OFFICE: 512-257-4396
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OFFICE: 915-446-3383
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P. O. BOX 423
JUNCTION, TEXAS 76849

June 19, 1985

Hon. Solomon Casseb, Jr.
District Judge
Casseb, Strong & Pearl
127 East Travis Street
San Antonio, Texas 78205

Dear Judge Casseb:

Thank you for the copy of your letter of June 7, 1985, concerning the recommended amendment to Rule 216 by the Supreme Court Advisory Committee.

This amendment will not only assist the multi-county District Courts in making jury settings, but will reduce the incidence of non-jury trials being obstructed by dilatory jury demands.

Sincerely yours,

Bob

ROBERT R. BARTON

RRB/fsj

216, 258

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OF COUNSEL

June 24, 1985

Hon. Jim Wallace
c/o Supreme Court of Texas
P. O. Box 12248, Capitol Station
Austin, Texas 78711

Dear Judge Wallace:

Enclosed please find copy of letter received from Judge Barton on the recommended amendment to Rule 216, which I previously submitted to you.

Sincerely,

Solomon Casseb, Jr.

SCJR:dng
Encs.
cc: Mr. Luke Soules
Attorney at Law
Milam Building
San Antonio, Texas 78205

OFFICE: 512-257-5945
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Sincerely yours,

Bob

ROBERT R. BARTON

RRB/fsj

C. Rehearing

Rule 100. Motion and Second Motion for Rehearing.

(a) Motion for Rehearing. Any party desiring a rehearing of any matter determined by a Court of Appeals or any panel thereof must, within fifteen days after the date of rendition of the judgment or decision of the court, file with the clerk of the court a motion in writing for a rehearing, in which the points relied upon for the rehearing shall be distinctly specified.

(b) Reply. No reply to a motion for rehearing need be filed unless requested by the court.

(c) Decision on Motion. If a majority of the justices of the Court of Appeals or of the panel that was assigned the case are of the opinion that the case should be reheard, the motion shall be granted and the case shall be resubmitted, with or without oral argument as a majority of the justices participating in the decision shall decide. If a majority of the Court of Appeals or of the panel that was assigned the case are of the opinion that the case should not be reheard, the motion for rehearing shall be overruled. If a motion for rehearing is granted, the court or panel may make final disposition of the cause without reargument, or may order the case resubmitted (with or without oral argument), or may make such orders as are deemed appropriate under the circumstances of the particular case.

(d) Second Motion for Rehearing. If on rehearing the Court of Appeals or any panel thereof modifies its judgment, or vacates its judgment and renders a new judgment, or hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may, if a party desires to complain of the action taken, be filed within fifteen days after such action occurs. However, in civil cases, a further motion for rehearing shall not be required or necessary as a predicate for a point in the application for writ of error if the asserted point of error was overruled by the Court of Appeals in a prior motion for rehearing.

(e) Amendments. Any motion for rehearing may be amended as a matter of right any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the court any time before its final disposition.

(f) Motion Overruled by Operation of Law. In the event a motion or second motion for rehearing is not determined by written order made within sixty days after the same is filed, it shall be overruled by operation of law on expiration of that period.

(g) En Banc Reconsideration. A majority of the justices of the court en banc may order an en banc reconsideration of any decision of a panel within fifteen days after such decision is issued with or without a motion for reconsideration en banc. A majority of the justices may call for an en banc review by (1) notifying the clerk in writing within said fifteen day period, or (2) by written

order issued within said fifteen day period, either with or without en banc conference. In such event, the panel decision shall not become final, and the case shall be resubmitted to the court for an en banc review and disposition.

(h) Extension of Time. An extension of time may be granted for late filing in a Court of Appeals of a motion or a second motion for rehearing, if a motion reasonably explaining the need therefor is filed with the Court of Appeals not later than fifteen days after the last date for filing the motion.

COMMENT: The sources of this proposed rule are Tex. R. Civ. P. 458 and Criminal Appellate Rule 208. The last paragraph is based on Tex. R. Civ. P. 21c.