AGENDA
Supreme Court Advisory Committee Meeting
May 31, 1985

	Date of Request	Request Submitted by	Action taken, if any	Comments
3a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
8	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
8	2/84	Ray Hardy	Proposed Revision approved by COAJ on 6/9/84	10, 14b
8	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule
10	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
10	2/84	Ray Hardy	Proposed Revision approved by COAJ on 6/9/84	10, 14b
10	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule
10a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
10b	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
14b	2/84	Ray Hardy	Proposed Revision approved by COAJ on 6/9/84	10, 14b

	Date of Request	Request Submitted by	Action taken, if any	Comments
14c	2/3/83	W.J. Kronzer	At 11/5/83 meeting, Chairman Green request the subcommittee to study the rule for a later report. At 2/25/84 meeting Gary Hopkins was to have a report at the next meeting; however, it was not on the 4/14/84 agenda prepared by Greene	
21c	6/26/84	Jordan & Haggen	Approved 12/3/83 by S.C. on 3/9/85 Agenda for Report by Doak Bishop on 306(2); Written report on 306(2) also received from Tom Pollan dated 3/6/85.	456,457,458
27a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
27b	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
27c	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
47	8/31/82	W.J. Kronzer	Referred to State Bar Committee on Professional Ethics	None
47	12/1/83	Hubert Green	Referred to State Bar Committee on Professional Ethics	None
47	9/20/84	Robert Davis	On 3/9/85 agenda for report by Jim Weber	None

	Date of Request	Request Submitted by	Action taken, if any	Comments
47	Unknown	Jim Weber	None	None
65	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule
86	1/9/84	Judge Wallace	None	87,88, 89
87	1/9/84	Judge Wallace	None	87,88, 89
87(2) (b)	2/10/84	Hubert Green	Approved by COAJ at 6/9/84 meeting	None
87	2/16/84	Bill Dorsaneo	Approved by COAJ at 6/9/84 meeting	None
87(2) (b)	8/29/83	Bob Martin	Approved by COAJ at 6/9/84 meeting	None
88	1/9/84	Judge Wallace	None	87,88, 89
89	1/9/84	Judge Wallace	None	87,88, 89
103	8/6/84	Donald Baker	On 3/9/85 Agenda for Appointment to Sub-committee	106
106	3/10/83	Ellen Grimes	Removed from docket 6/4/83, returned to docket and placed on 3/9/85 Agenda for Report on from Jeffrey Jones	None
127	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule
131	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule

	Date of Request	Request Submitted by	Action taken, if any	Comments
161	1/25/84	Don L. Baker	Amended version adopted by S.C. by order 12/3/83, on 3/9/85 Agenda for Appt. to Subcommittee	None
161	2/21/84	Putnam/K.Reiter	pertains to attorney fees not 161	
165a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
	9/15/83	Ray Hardy	None	10, 65, 165a, 127, 131 proposes New Rule
165a	8/21/84	Jeremy Wicker	Adopted by S.C. by Order of 12/3/83. On 3/9/85 Agenda; Written Report has been submitted by Tom Pollan dated 3/6/85.	306(a)(1)
166f	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
200	3/7/84	Richard Kelsey	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Appointment to Subcommittee.	324(b)
201	1/25/84	Don L. Baker	Approved S.C. by Order of 12/3/83. On 3/9/85 Agenda for Appointment to Subcommittee.	None
204	1/9/84	Harris Morgan	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	None
204	6/20/84	David Hyde	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	None

	Date of Request	Request Submitted by	Action taken, if any	Comments
204(4)	3/6/84	Judge Barrow	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	206(3),207(2), 208(a)
204(4)	2/21/85	L. Soules	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	None
206(3)	3/6/84	Judge Barrow	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	206(3),207(2), 208(a)
207(2)	3/6/84	Judge Barrow	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	206(3),207(2), 208(a)
208(a)	3/6/84	Judge Barrow	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Report by Collins and Haworth.	206(3),207(2), 208(a)
216	9/22/83	Bradford Moore	Was on 11/5/83 Agenda for suggested action by COAJ. No further record.	
247	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
247a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
250	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

	Date of Request	Request Submitted by	Action taken, if any	Comments
264	Unknown	Unknown	Proposed change presented by Richard Clarkson was approved at the 6/9/84 meeting	None
265(a)	6/14/83	Judge Onion	On 3/9/85 Agenda for Report by Judge Curtiss Brown	None
272	12/13/83	Judge Wallace	On 3/9/85 Agenda for Appointment to Sub-committee	297,373,749
296	6/14/83	D. Bickel	Appoved by S.C. 12/3/83 On 3/9/85 Agenda by . Doak Bishop.	None
296	8/6/84	Jeremy Wicker	Appoved by S.C. 12/3/83 On 3/9/85 Agenda by Doak Bishop.	306(c)
297	12/13/83	Judge Wallace	On 3/9/85 Agenda for Appointment to Sub-committee	297,373,749
305a	1/11/85	Judge Wallace	Amended version adopted by Supreme Court 12/3/83. No record of new request.	See also Rules 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.
306(a)(1)	8/21/84	Jeremy Wicker	Adopted by S.C. by Order of 12/3/83. On 3/9/85 Agenda; Written Report has been submitted by Tom Pollan dated 3/6/85.	306(a)(1)
306(a)(4)	6/26/84	Jordan & Haggen	Approved 12/3/83 by S.C. on 3/9/85 Agenda for Report by Doak Bishop on 306(a); Written report on 306(2) also received from Tom Pollan dated 3/6/85.	456,457,458

	Date of Request	Request Submitted by	Action taken, if any	Comments
306(c)	8/6/84	Jeremy Wicker	Appoved by S.C. 12/3/83 On 3/9/85 Agenda by Doak Bishop.	306(c)
324(b)	3/7/84	Richard Kelsey	Approved by S.C. by Order of 12/3/83. On 3/9/85 Agenda for Appointment to Subcommittee.	324(b)
329	3/9/84	Charles Childress	Approved 12/3/83 by S.C. On March 9, 1985 Agenda for Appointment to Subcommittee.	None
354	4/6/84	Jim Milam	Approved COAJ 4/14/84	354, 380
355	4/6/84	Jim Milam	Approved COAJ 4/14/84	354, 380
364(a)	5/2/84	Guy Hopkins	Approved COAJ 6/9/84	None
373	12/13/83	Judge Wallace	On 3/9/85 Agenda for Appointment to Sub-committee	297,373,749
380	4/6/84	Jim Milam	Approved COAJ 4/14/84	354, 380
438	7/17/84	Michael Remme	On 3/9/85 Agenda for Appointment to Sub-Committee	None
452	3/23/84	John Feather	At 4/14/84 meeting it was determined that Sub-committee would continue its work; No further record.	None

	Date of Request	Request Submitted by	Action taken, if any	Comments
456	6/26/84	Jordan & Haggen	Approved 12/3/83 by S.C. on 3/9/85 Agenda for Report by Doak Bishop on 306(a); Written report on 306(2) also received from Tom Pollan dated 3/6/85.	456,457,458
457	6/26/84	Jordan & Haggen	Approved 12/3/83 by S.C. on 3/9/85 Agenda for Report by Doak Bishop on 306(a); Written report on 306(2) also received from Tom Pollan dated 3/6/85.	456,457,458
458	6/26/84	Jordan & Haggen	Approved 12/3/83 by S.C. on 3/9/85 Agenda for Report by Doak Bishop on 306(a); Written report on 306(2) also received from Tom Pollan dated 3/6/85.	456,457,458
621A	6/29/84	John Pace	3/9/85 Agenda for Appointment to Subcommittee.	627
627	6/29/84	John Pace	3/9/85 Agenda for Appointment to Subcommittee.	627
680	7/6/83	W. C. Martin	On 3/9/85 Agenda for Appointment to Sub-Committee.	None
680	7/27/83		On 3/9/85 Agenda for Appointment to Sub-Committee.	None
680	1/27/84		On 3/9/85 Agenda for Appointment to Sub-Committee.	None
680	2/10/84	Kenneth Fuller	On 3/9/85 Agenda for Appointment to Sub-Committee.	683

	Date of Request	Request Submitted by	Action taken, if any	Comments
683	2/10/84	Kenneth Fuller	Approved by S.C. 12/3/83. 3/9/85 Agenda for Appointment to Subcommittee.	680
735-755	1/16/85	Jefferson Erving and Robert Ray	S.C. AC. only proposed changes to Rules 741-746. Changes in Rules 741-746 approved by S.C. 12/3/83. No record of new Request.	
749	12/13/83	Judge Wallace	On 3/9/85 agenda for appointment to sub-committee	297,373,749
792	8/25/83	John Williamson	At 6/4/83 meeting this was deferred to new committee on COAJ.	
	6/2/83	John Williamson	At 11/5/83 meeting Frank Jones moved further considerations be given to the rules, including	
	1/27/83	Carl Hoppess	Rules 791 and 798. At the 2/25/84 meeting, it was referred to the Section on Real Estate, Probate and Trust Law before final approval. No further action at this time.	

Supplement to
AGENDA
Supreme Court Advisory Committee Meeting
May 31, 1985

	Date of Request	Request Submitted by	Action taken, if any	Comments
10	4/17/85	Reese Harrison	None	165a, 306a
106	2/27/85	Jeffrey Jones	None	See 107
204	4/9/85	Charles Haworth	None	See 216
296	4/8/85	R. Doak Bishope	None	See 306a, 306c
Rules of Evidence	5/8/85	Newell Blakely	None	
Canon 3c	5/28/85	Luke Soules and Justice Kilgarin	None	
FRAP 10	4/23/85	Frank Baker	None	11

*These rules are located in the back.

THE SUPREME COURT OF TEXAS

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

January 11, 1985

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

Re: Rules 3a, 8, 10, 10a, 10b, 27a, 27b, 27c, 165a, 166f, 247, 247a, 250, 305a.

Dear Luke:

I am enclosing herewith copies of amendments to the Rules of Civil Procedure as recommended by the Committee on Local Rules of the Council of Administrative Judges. I am also enclosing a copy of that Committee's report to Judge Pope which sets out the reasons for the proposed changes.

If you would like a copy to go to each member of the Advisory Committee at this time, please call Flo in my office (512/475-4615) and we will take care of it.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

To: Jack Pope, Chief Justice, Supreme Court of Texas

Re: Report of Committee on Local Rules

Little vacuum exists is case processing; necessity, inventiveness and the skill of the martinette will rush in to plug gaps in any system of rules, wherever adopted.

Your committee was furnished copies of all Local Rules filed by District and County Courts with the Supreme court by April 1, 1984. Our work was divided, with Judges Ovard and Thurmond reviewing Criminal case processing and Judges McKim and Stovall civil case processing. Our approach was to group Local Rules by function, so each could be compared for likenesses and differences. Most Local rules addressed these functions:

1. Division of work load in overlapping districts.
2. Schedules for sitting in multi-county districts.
3. Procedures for setting cases: Jury, non-jury, ancillary and dilatory, preferential.
4. Announcements, assignments, pass by agreements, and continuances.
5. Pre-trial methods and procedures.
6. Dismissal for Want of Prosecution.
7. Notices - lead counsel.
8. Withdrawal/Substitution of Counsel.
9. Attorney vacations.
10. Engaged counsel conflicts.
11. Courtroom decorum - housekeeping.
12. Exhortatory suggestions about good-faith settlement efforts.

The Committee found three broad groups of Local Rules and offer the following comments:

Group One: General Administrative Rules

Most courts have general administrative rules, particularly those who serve more than one county, setting out terms of court in each county, types of setting calendars and information about who to call for settings, what kind of notice is to be given others in the case and general housekeeping provisions, subject to change, depending on circumstances.

Comment: The Committee notes that terms of court are governed by statute, usually when the court was created or in a reconstituting statute, making most, if not all, continuous term courts. This language is probably not needed in a Local Rule. Calendars setting out the "who, when, what and where" are useful and must be flexible, to fit court needs, such as illness, vacations and the unexpected long case or docket collapse. Our recommendation: place this information in a "broadside", post it in all courthouses in the District and instruct the clerk to send a copy to all out-of-district attorneys and pro se who file papers, when the first appearance is made. The local Bar can be copied when the schedule is first made and notified of any changes. We note that many multi-county Judicial

Districts serve overlapping counties and the division of work load is governed by statute or agreement of the affected Judges. All the above could be covered by a "Court Information Bulletin", spelling out the manner of getting a setting on motions, pre-trial and trial matters.

Recommendation: Adopt as a statewide Rule the following:

LOCAL RULES: NOTICE TO COUNSEL AND PUBLIC

Local Schedules and Assignments of Court shall be mailed by each District or County Clerk upon receipt of the first pleading or instrument filed by an attorney or pro se party not residing within the county. The clerk shall not be required to provide more than one copy of the rules during a given year to each attorney or litigant who resides outside of the county in which the case is filed. It shall be the attorney and litigant's responsibility to keep informed of amendments to local rules, which shall be provided by the clerk on request for out of county residents. Local Rules and Amendments thereto shall be printed and available in the clerks office at no cost, and shall be posted in the Courthouse at all times.

Group Two: State Rules of Procedure

Many of Local Rules address functions which could best be served by a statewide uniform rule. These are suggested, as examples.

36th, 156th

Rule 3a. Rules by Other Courts

(a) Each Court of Appeals, each administrative judicial district, each district court, and each county court may, from time to time, make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made shall before their promulgation be furnished to the Supreme Court of Texas for approval.

(b) If a judge of a single judicial district desires to adopt a local rule of procedure governing his judicial district, he shall request approval of such rule by filing with the Presiding Judge of the Administrative Judicial District the rule and the reason for its adoption. In a county or counties having two judicial districts, both judges must approve the proposed rule before submitting it to the Presiding Judge. In counties of three or more judicial districts, a majority of judges must approve the proposed rule before it is sent to the Presiding Judge of the Administrative Judicial District in accordance with Section 3(b), Article 200b, V.T.C.S. All requests for approval of new rules of procedure or amendments thereto shall be filed with the Presiding Judge of the Administrative Judicial District on or before December 31st of each year. The Presiding Judge shall provide written support or opposition to the proposed rule, which shall accompany the proposed rule and which shall be filed by the Presiding Judge with the Supreme Court not later than January 31st of the succeeding year. The Supreme Court shall have final authority to approve or disapprove the adoption of all local rules of procedure as provided by Section (a) of this Rule and Section 3(b), Article 200b, V.T.C.S.

CA:RULE1(69th)

Rule 8. Attorney in Charge [~~Leading Counsel Defined~~]

Each party shall, on the occasion of its first appearance through counsel, designate in writing the "attorney in charge" for such party. Thereafter, until such designation is changed by written notice to the court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party and shall attend or send a fully authorized representative to all hearings, conferences, and the trial.

All communications from the court or other counsel with respect to a suit will be sent to the attorney in charge. [~~The attorney first employed shall be considered leading counsel in the case, and, if present, shall have control in the management of the cause unless a change is made by the party himself, to be entered of record.~~]

Rule 10. Withdrawal of Counsel [~~Attorney of Record Defined~~]

Withdrawal of an attorney in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the Presiding Judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address, telephone number, and State Bar Number of the substitute attorney, with the signature of the attorney to be substituted, the approval of the client, the client's current address and telephone number, and an averment that such substitution will not delay any setting currently in effect. [~~An attorney of record is one who has appeared in the case, as evidenced by his name subscribed to the pleadings or to some agreement of the parties filed in the case; and he shall be considered to have continued as such attorney to the end of the suit in the trial court, unless there is something appearing to the contrary in the record.~~

CA:RULE3(69th)

Rule 10a (new). Attorney Vacations

Each attorney practicing in the district and county courts who desires to assure himself of a vacation period not to exceed four weeks in June, July, and August, may do so automatically by designating the four weeks, in writing, addressed and mailed or delivered to the District or County Clerk, or any officer designated as the Docket Clerk in his own county, with a copy thereof to the District Clerk or Docket Clerk of any other county in which he has cases pending trial, before the 15th of May of each year. The vacation period so designated shall be honored by all judges so notified.

This provision shall not apply to vacations for attorneys engaged in a criminal case. Nothing herein provided shall prevent the various judges from recognizing vacations of attorneys as a discretionary matter.

CA:RULE4(69th)

Rule 10b (new). Conflict in Trial Settings

1. Attorney Already in Trial Assigned to Trial in Another Court: When the docket clerk or judge is informed that an attorney is already in trial, he clerk will determine the designation of the court, the county where it is located, and the time the attorney went to trial. If the judge or opposing attorney desires the information to be verified, the court will ascertain if the attorney is actually in trial and the probable time of release. The case may then be put on "hold", or another date may be set for trial.

If the attorney is not actually in trial, the case will be assigned to trial as scheduled, and the court shall inform all parties.

If the attorney's office cannot provide the clerk with an attorney's location, the case will nevertheless be scheduled for trial as planned, and his office so advised, with the warning that the case will be tried without further notice.

2. Attorney Assigned to Two Courts Simultaneously: Whenever an attorney has two or more cases on trial dockets and is set for trial at the same time, it shall be the duty of the attorney to bring the matter to the attention of the judges concerned immediately upon learning of the conflicting settings.

3. General Priority of Cases Set for Trial -- Determination: Insofar as practicable, judges should attempt to agree on which case has priority, otherwise, the following priorities shall be observed by the judges of respective courts:

(1) criminal cases have priority over civil cases and jail cases over bond cases;

(2) preferentially set cases have priority over those not given preference by statute or otherwise;

(3) the oldest case, on the basis of filing date, has priority;

(4) courts in metropolitan counties should yield to courts in rural counties in all other instances of conflicting trial settings.

4. Comity Between Federal and State Courts: The judges of local State Courts should enter into agreements with the Chief Judge of Federal Judicial Districts having jurisdiction in the same counties to establish the priorities for trial in the event of setting conflicts between the Federal and State Courts.

Rule 27a (new). Filing of Cases; Random Assignment

Except as provided in this rule, all cases filed in counties having two or more district courts shall be filed in random order, in a manner prescribed by the judges of those courts. Each garnishment action shall be assigned to the court in which the principal suit is pending, and should transfer occur, both cases shall be transferred. Every suit in the nature of a bill of review or other action seeking to attach, avoid or set aside a judgment or other court order shall be assigned to the court which rendered such decree. Every motion for consolidation or joint hearing under Rule 174(a) shall be heard in the court in which the first case filed is pending. Upon motion granted, the cases being consolidated shall be transferred to the granting court.

CA:RULE9(69th)

Rule 27b (new). Transfer of Cases

Whenever any pending case is so related to another case pending in or dismissed by another court that a transfer of the case to such other court would facilitate orderly and efficient disposition of the litigation, the judge of the court in which either case is or was pending may, upon motion and notice (including his own motion) transfer the case to the court in which the earlier case was filed. Such cases may include but are not limited to:

1. Any case arising out of the same transaction or occurrence as did an earlier case, particularly if the earlier case was dismissed for want of prosecution or voluntarily dismissed by plaintiff at any time before final judgment;

2. Any case involving one or more of the same parties in an earlier case and requiring a determination of any of the same questions of fact or law as those involved in the earlier case;

3. Any case involving a plea that a judgment in the earlier case is conclusive of any of the issues of the later case by way of res judicata or estoppel by judgment, or any pleading that requires a construction of the earlier judgment or a determination of its effect;

4. Any suit for a declaration concerning the alleged duty of an insurer to provide a defense for a party to another suit; or

5. Any suit concerning which the duty of an insurer to defend was involved in another suit.

CA:RULE10(69th)

Rule 27c (new). Temporary Orders

Except in emergencies when the clerk's office is closed, no application for immediate or temporary relief shall be presented to a judge until a case has been filed and assigned to a court according to these rules. If the judge of the court to which a case is assigned is absent, cannot be contacted or is occupied, emergency application may be made to either a judge appointed to hear such matters, or in his absence, any judge of the same jurisdiction, who may sit for the judge of the court in which the case is pending, and who shall make all orders, writs, and process returnable to the court in which the case is pending. Any case not initially filed with the clerk before temporary hearing shall be filed, docketed and assigned to a court under normal filing procedures at the earliest practicable time. All writs and process shall be returnable to that court.

CA:RULE11(69th)

Rule 165a. Dismissal for Want of Prosecution

1. Dismissal. A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief or his attorney to appear for any hearing or trial of which the party or attorney had notice, or on failure of the party or his attorney to request a hearing or take other action specified by the court within fifteen days after the mailing of notice of the court's intention to dismiss the case for want of prosecution. Notice of the court's intention to dismiss shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

2. Reinstatement. A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

3. Cumulative Remedies. This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement procedure and metable 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.

4. Cases on File for Two or More Years. Except as provided in this rule, each civil case on file for two or more years which does not meet one of the exceptions herein provided, shall be dismissed for want of prosecution by the court unless set for hearing on written motion to retain submitted by counsel or set by the court within thirty days of receipt of notice of intent to dismiss which shall be sent by the court to all attorneys in charge and pro se litigants. Dismissal for want of prosecution shall occur at least once a year on the first Monday of April, and may occur at any time in accordance with section 1. of this rule.

Upon receipt of a motion to retain, the court shall notify the parties of the hearing date. At the hearing, if the parties request trial, the court shall either set the case for final pretrial conference to insure prompt completion of discovery, or, if the court finds the case is ready for trial, shall set the case for trial not less than 30 days from the date of hearing on retention. Cases shall be exempt from dismissal for want of prosecution if at the time of eligibility their status is one or more of the following:

(1) set for trial;

(2) one or more of the parties announces ready for trial subsequent to the issuance of the notice of intent to dismiss;

(3) under Bankruptcy Stay Order;

(4) having legal or other impediments which the court shall determine as justifiable grounds for retaining the case from dismissal.

Judicial districts previously by local rule having eligibility for dismissal for want of prosecution set at less than two years may retain their dismissal age criteria at less than two years; jurisdictions previously having eligibility for dismissal for want of prosecution set at over two years from the date of filing shall set dismissal for want of prosecution at three years maximum from the date of filing.

Rule 166f (new). Oral Hearings; Rulings of Submissions

The judge of the court in which a case is pending will hear all matters regarding cases either by submission without oral hearing or by oral hearing where such is requested in writing.

1. Form of the Motion. Motions shall be in writing, shall state the grounds therefor, and may include or be accompanied by authority for the motion. Motions shall set a date of submission, and shall be accompanied by a proposed order granting the relief sought. The proposed order shall be a separate instrument.

2. Service. Motions and responses shall be served in accordance with Rule 21 on all attorneys in charge and shall contain a certificate of service.

3. Submission Date. Motions shall bear a submission date at least ten (10) days from the date of filing. The motion will be submitted to the court on the specified day or as soon after as is practical.

4. Response. Responses by opposing parties shall be in writing, shall advise the court whether the motion is opposed or unopposed and may be accompanied by authority for opposition. Failure to file a response shall be a representation of no opposition.

5. Supporting Material. If the motion or response to motion requires consideration of facts not appearing of record, proof will be by affidavit or other documentary evidence which shall be filed with the motion or response.

6. Oral Argument. The motion or response shall include a request for hearing for oral argument if either party views argument as necessary, which the court shall grant in the form of an oral hearing or by telephone conference. The court may order oral argument.

7. Attorneys attending. Counsel attending a hearing shall be the attorney who expects to try the case, or who shall be fully authorized to state his party's position on the law and facts, make stipulations, and enter into any proceeding in behalf of the party. If the court finds counsel unqualified, the court may take any actions specified in this rule.

8. Failure to Appear. Where hearing is set and counsel fails to appear, the court may rule on motions and exceptions timely submitted, shorten or extend time periods, request or permit additional authorities or supporting material, award the prevailing party its costs, attorneys fees, or make other orders as justice requires.

CA:RULE12(69th)

Rule 247. Tried When Set

Every suit shall be tried when it is called, unless continued or postponed to a future day, unless continued under the provisions of Rule 247a, or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

CA:RULE15(69th)

Rule 247a (new). Trial Continuances

Motions for continuance or agreements to pass cases set for trial shall be made in writing, and shall be filed not less than 10 days before trial date or 10 days before the Monday of the week set for trial, if no specific trial date has been set. Provided however, that agreed motions for continuance may be announced at first docket call in courts utilizing docket-call court setting methods. Emergencies requiring delay of trial arising within 10 days of trial or of the Monday preceding the week of trial shall be submitted to the court in writing at the earliest practicable time. Agreements to pass shall set forth specific legal, procedural or other grounds which require that trial be delayed. The court shall have full discretion in granting or denying delay in the trial of a case. Upon motion or agreement granted, the court shall reset the date for trial.

CA:RULE16(69th)

Rule 250 (new). Cases Set for Trial; Announcement of Ready

Cases set for trial on the merits shall be considered ready for trial, and there shall be no need for counsel to declare ready the week, month, or term prior to trial date after initial announcement of ready has occurred. Cases not tried as scheduled due to court delay shall be considered ready for trial at all times unless informed otherwise by motion, and such cases shall be carried over to the succeeding term for trial assignment until trial occurs or the case is otherwise disposed. In all instances it shall be the attorney's or pro se party's responsibility to know the status of a case set for trial.

CA:RULE14(69th)

Rule 305a (new). Final Preparation of Rulings, Orders and Judgments

Rulings, orders and judgments requiring the signature of the judge must be prepared by the prevailing party and submitted to all other counsel for "approval as to form", then transmitted to the court for signature. If the counsel for the prevailing party does not receive an "approved as to form" instrument after 10 days (or 3 days in temporary injunction matters) after submission to such other counsel, prevailing counsel may forward a duplicate original of such instrument to the court with a request that the court sign same without the "approval as to form" of the non-prevailing counsel and an affidavit verifying that the instrument has been submitted to the non-prevailing counsel as required by this rule and that no response has been received.

Non-prevailing counsel may oppose the instrument proffered to the court by requesting the court to set such matter for hearing thereon, provided that such request for setting of hearing must be made prior to the lapse of the said 10 (or 3) day period. It will be the further responsibility of the non-prevailing party to advise the court of the intention to appeal any such ruling, order or judgment.

CA:RULE13(69th)

Proposed Rule: Parties Responsible for Accounting of Own Costs

Each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, and such record shall be presented to the Court at the time the Judgment is submitted to the Court for entry, if the Judgment is to provide for the taxing of such costs. If the Judgment provides that costs are to be borne by the party by whom such costs were incurred, it shall not be necessary for any of the parties to present a record of court costs to the Court in connection with the entry of a Judgment.

A judge of any court may include in any order or judgment all taxable costs including the following:

(1) Fees of the clerk and service fees due the county;

(2) Fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;

(3) Compensation for experts, masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes;

(4) Such other costs and fees as may be permitted by these rules and state statutes.

Proposed Rule: Documents Not To Be Filed

Depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests, and other pre-trial discovery materials propounded and answered in accordance with these rules shall not be filed with the Clerk. When any such documents are needed in connection with a pre-trial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of such material needed at a trial or hearing shall be introduced in Open Court as provided by these rules and the Rules of Evidence.

Proposed Rule 8: Attorney in Charge

Each party shall, on the occasion of its first appearance through counsel, designate in writing the "attorney in charge" for such party. Thereafter, until such designation is changed by written notice to the Court and written notice to all other parties in accordance with Rules 21a and 21b, said attorney in charge shall be responsible for the suit as to such party and shall attend or send a fully authorized representative to all hearings, conferences, and the trial.

All communications from the court or other counsel with respect to a suit will be sent to the attorney in charge.

Proposed Rule 10: Withdrawal of Counsel

Withdrawal of counsel in charge may be Effected (a) upon motion showing good cause and under such conditions imposed by the Presiding Judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, with the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Proposed Rule 14(b): Return or Other Disposition of Exhibits

(1) Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial, unless otherwise ordered by the Judge.

(2) Exhibits offered or admitted into evidence will be removed by the offering party within thirty (3) days after final disposition of the cause by the court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within ten (10) days after telephonic notice by the clerk. Exhibits not so removed will be disposed of by the clerk in any convenient manner and any expense incurred taxed against the offering party without notice.

(3) Exhibits which are determined by the Judge to be of a sensitive nature, so as to make it improper for them to be withdrawn, shall be retained in the custody of the clerk pending disposition on order of the Judge.

RAY HARDY
DISTRICT CLERK
HOUSTON, TEXAS 77002

September 15, 1983

Supreme Court Justice James P. Wallace
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I am writing to you again regarding the consideration of adopting several State Rules to delineate the following areas:

(1) Clarification of Lead Counsel and Attorney of Record

There appears to be some inconsistancy with respect to which attorney is attorney of record and lead counsel, and which are recorded only as attorneys of record. According to State Rules 8 and 10, lead counsel is the first attorney employed (does this mean just employed, or the attorney whose signature appears on the first instrument filed by a party to a suit?), and remains such until he designates another attorney in his stead. Does State Rule 65, substitution of amended instrument for the original, act to substitute the lead counsel automatically? Or simply to remove the superceded instrument? If lead counsel remains such until a separate designation is made, of record, by the counsel substituting "out", then is it necessary to provide notice under State Rule 165a of dismissal for want of prosecution to all attorneys of record, or only to lead counsel? If the intent of the rule is to insure notification be made to the party, then notification to lead counsel should suffice; if, however, the notice is intended to protect every attorney connected to the suit (multiple attorneys representing one party, potentially), then the Rule would be left as written.

Below is Rule 1.G. (1) and (4), of the Local Rules Of The United States District Court for the Southern District of Texas, amended May, 1983, effective July 1, 1983, which appears to adequately answer these questions:

1.G. Attorney in Charge.

(1) Designation and Responsibility. Unless otherwise ordered, in all actions filed in or removed to the Court, each party shall, on the occasion of his first appearance through counsel, designate as "attorney in charge" for such party an attorney who is a member of the Bar of this Court or is appearing under the terms of paragraph E of this rule. Thereafter, until such designation is changed by notice pursuant to Local Rule 1.G.(4), said attorney in charge shall be responsible for the action as to such party and shall attend or send a fully authorized representative to all hearings, conferences and the trial.

1.G.(4) Withdrawal of Counsel. Withdrawal of counsel in charge may be effected (a) upon motion showing good cause and under such conditions imposed by the presiding judge; or (b) upon presentation by such attorney in charge of a notice of substitution designating the name, address and telephone number of the substitute attorney, the signature of the attorney to be substituted, the approval of the client, and an averment that such substitution will not delay any setting currently in effect.

Regarding the problem of appropriate attorney notification, the same Rule, 1.G.(5), regarding Notices, specifies:

All communications from the Court with respect to an action will be sent to the attorney in charge who shall be reponsible for notifying his associate or co-counsel of all matters affecting the action.

(2) Attorney responsibility for the preparation and submission of a Bill of Costs:

Originally legislation was proposed to place the responsibility on each party to maintain a record and cause to have included in the judgment their recoverable costs. This legislation was not adopted. We recommend consideration of a State Rule which would require that each attorney be responsible for the inclusion of the recoverable cost in the Judgment submitted to the court. This might be attached to either State Rule 127 or State Rule 131, or be a separate rule, such as:

Rule: Parties Responsible for Accounting of Own Costs.

Each party to a suit shall be responsible for the accurate recordation of all costs incurred by him during the course of a law suit, and such shall be presented to the court at the time the Judgment is submitted.

(3) Removal of the Filing of All Depositions and Exhibits:

It is recommended that in an effort to save the counties from increasing space requirements to provide library facilities for case files, that a limit be set on the depositions, interrogatories, answers to interrogatories, requests for production or inspection and other discovery material so that only those instruments to be used in the course of the trial are filed. Again, the United States District Court for the Southern District of Texas has adopted this rule:

Rule 10. Filing Requirements.

F. Documents Not to be Filed. Pursuant to Rule 5(d), Fed. R. Civ. P., depositions, interrogatories, answers to interrogatories, requests for production or inspection, responses to those requests and other discovery material shall not be filed with the Clerk. When any such document is needed in connection with a

pretrial procedure, those portions which are relevant shall be submitted to the Court as an exhibit to a motion or answer thereto. Any of this material needed at trial or hearing shall be introduced in open court as provided by the Federal Rules. (Added May, 1983).

and

Rule 12. Disposition of Exhibits.

A. Exhibits offered or admitted into evidence which are of unmanageable size (such as charts, diagrams, and posters) will be withdrawn immediately upon completion of the trial and reduced reproductions substituted therefor. Model exhibits (such as machine parts) will be withdrawn upon completion of trial unless otherwise ordered by the Judge.

B. Exhibits offered or admitted into evidence will be removed by the offering party within 30 days after final disposition of the cause by the Court without notice if no appeal is taken. When an appeal is taken, exhibits returned by the Court of Appeals will be removed by the offering party within 10 days after telephonic notice by the Clerk. Exhibits not so removed will be disposed of by the Clerk in any convenient manner and any expenses incurred taxed against the offering party without notice.

C. Exhibits which are determined by the Judge to be of a sensitive nature so as to make it improper for them to be withdrawn shall be retained in the custody of the Clerk pending disposition on order of the Judge.

Yours very truly,

Ray Hardy, District Clerk
Harris County, Texas

RH/ba

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COUNSEL TO THE FIRM

February 3, 1983

Honorable Jack Pope
Chief Justice
Supreme Court of Texas
Capitol Station
Austin, Texas 78701

Mr. George W. McCleskey
Chairman
Advisory Committee
Texas Rules of Civil Procedure
McCleskey, Harriger, Brazill & Graff
P. O. Box6170
Lubbock, Texas 79413

Mr. Jack Eisenberg
c/o Messrs. Byrd, Davis & Eisenberg
P. O. Box 4917
Austin, Texas 78765

Dear Judge Pope, George and Jack:

The recent holding of the Dallas Court in number 05-82-00992-CV, Herritage Housing Corporation v. Harriett A. Ferguson, construing Rule 14c, seems to me to light up a problem that needs attention in Texas.

In the case mentioned the Dallas Court held that a "letter of credit" would not pass muster as a "negotiable obligation" under Rule 14c, which thus in turn could be used to supersede a judgment under Rule 364.

I have no great quarrel with the bottom line holding insofar as it interprets Rule 14c, but I do with the current restrictive interpretations of our supersedeas rules and principles as contrasted with the corresponding Federal rules. More specifically, Federal Rule 62 permits the district courts and courts of appeal to fashion stay orders that both protect the right of appeal, and, of course, the rights of the prevailing party.

It is true that in most instances the Federal courts have required cash bonds, or the equivalent thereof, but where there are serious appellate questions, and it can be made to appear that the judgment plaintiff or creditor will not suffer a loss of actual rights and remedies by fashioning a remedy less than requiring of full cash or security, the Federal courts have not been unwilling to do so.

It is also true that the prevailing party insists upon his "full pound of flesh" to prevent the appeal, particularly if the judgment rests on shaky grounds but it has always seemed to me the right to levy and execute upon the trial court judgment which remains unsuperseded can in some instances be too harsh and requires action and relief by the judgment-debtor that may be irreversible regardless of the success of the appeal.

In any event, I do suggest that both Committees give consideration to adopting a practice similar to the Federal rule which does permit some protection against the battering ram use of power to execute pending appeal.

Yours very truly,

W. James Kronzer

WJK/ja

Revision Proposed by Judge Thomas R. Phillips

14c: Deposit in Lieu of Surety Bond.

I don't understand the scope of the term"surety bonds"; are supersedeas bonds included?

Justice Pope - Please answer for J.P. ers. J.

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JOHN A. BUCKLEY, JR.

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

:tt

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THURMAN M. GUPTON
COUNSEL TO THE FIRM

August 31, 1982

Honorable Jack Pope
Associate Justice
Supreme Court of Texas
Capitol Station
Austin, Texas 78711

Re: Rule 47

Dear Judge Pope:

I have taken a hand at preparing "sanctions" that might slow down the past and current abuse of the pleading Rules. I would suggest:

Failure to comply with (b) may result in

(1) the imposition of any of the applicable sanctions provided in Rule 170(b) and (c),

(2) an instruction to offending counsel not to inform the jury of the amount stated except in response to his opponent, or

(3) be considered conduct in contravention of DR 7-102 (A) of the State Bar Rules governing Professional Responsbility...

At first I was so distressed that I wanted to make the sanctions mandatory, but I do believe the practice will slow down with these discretionary penalties.

I do hope it will be considered because the "violators" abound in the woods.

Sincerely,

W. James Kronzer

WJK/ja

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ROBERT W. LOREE
BRYAN C. WRIGHT

TELEPHONE
AREA CODE 512
225-6345

December 1, 1983

Mr. Stanton B. Pemberton
P.O. Box 844
Temple, Texas 76501

RE: STATE BAR COMMITTEE ON
PROFESSIONAL ETHICS

Dear Stan:

As you recall, being a member of the Committee on Administration of Justice, there has been pending a proposal concerning Rule 47 which provides the pleading of unliquidated damages, and the abuse of that provision. Last year's committee voted to refer the matter to the Committee on Professional Ethics to determine, among other considerations, whether an abuse of this rule constitutes unethical conduct which is subject to professional sanctions.

Would you as chairman of this subcommittee consider this as a reminder to carry this question to the ethics committee, of which you are now chairman, and if it is an appropriate matter of decision on your part, to render an answer for the benefit of the Committee on Administration of Justice.

As you know, the committee could still decide to amend the rule, or to impose sanctions for its violation, but it seems to be the sense of the committee that we should first determine whether its violation is deemed to be unethical.

Thanking you for your kind assistance in this matter, I am

Yours very truly,

HUBERT W. GREEN

HWG:feb

xc: Mrs. Evelyn Avent

ROBERT E. DAVIS
ATTORNEY AT LAW
6620 CEDAR SPRINGS
DALLAS, TEXAS 75201

AREA CODE 214
827-2060

September 20, 1984

Justice James Wallace
Supreme Court of Texas
Supreme Cout Building
Austin, Texas 78767

COPY

Re: Rules of Civil Procedure, Rule 47

Dear Justice Wallace:

I noted with interest Ethics Opinion 415 published in the September 1984 issue of the Texas Bar Journal. The result of this opinion create's a dilema which ought to be resolved. Specifically, if a Plaintiff pleads a monetary sum for unliquidated damages there is a potential ethical violation, but failure to do so automatically gives the Defendant power to force a repleading with the attendant expense and loss of time.

Might I respectfully submit a suggestion? Why not amend Rule 47 in the last paragraph to read as follows:

> Rule 47. Claims for Relief
>
> ". . .
> a
> b
> c
> Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the Court shall require the pleader to [~~amend so as to~~] specify in writing, the maximum amount claimed."

Then the requirement could be met by a simple letter or other document without a complete repleading.

It might be argued that this result could be obtained by a supplemental pleading, but Rule 47 specifically requires that "the pleader amend." By this language, there is a complete repleading required as specified in Rule 64.

While I recognize this is not a major problem, nonetheless, elimination of these petty nuisances to the practice of law is, in itself, a worthwhile goal.

Thank you for your attention.

Very truly yours,

Robert E. Davis

RED/sp

Rule 47 - Claims for Relief

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved, and

(b) a demand for judgment for all the other relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded.

Submitted by James L. Weber

THE SUPREME COURT OF TEXAS

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

January 9, 1984

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

Dear Luke:

In studying the amendments to Rules 88 through 89 in conjunction with the newly amended Article 1995, I find what appears to be a void in our rules. The problem is:

> Plaintiff files suit in Travis County against D-1, D-2, and D-3. D-1 files a motion to transfer to a county of mandatory venue, D-2 and D-3 file no motion to transfer. Must venue as to D-2 and D-3 remain in Travis County, or can the plaintiff request the trial judge to transfer the entire suit.

It appears that we just did not adequately consider the various problems that can arise with multiple defendants when we amended the rules. This, of course, was due to the very short time frame within which we had to get the rules amended and published in order to become effective on September 1, when the new statute became effective.

I feel that we should address this problem and therefore ask that it be put on the agenda for your next meeting.

Sincerely,

James P. Wallace
Justice

JPW:fw

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TELEPHONE
AREA CODE 512
225-6345

February 10, 1984

Mr. R. Doak Bishop
1000 Mercantile Dallas Bldg.
Dallas, Texas 75201

RE: COMMITTEE ON ADMINISTRATION OF JUSTICE, RULE 87, ETC. (VENUE RULES)

Dear Doak:

Thank you for your letter of January 12 and attachment, suggesting certain modifications to new Rule 87.

In this respect I forward to you and your cohorts letter dated January 9 from Judge James P. Wallace raising problems concerning the new venue rules.

Please give this your additional consideration and any advice or suggestions your subcommittee may have concerning the multiple defendant situation.

Yours very truly,

HUBERT W. GREEN

HWG:hcb

Encl.

xc: Hon. James P. Wallace ✓
Mr. William V. Dorsaneo III
Mr. Michael A. Hatchell
Ms. Evelyn Avent

. . . . .

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading that the cause of action, or a part thereof, arose or accrued in the county of suit by prima facie proof as provided in paragraph 3 of this rule. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. A defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

. . . . .

5. ~~No Rehearing~~. No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then ~~no further~~ additional motions to transfer by a movant who was a party to the prior proceedings shall be considered, ~~regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings~~,

unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the venue proceedings may be filed but not considered, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

Rule 87. Determination of Motion to Transfer

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading ~~that the cause of action or a part thereof, accrued in the county of suit~~ by prima facie proof, as provided in paragraph 3 of this rule, that the cause of action, or a part thereof, arose or accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. A defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

5. ~~No Rehearing~~. No Additional Motions. If a motion to transfer is overruled and the suit retained in the county of suit or if a motion to transfer is sustained and the suit is transferred to another county, no additional motion to transfer may be made by a party whose motion was overruled or sustained except on grounds that an impartial trial cannot be had under Rules 257-259.

No motion to transfer may be granted a party who is joined subsequent to the ruling on a motion or motions to transfer, unless based on the ground that an impartial trial cannot be had under Rules 257-259 or upon a mandatory venue exception, and a subsequently-joined party may file a motion to transfer based upon such grounds. A subsequently-joined party may not file a motion to transfer based upon venue grounds previously raised by another party, but such subsequently-joined party may complain on appeal of improper venue based upon grounds previously raised in the motion to transfer of another party.

Nothing in this rule shall prevent the trial court from reconsidering an order overruling a motion to transfer.

~~5.--No-Rehearing.--If-venue-has-been-sustained-as-against-a motion-to-transfer,-or-if-an-action-has-been-transferred-to-a proper-county-in-response-to-a-motion-to-transfer,-then-no-further motions-to-transfer-shall-be-considered-regardless-of-whether-the movant-was-a-party-to-the-prior-proceedings-or-was-added-as-a-party-subsequent-to-the-venue-proceedings,-unless-the-motion-to transfer-is-based-on-the-grounds-that-an-impartial-trial-cannot-be had-under-Rules-257-259-or-on-the-ground-of-mandatory-venue, provided-that-such-claim-was-not-available-to-the-other-movant or-movants.~~

~~Parties-who-are-added-subsequently-to-an-action-and-are precluded-by-this-rule-from-having-a-motion-to-transfer considered-may-raise-the-propriety-of-venue-on-appeal,-provided that-the-party-has-timely-filed-a-motion-to-transfer.~~

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February 9, 1984

Mike Hatchell
Ramey, Flock, Hutchins, Jeffus,
McClendon & Crawford
P. O. Box 629
Tyler, Texas 75710

Professor William Dorsaneo
SMU School of Law
Dallas, Texas 75275

Gentlemen:

Enclosed is a new draft of proposed revisions to Rule 87. These changes were prompted by Mike's recent letter regarding the first draft. I believe that this new draft will satisfy our mandate, subject to one question: Should the whole concept of paragraph 5 be revised? The modifications embodied in this draft are primarily technical clarifications with only minor substantive changes.

Please give me your comments as soon as possible.

Respectfully,

R. Doak Bishop

RDB/bsl

Enclosure

cc: Ms. Evelyn Avent
Hubert Green, Esq.

Rule 87. Determination of Motion to Transfer

. . . . .

2. (b) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. ~~but~~ When the claimant's venue allegations relating to the place where the cause of action arose or accrued are specifically denied, the pleader is required to support his pleading ~~that the cause of action, or a part thereof, accrued in the county of suit~~ by prima facie proof, as provided in paragraph 3 of this rule, that the cause of action, or a part thereof, arose or accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. A defendant who seeks to transfer a case to a county where the cause of action, or a part thereof, accrued shall be required to support his motion by prima facie proof as provided in paragraph 3 of this rule.

. . . . .

5. ~~No Rehearing~~. No Additional Motions. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then no ~~further~~ additional motions to transfer by a movant who was a party when the prior motion to transfer was ruled upon shall be considered ~~regardless~~ of whether the movant was a party to the

~~prior proceedings or was added as a party subsequent to the venue proceedings,~~ unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was previously not available to the movant or to the other movant or movants. In addition, if venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county in response to a motion to transfer, then a motion to transfer by a party added subsequent to the ruling on another party's motion to transfer may be filed as a prerequisite to an appeal, but it shall be considered as overruled by operation of law upon filing, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not made by the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

February 16, 1984

Hubert W. Green, Esquire
Green & Kaufman, Inc.
800 Alamo National Building
San Antonio, Texas 78205

Re: Rule 87

Dear Hubert,

I have reviewed Judge Wallace's letter of January 9, 1984. He is right that neither the amended venue statute nor the amended rules address this question with any clarity. Rule 89's third sentence touches upon the issue but doesn't do so very clearly.

We did consider the matter when the drafts of the amended rules were being circulated. But as in the case of several other matters (effect of plaintiff's nonsuit; fraudulent joinder to confer venue), we did not draft a provision to deal with the issue.

I agree with Judge Wallace that this issue should be addressed by a provision in the rules because the current state of the law is unsatisfactory. Prior to the amendment of the venue statute, the cases on the subject basically provided the following answer to Judge Wallace's question.

> "The rule seems to be that, where one of several defendants files a plea of privilege to be sued in the county of his residence, and the plea is sustained, if the cause of action is a joint action growing out of joint liability of all of the defendants, the suit must be transferred in its entirety to the county of the residence of the defendant whose plea is sustained. On the other hand, if the cause of action against several defendants is severable, or joint and several, the court should retain jurisdiction over the action in so far as it concerns the defendants whose pleas of privilege have not been sustained, and should transfer the suit in so far as it concerns the defendant whose plea is sustained."

The above quotation is set forth in the Texas Supreme Court's opinion in International Harvester Co. v. Stedman, 59 Tex. 593, 324

S.W.2d 543 (1959) quoting Johnson v. First National Bank, 42 S.W.2d 870 (Tex. Civ. App. - Waco 1931, no writ). Since a literal application of the test ordinarily would require a division of the case (i.e., there are very few instances where defendants are only jointly liable rather than jointly and severally liable), the courts have on occasion mouthed the test but have actually applied a more practical principle. See e.g. Geophysical Data Processing Center, Inc. v. Cruz, 576 S.W.2d 666 (Tex. Civ. App. - Beaumont 1978, no writ) - applying test that when relief sought is "so interwoven" that case should not be split up, entire case should be transferred.

My own view is that judicial economy would be better served by not transferring part of the case, assuming the requirements of Rule 40 have been satisfied in the first place, i.e. assuming that the claims against multiple defendants have arisen from the same transaction or occurrence or series of transactions or occurrences.

Once this matter is voted upon by the Committee, it will not be a difficult matter to draft a provision for inclusion in either Rule 87 or perhaps Rule 89.

Best regards,

William V. Dorsaneo, III

WVD,III:cr

cc: Hon. James P. Wallace
Mr. Doak R. Bishop
Mr. Michael A. Hatchell
Ms. Evelyn Avent

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ROBERT M. MARTIN, JR.

EAST DALLAS OFFICE:
ALLIED LAKEWOOD BANK TOWER
GASTON AVENUE AT LA VISTA

August 29, 1983

Chief Justice and Associate Justices
Supreme Court of Texas
Supreme Court Building
PO Box 12248
Austin, Texas 78711

Re: Rules of Civil Procedure - Order of June 15, 1983 adopting amendments effective September 1, 1983.

Your Honors:

As you perhaps know from conversations with Justice James P. Wallace, the new statute and the rules adopted by the Court, affecting venue, were the subject of a one day institute in Austin last Friday.

Some of our better scholars and practitioners conducted the seminar in a very thought provoking manner.

There were two items which were raised in the institute which might cause the Court to consider two areas of clarification in Rule 87.

The first of these relates to sub-paragraph 2(b). It occurs to me that the Court might wish to add at the end of the first sentence following the words "paragraph 3 of this Rule" the words "if such accrual is a venue fact denied by the defendant and essential to the determination of the venue question." It occurs to me that the portion of the rule following the semicolon implies that the denial of venue facts triggers an additional burden of prima facia proof on the part of the claimant; but if these venue facts which were denied (for example "agent or representative" in a permissive venue or location of land in a mandatory venue situation) do not involve accrual of a cause of action in a particular county I see no reason why the pleader would, in effect, be required to prove venue under the general rules. Another way of stating the matter is to observe that I think the Court meant to say that when the claimant's venue allegations are specifically denied (which the Court did in fact say) the pleader is required to meet those denials by some prima facia proof, whatever those denials might be.

The second thought relates to paragraph 5 of Rule 87. Although there was a sharp difference of opinion among at least two of the speakers on this matter, it was observed that the Court could not even change its mind about a venue decision during the trial, or at the conclusion of the trial. I do not read the Rule that way. The words "no further motions to transfer shall be considered" indicates to me that the Court meant no further motions by parties. It was observed, however, that the Court could not reconsider his decision on the original Motion to transfer, even though the evidence during the trial clearly indicated that the Affidavit proof was completely insufficient, and perhaps even fraudulent. Since the Trial Court normally has 30 days even following the rendition of a final judgment to correct any errors he may think he has made, I can not believe it was intended to limit the Court on a reconsideration of his venue decision. Perhaps the Court might wish to add the statement that no further motions "by the parties" would be accepted for filing or considered; or perhaps add some phrase to the effect that the Trial Court retains his usual powers to modify, rescind or reverse any decision he has previously made, so long as he maintains jurisdiction over the case.

There was a good deal of speculation about the effect of the "effective date", but any problem in this area appears to be rooted in the statute and I'm not sure what the Court might be able to do by way of rule making. I suspect most cautious lawyers will re-file a lot of things so as to comply with the old procedure and the new.

I hope that these comments will be of interest to the Court.

Sincerely yours,

Robert M. Martin, Jr.

RMM:vjp

cc: Professor J. Patrick Hazel

LAW OFFICES OF
Donald O. Baker
1024 10TH STREET
HUNTSVILLE, TEXAS 77340
(409) 295-9351

August 6, 1984

Hon. James Wallace
Associate Justice
Supreme Court of Texas
Supreme Court Building
Capitol Station
Austin, Texas 78711

Hon. Kent Caperton
State Senate
State Capitol Building
Capitol Station
Austin, Texas 78711

Gentlemen:

I am writing both of you because I don't know whether my problem is judicial or legislative. I think it is both, so I am addressing both of you because of your membership on the civil procedure committees.

I applauded the Court and the Legislature in 1981 for authorizing service of process by certified mail. However, it is just not working. There are two reasons: the clerks, constables and sheriffs in most counties simply refuse certified mail service, and when they accept it, they charge the same as for personal service, e.g., it costs $40 in Walker County to have the District Clerk serve citation by certified mail. You can't get it done in San Jacinto County because no official will accept it.

The statutes and rules that may have to be amended are Arts. 3926a, 3928 and 2041b, V.A.C.S., and Rules 103 and perhaps 106, T.R.C.P.

Art. 3926a states:

(a) The commissioners court of each county may set reasonable fees to be charged for services by the offices of sheriffs and constables.

(b) A commissioners court may not set fees higher than is necessary to pay the expenses of providing the services.

Art. 3928 provides:

The District Clerk shall also receive the following fees:

* * *

4. If a clerk serves process by certified or registered mail, the clerk shall charge the same fee that sheriffs or constables are authorized by . . .[Art. 3926a] to charge for service of process.

* * *

(Bracketed material added).

Art. 2041b provides:

> If a public official is required or permitted by law to serve any legal process by mail, including process in suits for delinquent taxes, the official may collect advance payment for the actual cost of the postage required to serve or deliver the process, or the official may assess the expense of postage as costs. The charges authorized by this Act are in addition to the fees allowed by law for other services performed by the official.

Rule 103 provides, in part, that service by certified mail and by publication may be made by the clerk.

Allowing Commissioners Courts to set fees is also not working. I read the minutes of the Supreme Court Committee prior to the amendment of Rule 103 and I know that it was amended largely because of the Harris County backlog. However, personal service costs $20 in Harris County and $50 in San Jacinto County, which has about 1% of Harris County's population and maybe 10% of its territory. I can get Rule 106 papers privately served anywhere for $20. In fact, that is probably the neatest thing about Rule 103 (if it worked): for the price of a certified letter ($2.65), I am automatically into Rule 106 if certified service fails and can get private service cheaper than most sheriffs' fees.

For certified mail service to work, I suggest that you may have to amend the above statutes and rules as follows:

(1) Art. 3926a or Art. 2041b should clearly state that the postage is the only charge for certified mail service;

(2) A modest fee for posting and for publication should be set statewide - it costs no more to mail a letter or to stick a thumbtack in a wall in Dallas than it does in Dime Box;

(3) The fee for serving two processes on the same person at the same time should cost no more than serving one. Believe it or not, it costs $40 in Walker County to have a divorce petition served, but $80 when a temporary restraining order accompanies it. The officer gets $40 for signing his name an extra time.

(4) Rule 103 should be amended to provide that the sheriffs, constables and clerks shall serve process, instead of may. At least two clerks have defended their refusal of certified mail on the basis that may renders it optional.

(5) Even if the officials accepted certified mail and even if it were at a lower cost, I still would not use it. The green certified mail card no longer has a box to be checked "deliver to addressee only" as it used to. It now says "restricted delivery" and I don't know whether this is the same or not. Maybe I'm being overly cautious, but I can envision a court of appeals somewhere making a strict construction because service my mail is in derogation of the common law or some similar nonsense.

When it comes time for technical amendments, I would appreciate your considering the above. I don't feel that any of the officials involved will oppose you. All of them I have talked to approve of certified mail. It merely takes some of the load off them.

Also, you might consider allowing anyone 18 or over to serve process, as is now allowed for subpoenas. I would just as much regret being thrown in jail because someone lied in making a subpoena return as I would in having a default judgment taken for the same reason.

Very truly yours,

Donald O. Baker

Donald O. Baker

DOB:bp

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BOARD CERTIFIED-IMMIGRATION & NATIONALITY LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

JUDITH C. COOPER
ELLEN ELKINS GRIMES
JULIE A. RIFAAT

March 10, 1983

Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I am writing this letter to recommend amending Rule 106 of the Texas Rules of Civil Procedure in regard to authorizing private process service.

Our firm has experienced a great deal of frustration in attempting to perfect service through the Constable's Office here in Harris County. On the other hand, we have received efficient and quick results when using a private process service. The delay caused by having to first attempt service through the Constable's Office, before using a private process service, has caused great hardship to our clients in many instances. An amendment to Rule 106 is endorsed by the Family Law Council as well as the Texas Trial Lawyers Association, and our firm concurs in this endorsement and highly recommends it.

Thank you for your attention to this matter. My best regards.

Very truly yours,

Ellen E. Grimes

Ellen Elkins Grimes

EEG/sb

Rule 161

Evaluate

J. P.

January 25, 1984

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Rule 161, Texas Rules of Civil Procedure

Dear Judge Pope:

Please forgive my delay in bringing this up, but it seems to me there is a further amendment to Rule 161 which might well improve administration of justice. Frequently, when some parties are served and others are not served, the most appropriate remedy is to sever the case so that the case may proceed to judgment against those parties who are properly before the court and not be held up awaiting service on parties as to whom a dismissal is not desired.

Therefore, I suggest the rule be amended to read as follows:

> "When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by Article 2088 of the Texas Revised Civil Statutes. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liablity, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered."

Sincerely yours,

Don

DON L. BAKER

DLB:lg

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Rules 306 & 165a

Texas Tech University

School of Law

August 21, 1984

Honorable James P. Wallace
The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, TX 78711

Re: Possible oversights in the 1984 amendments to Rules 306a(1) and 165a.

Dear Justice Wallace:

Thank you for your letter of August 15 regarding my comments about Rules 296 and 306c.

Today I noticed another possible problem that I would like to bring to the Court's attention. But before I do, perhaps I should mention that I am currently writing a two-volume treatise for West on Texas civil trial and appellate procedure. This is the main reason my study of the amendments has been so intense lately. Perhaps this will explain the series of letters to you -- and previously to Justices Pope and Spears.

1. The Official Comment to the 1984 amendment to Rule 306a states that the rule collects all provisions concerning the beginning of post-judgment periods that ordinarily run from the date the judgment is signed. Rule 306a, par. 1, was amended to include the court's plenary power to vacate, modify, correct or reform a judgment. No mention, however, is made in the amended rule to original requests for findings of fact and conclusions of law or the trial court's findings and conclusions in response thereto. Nor is any mention made in R 306a, par. 1, to the filing of a motion to reinstate a case dismissed for want of prosecution. The time period for these requests and filings all run from the date the judgment is signed. Rules 296, 297 and 165a. Presumably then, despite the intended purpose of the 1984 amendment to Rule 306a, par. 1, these matters are not subject to the procedures of Rule 306a, par. 4, regarding extension of time periods for failure of a party to receive notice of the judgment.

2. Prior to the 1984 amendment to Rule 306a, it did not apply to reinstatement procedures under Rule 165a. Walker v. Harrison, 597 S.W.2d 913 (Tex. 1980). But now Rule 165a, par. 2, states that a motion for reinstatement must be filed within 30 days after the order of dismissal is signed "or within the period provided by Rule 306a." The rule also provides that if the motion is

Lubbock, Texas 79409-0001 / (806) 742-3791 Faculty 742-3785

not overruled within 75 days after the judgment is signed, "or, within such other time as may be allowed by Rule 306a," the motion is deemed overruled by operation of law. It appears that the quoted provisions of Rule 165a were intended to refer to situations where an extension of the time periods were obtained by a party under the provisions of Rule 306a, par. 4. But, as discussed in the preceding paragraph, it appears that Rule 306a, par. 4, does not apply to motions for reinstatement, since they are not expressly included in Rule 306a, par. 1. The problem can be solved by amending Rule 306a, par. 1, to expressly include reinstatement under Rule 165a.

I hope that my comments have been helpful.

Respectfully,

Jeremy C. Wicker
Professor of Law

JCW:tm

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ATTORNEYS-AT-LAW

RICHARD H. KELSEY
MIKE GREGORY
JUDD B. HOLT
RONNIE PHILLIPS

Reply to:
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METRO. 430-1072

March 7, 1984

SD - Dec 1/84
Hungry!

Rules Committee
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

Re: Recent Rules Changes

Gentlemen:

In your recent videotape you requested comments on the proposed rules.

Rule 200 (Oral Depositions) now only requires "reasonable notice". It seems to me there should be a presumption of how many days notice is "reasonable notice"; otherwise, you may have a witness who fails to appear and upon motion for sanctions raises the defense that the notice was not "reasonable", thus interjecting a fact question to be decided by the judge, taking the time expense and effort of all concerned. If the rule provided for a presumption, it would place the burden upon the non-complying party to show that the amount of notice was not reasonable.

You can see the difficulty if you set up extensive depositions with multiple parties and attorneys, send out notices, and one of the attorneys makes the determination that the notice was not "reasonable", thus placing the entire deposition process in jeopardy.

In regard to Rule 324(b) (Prerequisites of Appeal), it seems to me that by your requirements of filing a motion for new trial under subdivision (2) (Factual Insufficiency) and (3) (Weight and Preponderance) all you are accomplishing is for an automatic filing of motion for new trial at all appeals. If the intended purpose is to speed up the appeal process, and human nature being what it is, no lawyer is going to forego his evidence questions on appeal merely in order to save the expense and time of a motion for new trial. This is particularly true when the statement of facts may not be prepared for several months, at which time the attorney can truly evaluate his appeal position in regard to the quantum of evidence.

I commend you and the Supreme Court for the production of these new rules. By and large, they seem to solve most of the problems which have been in existence for many years.

Very truly yours,

Richard H. Kelsey

RHK:ssd

Judge Hall
Evaluate, please
J. P.

January 25, 1984

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Rule 201, Texas Rules of Civil Procedure

Dear Judge Pope:

It may be too late to say so and I'm not sure where I missed the boat earlier, but there is a change which I suggest is needed in Rule 201.

Subdivision 3 as amended maintains the rule that notice to the attorney of record dispenses with the necessity of a subpoena if the witness is a party who is represented by counsel. It has been my experience that there is no advantage to serving a subpoena with all of its attendant expense and delay even in cases where the party is representing himself and does not have counsel of record. Once a party is before the court, it seems to me that a subpoena to a party should not be necessary to require the attendance of a party at his own deposition. I suggest that Subdivision 3 be amended to read:

> "When the deponent is a party, [after the filing of a pleading in the party's behalf by an attorney of record,] service of the notice upon the party or his attorney shall have the same effect as a subpoena served on the party. If the deponent is an agent or employee who is subject to the control of a party, notice to take the deposition which is served upon the party or the party's attorney of record shall have the same effect as a subpoena served on the deponent."

Travis County, for example, now charges $50.00 for service of a subpoena. High court costs are another topic, but if they continue to be a fact of life, then it seems it does not serve the ends of justice to require expenditure of substantial amounts of court costs money unnecessarily.

Sincerely yours,

Don

DON L. BAKER

DLB:lg

Law Offices of Baker & Prince A PROFESSIONAL CORPORATION SUITE 500 314 WEST 11TH ST. AUSTIN, TEXAS 78701-2186 512-476-6003

Evaluate
J. P.

January 25, 1984

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Re: Rule 161, Texas Rules of Civil Procedure

Dear Judge Pope:

Please forgive my delay in bringing this up, but it seems to me there is a further amendment to Rule 161 which might well improve administration of justice. Frequently, when some parties are served and others are not served, the most appropriate remedy is to sever the case so that the case may proceed to judgment against those parties who are properly before the court and not be held up awaiting service on parties as to whom a dismissal is not desired.

Therefore, I suggest the rule be amended to read as follows:

> "When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principal obligor without also dismissing the parties secondarily liable except in cases provided by Article 2088 of the Texas Revised Civil Statutes. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liablity, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered."

Sincerely yours,

Don

DON L. BAKER

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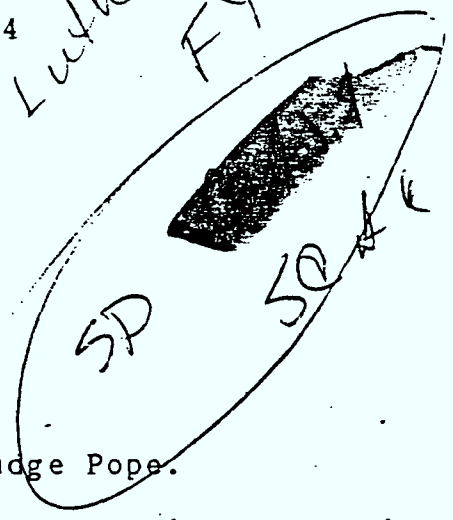
J. H. MORGAN (1867-1938)
J. BENTON MORGAN (1894-1948)
J. HARRIS MORGAN
HOLLY HALE GOTCHER

January 9, 1984

To Luther Soules
FYI



Judge James P. Wallace
Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Judge Wallace:

I write you at the suggestion of Judge Pope.

In examining the proposed 200 rule changes in preparation for the Video Tape Teaching Program, I realized for the first time the major change being proposed in [redacted] concerning depositions.

The Rule as it now stands, as I understand the language, will mean that an objection to the form of a question and an objection to responsiveness of answers must be made at the time the deposition is taken or those objections will be waived. The effect of this Rule, I suggest, will increase the cost of litigation substantially in Texas.

(1) The making of these two types of objections, which will be very, very common in most deposition situations, will increase the length of depositions substantially - my estimate is about one-third.

(2) Most law firms send their most inexperienced stable members to take depositions. In many situations the law firm, that is careful, will feel the necessity of providing for a deposition of an important witness a senior experienced lawyer. An inadvertent waiver is terror, as I am sure you remember from your own practice. Again, this procedure, which I suggest will occur in many cases, increases the cost of litigation in Texas.

I note that the original proposed Rule 204 as found on page 60 of the Agenda for the Advisory Committee did not include these waiver provisions. I suggest that this proposed change may have occurred without proper consideration and thought. In the area in which I practice, 95% of our depositions are taken for discovery purposes and not to be used in any manner, except occassionally for cross-examination, in Court. The lengthening of the deposi-

tion record provides no additional discovery, but forces every deposition to be taken with the care, length and preparation that is now used for expert witness depositions to be used in lieu of personal appearance in Court.

When I read the 204 revision, I assumed it was taken from the Federal Rules. I do not do enough practice in Federal Court to be intimately familiar with the Federal Rules without case by case perusal. I have read Rule 30, this morning, and I determined that the waiver provision is not included in the 1983 Rules.

I suspect the proposed Rule 204 change will effect more lawyers and more clients of lawyers than any other change proposed in the new Rules. I am just wondering if you and the committee recognized that fact at the time that the waiver provisions were added to the original proposal on page 60 of the Agenda.

Before we inflict more costs on our over-burdened public and remove a few more citizens from the list of those that can afford to use the Texas Court system for regress of wrongs, I ask that you and your committee rethink the minimal value the proposed rule change has in contrast to the enormity of its cost.

If I were a cynic, I would assume that this rule change was motivated and sponsored by the Court Reporter's Association or those dedicated to the ultimate removal of the Court system as a means of resolving disputes in Texas.

My congratulations go to you and the large number of fine lawyers that have worked on these revisions for an excellent overall job. I send my best wishes for the restoration of Rule 204 to the Agenda proposal.

Yours very truly,

J. Harris Morgan

JHM/tch

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June 20, 1984

RE: Texas Rules of Civil Procedure

Honorable James P. Wallace
Supreme Court of Texas
Supreme Court Building
P. O. Box 12248
Austin, Texas 78711

Dear Justice Wallace:

I recently viewed a videotaped presentation by Chief Justice Pope and others on the amendments to the Texas Rules of Civil Procedure effective April 1, 1984. Although I generally applaud the work of the various Committees and the Court with respect to these amendments, there is one provision in new Rule 204 that I think is going to create more problems than it solves. The provision to which I refer concerns the waiver of objections to the form of questions and responsiveness of answers if not made at taking of oral deposition.

The new Rule is silent on whether this provision with respect to waiver may itself be waived. However, my guess is that it was the intent of the Committee and the Court that such a waiver of the waiver provision would not be possible. What this will lead to (and I am seeing it already) is a greatly increased number of objections as to form and responsiveness at the time of the taking of the deposition, thereby lengthening the deposition and increasing the resulting expense to the client. The problem is compounded when there are multiple parties, each feeling the necessity to make its own objection. Since a very small fraction of depositions taken are ever read into evidence, the need ever to object under our former practice rarely arose.

May I suggest that the Court and the Committees consider further revision of the Rule whereby the parties would be allowed to agree that objections to the form and responsiveness could be postponed until some date prior to trial, say ten days, when they must be filed in writing. I assume that the Court's concern was that the reservation of all objections sometimes served as a trap for the unwary, and possibly resulted in the unavailability of necessary testimony. The approach I suggest would allow any party to demand that such objections be made at the time of the taking of the deposition, but would allow the parties to modify that requirement for those depositions that in all likelihood will never be used at trial except possibly for impeachment purposes. The problem of a witness' death, disability or unavailability could be solved by allowing the trial court to allow the use of leading questions or nonresponsive answers contained in depositions if substantial rights of the parties were not prejudiced thereby.

Perhaps the above suggestion complicates what the Court has now simplified, and that may be undesirable. However, I hate to see depositions turned into a circus of objections virtually mandated by the new Rule. At any rate, I appreciate the opportunity to put forward my thoughts.

Best personal regards.

Very truly yours,

Daniel A. Hyde

DAH:dc

Rules 204(4), 206(3), 207(2) & 208(a)

MEMO

TO: Judge Wallace
FROM: Judge Barrow March 6, 1984

RE: 1984 Amendments - Texas Rules of Civil Procedure

It has come to my attention that the amendments due to take effect April 1 may need slight revision. Specifically, there are four different rules that need to be pointed out as possible sources of confusion.

(1) Amended Rule 204(4) requires a party to make objections to the form of questions or the nonresponsiveness of answers at the time a deposition is taken or such objections are waived. One problem that could arise because of this change is that the party noticing and taking the deposition will be unable to object at trial if his opponent introduces the deposition into evidence. The party who took the deposition generally will lead the adverse witness, and he waives the "leading" objection by failing to raise it at the deposition. Thereafter, when his opponent seeks to use the deposition at trial, including the leading question, no objection may be made, since the deposition is considered to be the evidence of the party introducing it.

It is possible that the rules should provide that an objection to the form of questions is not required if the party has no reason to make it at the time the deposition is taken. Also, should the parties be permitted to agree to waive objections.

(2) Rule 206(3) provides that the deposition officer shall furnish a copy of a deposition to any party upon payment of reasonable charges therefor. Nowhere in the new rules is there a provision as to who must pay for the cost of the original transcription of a deposition. Old Rule 208a, which has been repealed, stated that the clerk shall tax as costs the charges for preparing the original copy of the deposition. If the Court wishes to bypass the court clerk in this matter, some provision should be included in the rules to clear up this situation.

(3) Rule 207(2), which deals with the use of depositions in a susequent suit between the same parties, states that such depositions may be used in a later suit only if the original suit was dismissed. This rule originally was taken from Federal Rule 32(a)(4), but the federal rule has since been amended to do away with the requirement that the first case have been "dismissed." The federal rules advisory committee concluded that the "dismissed" language was an "oversight" that had been ignored by the courts. This language is included in the Texas rules, and it may be that it should be deleted.

(4) Rule 208(a) allows a party to notice a written deposition at any time "after commencement of the action," which presumably means the day the original petition is filed. Thereafter, cross-questions are due within ten days. It would be possible that the time limit for cross-questions could lapse before the defendant is required to answer. This problem is taken care of in the oral deposition rule, Rule 200, because it requires leave of court if a party wishes to take an oral deposition prior to the appearance day of his opponent. A similar requirement should be provided for in the case of a deposition on written questions.

MEMO

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2/21/85

Suggestion of Luke Soules III

(3) Examination. The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

R204

(4) Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Except in the case of objections to the form of questions or the nonresponsiveness of answers, which objections are waived if not made at the taking of an oral deposition, the court shall not be confined to objections made at the taking of the testimony. ~~,~~ about agreement to the contrary of all parties

Change by amendment effective April 1, 1984: Section one is former Rule 204 revised; section 2 comes from former rule 205; section 3 from former Rule 206; section 4 from former Rule 207. A major change is the waiver of objections to form of questions and responsiveness of answers if not made at taking of oral deposition.

Rule 205. Submission to Witness; Changes; Signing

When the testimony is fully transcribed, the deposition officer shall submit the deposition to the witness or if the witness is a party with an attorney of record, to the attorney of record, for examination and signature; unless such examination and signature are waived by the witness and by the parties.

Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with the statement of the reasons given by the witness for making such changes. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the witness does not sign and return the deposition within twenty days of its submission to him or his counsel of record, the officer shall sign it and state on the record the fact of the waiver of examination and signature or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed; unless on motion to suppress, made as provided in Rule 207, the Court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

This is a new rule effective April 1, 1984. Former Rule 205 is incorporated into Rule 204. This new rule is former Rule 209 with modification. The modification gives the court reporter authority to file an unsigned deposition for both party and non-party witnesses.

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J. McGOWAN
894-1978)

BILL McGOWAN
WM J. McGOWAN II
BRADFORD L. MOORE

KELLY G. MOORE

AREA CODE 806
PHONE 637-7585

September 22, 1983

Mr. George W. McCleskey
Attorney at Law
P. O. Drawer 6170
Lubbock, Texas 79413

Dear George:

It is my understanding that you may be a current member of the Rules Committee. If you are not on the committee, then I assume you would know where to channel this letter.

For some time, I have been concerned about the fact that in Texas a party may pay a jury fee at any time, and I have even had that happen up to the day before trial was scheduled to begin and the Judge go ahead and remove the case to the jury docket. It seems this happens more frequently with defense attorneys, but I have had about equal experience on both sides of the case. What I would like to see happen is for the Supreme Court to go ahead and make a rule change that would allow either party to have a jury trial upon payment of the jury fee at any time within six months from the date the case is filed. Although this does not conform to the federal rules, I believe that it would give ample opportunity for each side to evaluate the case and to decide whether in fact a jury was needed to hear the facts. Hopefully, this would avoid the problems which I have been having regarding being on the non-jury docket for 1 1/2-2 years, finally getting to trial, then having the other party pay a jury fee and having the case removed to the jury docket for an additional 2 1/2-3 years before we could possibly get to trial. I do not see anything fair about this type of tactics since I see they are done only for delay purposes. Further, it seems it is a great inconvenience and hindrance to the Court in scheduling cases, and I would ask that you present this proposal, or in the alternative forward it on for consideration.

I appreciate your cooperation and consideration regarding this matter.

Sincerely yours,

Bradford L. Moore

BLM/nc

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule: Rule 264. Appeal Tried De Novo.

A Cases brought up from inferior courts shall be tried de novo.
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II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

1 Rule 264. ~~Appeal Tried De Novo.~~ Videotape Trial.
2 ~~Cases brought up from inferior courts shall be tried de novo.~~
3 By agreement of the parties, the trial court may allow that all
4 testimony and such other evidence as may be appropriate be pre-
5 sented at trial by videotape. The expenses of such videotape re-
6 cordings shall be taxed as costs. If any party withdraws agreement
7 to a videotape trial, the videotape costs that have accrued will
8 be taxed against the party withdrawing from the agreement.
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etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

Respectfully submitted,

Date _____ Name

AREA CODE 512 220-2525

Judge Pope - This letter is of interest. J.P.

JAMES C. ONION
JUDGE 73RD DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

June 14, 1983

Hon. Jack Pope
Chief Justice
Supreme Court of Texas
Courts Building
Austin, Texas 78711

In re: Rule 265(a)

Dear Judge Pope:

As I understand, this Rule was amended in 1978 to eliminate the requirement of having to read the pleadings to the jury. The Rule was intended to have the attorneys summarize their pleadings in everyday language rather than reading a lot of legal words which most pleadings contain and which meant nothing to most jurors. I thought this was a great improvement. However, unfortunately, it did not work out that way. The trial attorneys, good and bad, are using the same as a tool to completely argue the entire facts of their case, often witness by witness. Hence, they do not summarize their pleadings but their entire case.

I attempt to control this problem, but many trial judges do not because of the wording of the Rule, and hence, when the lawyers come to my court, they want to do the same thing they have done in other courts. The net result is that we hear the facts from all sides during voir dire, then again in opening statements to the jury, then again from the witness stand, and then again during closing arguments. So in every jury case we hear the facts four times. This is a waste of judicial time.

Rule 265(a) in part says, ". . . shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought . . ."

Attorneys not only state what they expect to prove, but go into the qualification and the credibility of each and every witness and into many immaterial and irrelevant facts and conclusions. In addition, most attorneys do not know how to be brief. I would suggest that Rule 265(a) be amended to read, ". . . shall

state to the jury a brief summary of his pleadings." And eliminate the phrase, "what the parties expect to prove and the relief sought." I feel that this would be in line with the committee's intention just prior to 1978, according to my reading of the record made by the committee. Right now we have two closing arguments to the jury.

I fully realize that it will be sometime before any attention can be given to this matter. However, I hope it will be properly filed in order to be considered at the proper time by the proper committee.

Very truly yours,

James C. Onion

James C. Onion

JCO/ebt

COAs & SCBC

THE SUPREME COURT OF TEXAS

December 13, 1983

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

Dear Luke:

I have had complaints-suggestions concerning several rules so I will pass them on to you for your committee's consideration.

Rule 272:

Some members of the court as well as several lawyers have expressed concern that present Rule 272 is unduly restrictive and results in an injustice in instances where specific objections are made to the court's charge but the trial court does not specifically rule on the objection. The most common suggestion is that the rule be amended to require only that a specific objection be made in the record. The trial judge would thus be made aware of the objection but he could not refuse to rule and thus avoid having his decision reviewed on appeal.

Rule 296 and 297:

Professor Wicker's letter is enclosed.

Rule 373:

It has been suggested that Rule 373 and Rules of Evidence 103 are inconsistent, i.e., under the Rules of Evidence the attorney could tell the judge in narrative form what his witness would testify to and thus preserve his point for appellate review. Rules of Procedure 373 requires a bill of exception setting out the proffered testimony. The committee may have suggestion as to which if either of these rules should be amended.

Rule 749:

This rule provides that in a forceable entry and detainer suit an appeal bond must be filed within five days of judgment. The rules of practice in justice courts, specifically Rule 569, provides five days for filing a motion for new trial in the justice court and Rule 567 provides that the justice of the peace has ten days to act on the motion for new trial. In a recent motion for leave to file a petition for a writ of mandamus we were presented with a situation where the defendant filed a motion for new trial five days after judgment, the next day the justice of the peace overruled the motion, but it was too late to file an appeal bond under Rule 749.

The question presented is whether forcible entry and detainer actions should be an express exception to the rules of practice in justice courts so as to clarify the procedural steps such as occurred in the above case.

As usual I leave further action on these matters to your and the committee's good judgment.

Sincerely,

James P. Wallace
Justice

JPW:fw
Enclosures

P.S.
I am enclosing a letter from John O'Quinn concerning Rules 127 and 131. Ray Hardy's correspondence has been previously forwarded to you.

K. 296

TAYLOR, HAYS, PRICE, McCONN & PICKERING
ATTORNEYS AT LAW
400 TWO ALLEN CENTER
HOUSTON, TEXAS 77002
(713) 654-1111

May 14, 1984

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

RE: Rule 296

Dear Hubert:

Pursuant to your request to send this letter to you with a copy to Justice Wallace, I am writing to point out the question I had with respect to the new Rule 296, Tex. R.Civ.P.

There is a discrepency between the amended Rule 296 as it appears in the pocket part in Vernon's and the Rule as it appears in the pull-out to the February, Texas Bar Journal. As Garson Jackson and Justice Wallace's office have informed me, the pocket part version is incorrect.

My question is whether there are any published explanations or bar comments as to the change in Rule 296? Under the prior Rule 296, it applied to hearings over motions to set aside default judgments. As you know, the Court often conducts an oral hearing in which testimony is presented. Thereafter, the motion to set aside a default judgment may be overruled by operation of law seventy-five (75) days after the default judgment was signed. Under the case law the Appellate Court might review the trial court's findings of fact and conclusions of law as to this hearing. See Dallas Heating Co., Inc. v. Pardee, 561 S.W.2d. 16 (Tex.Civ. App.-Dallas, 1977, ref.n.r.e.). Now that the new rule has eliminated the "by operation of law" wording, does it mean that the Appellate Courts do not need findings of fact and conclusions of law on these matters, or that the "signing" in Rule 296 also applies to the operation of law time period? See Int'l. Specialty Products, Inc. v. Chem-Clean Products, Inc., 611 S.W.2d. 481 (Tex.Civ.App.-Waco, 1981, no writ).

In Guaranty Bank v. Thompson, 632 S.W.2d. 338, 340 (Tex. 1982), the Court held that a motion to set aside a default judgment "should not be denied on the basis of counter-

testimony." Accordingly, the dropping of the language in Rule 296 may have been done because findings of fact and conclusions of law are no longer necessary for appellate review.

Sincerely,

TAYLOR, HAYS, PRICE, McCONN
& PICKERING

David R. Bickel

DRB/lmm

cc: Justice James P. Wallace
Supreme Court of Texas
P. O. Box 12248
Capital Station
Austin, TX 78711

Rules 296 &
306c

Justice Pope: Please consider & write Wicker. J.P.

Texas Tech University

School of Law

August 6, 1984

Honorable Jack Pope, Chief Justice
The Supreme Court of Texas
P.O. Box 12248, Capitol Station
Austin, TX 78711

Re: Apparent unintended anomoly in amendment to the Texas Rules of Civil Procedure, effective April 1, 1984

Dear Justice Pope:

I have recently discovered an apparent anomoly created by the amendments to Rules 296 and 306c, effective April 1, 1984. The problem is created where a premature request for findings of fact and conclusions of law is made and a motion for new trial is filed.

Rule 306c was broadened to include prematurely filed requests for findings of fact and conclusions of law. If such a request is prematurely filed and a motion for new trial is filed, the request is deemed to have been filed on the date of (but subsequent to) the date of the overruling of the motion for new trial. This amendment would have created no problem had Rule 296 not also been amended to require a request for findings and conclusions to be filed within ten days after the final judgment is signed, regardless of whether a motion for new trial is filed. The pre-1984 version permitted a request to be filed within ten days after a motion for new trial is overruled.

Reading both the amended rules together, if a premature request for findings and conclusions is made and a timely motion for new trial is filed, the request will be deemed to have been filed too late if the motion for new trial is overruled more than ten days after the judgment is signed. This is quite possible, of course, since Rule 329b(c) allows the trial court 75 days to rule on a motion for new trial before it is overruled as a matter of law.

If this result was intended, please excuse my having taken up your valuable time. If it was not intended, I hope that I have been of some assistance to the Court.

Respectfully,

Jeremy C. Wicker

Jeremy C. Wicker
Professor of Law

JCW/nt

LEGAL AID
BEXAR COUNTY LEGAL AID ASSOCIATION
434 SOUTH MAIN AVENUE, SUITE 300
SAN ANTONIO, TEXAS 78204 (512) 227-0111

A United Way Service

March 19, 1984

Justice James Wallace
The Supreme Court of Texas
Box 12248
Austin, Texas 78711

Re: 1984 Amendments to the Texas Rules of Civil Procedure, Rule 329.

Dear Sir:

The revision to Rule 329, Motion for New Trial on Judgment Following Citation by Publication, effective April 11, 1984, permits a motion for new trial following judgment on publication to be filed within two years after entry of the judgment, but provides that:

> d. If the motion is filed more than thirty days after the judgment was signed, all of the periods of time specified in Rule 306a(7) shall be computed as if the judgment were signed thirty days before the date of filing the motion.

As I read this new rule, and as it was explained in the videotape training provided by the State Bar of Texas, it is designed to kick these proceedings into the normal appellate timetable, which means that the motion is overruled by operation of law if not decided within 45 days after filing, appeal bond must be filed in 60 days and the record must be at the Court of Civil Appeals 70 days after filing of the motion.

This action, of course, reverses at least forty years of caselaw on the issue of when such a motion should be decided, and is probably an advance toward prompt disposition of such suits. The revision committee may, however, have overlooked the effect of failing to also amend subsection (a) of Rule 329, which states:

> (a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was signed. The parties adversely interested in such judgment shall be cited as in other cases. (emphasis added)

This last sentence has been interpreted to mean that certified mail service on the attorney of record for the publication plaintiff is not sufficient. Gilbert et al. v. Lobley, 214 SW2d 646 (Tex.Civ.App.- - Ft. Worth, 1948 writ ref'd). Personal service on the parties adversely interested and an opportunity to reply "as in other cases" has been the rule. 4 McDonald, Tex.Civ.Prac. §18.23.2 (1971). Since filing the motion tolled the two-year period this procedure was reasonable, and no time limit was imposed as to the period within which the motion had to be determined. 4 McDonald Tex.Civ.Prac., §18.23.1 (1971).

The new time limits, combined with the old practice relating to service of citation creates obvious problems. Citation as in other cases would permit the respondent to answer on "the Monday next after the expiration of 20 days" after service (Rule 101). After answering, a respondent is entitled to 10 days notice of a setting (Rule 245). Therefore, under the best possible conditions of citation and setting, movant would have 14 days or less to get an order granting new trial entered. Furthermore, since the time runs from the date of filing the motion, a respondent can effectively defeat a motion for new trial simply by evading service.

It appears to me there are two appropriate remedies to this dilemma. First, the court could allow Rule 21a service of the motion for new trial following publication upon the judgment plaintiff's attorney of record, so that issue could be joined and the matter decided as in other types of motions for new trial. This resolution seems questionable to me, since most attorneys do not maintain contact with former clients in any systematic way. It is probable, therefore, that Rule 21a service would prove ineffective to give actual notice to the parties affected, especially when the judgment may be discovered a year or longer after entry. Second, the court could compute the time limits from the date issue is joined, or from the date of service on the last respondent to be served, rather than from the date of filing the motion. The rules relating

to due diligence in issuance and service of citation which have been developed with respect to tort suits could be applied to prevent abusive delays in proceeding with such motions; it should also be made clear that respondents to such motions are not entitled to more than the minimum notice of hearing provided by Rule 21, or such time as is provided by local rules relating to other motions (in Bexar County this is normally 10 days).

In the meantime, as a senior attorney at Bexar County Legal Aid, I am advising my younger colleagues to issue citation and notice of a hearing, so that the respondent is given a setting on the motion within 45 days after filing. I have also advised them to issue certified mail notice to the attorney of record in the hope that an answer will render the service question moot.

I appreciate your time and attention in reviewing this comment. If I have misconstrued the revision or can be of any assistance in addressing the problem, please feel free to call on me.

Sincerely,

Charles G. Childress

CHARLES G. CHILDRESS
Chief of Litigation

CGC:lph

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 present 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.

GUY E. BUDDY HOPKINS P.C.
BOARD CERTIFIED
PERSONAL INJURY TRIAL LAW

DUANE T. GORLEY
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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.

K. 438

MICHAEL J. REMME
ATTORNEY AT LAW
PARKWAY CENTRAL SUITE 725
611 RYAN PLAZA DRIVE
ARLINGTON, TEXAS 76011
(817) 460-7301 or 275-7029

July 17, 1984

Rules Committee
Texas Supreme Court
Supreme Court Building
P.O. Box 12248
Austin, Texas 78711

Gentlemen:

I propose a change to Rule 438 (Affirmance with Damages for Delay), which should have the effect of further reducing frivolous appeals.

I recently was faced with a meritless and frivolous appeal in which the record was was virtually free of preserved allegations of error. We wished to ask for delay damages under Rule 438, but in briefing cases under the rule I became aware of several cases- never reversed- which held that by asking for such relief, one opened the entire record to scrutiny for error, whether such error was preserved by timely objection, or not. We decided that the risk was not worth the damages obtainable, and did not assert the claim for damages. I have reason to believe that the doctrine announced in these cases effectively nullifies the purpose behind Rule 438, and suggest an Amendment, as follows:

Rule 438

Where the court shall find that an appeal or writ of error has been taken for delay and that there was no sufficient cause for taking such appeal, then the appellant, if he be the defendant in the court below, shall pay ten per cent on the amount in dispute as damages, together with the judgment and interest and costs of suit thereon accruing. A request for relief under this rule shall not have the effect of permitting consideration of unpreserved allegations of error.

Such an amendment to the rule, in my opinion, would restore its intended vitality, and would remove the hazard presently associated with its invocation.

Yours truly,

Michael J. Remme

MJR/pc

HUBBARD, THURMAN, TURNER & TUCKER

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JOHN R. FEATHER
RICHARD KIRK CANNON
ANDREW J. DILLON
W. KIRK McCORD
GARY D. MANN
MOLLY BUCK RICHARD
THOMAS E. TYSON
HARRY J. WATSON*
JOHN M. CONE

*NOT ADMITTED IN TEXAS

March 23, 1984

Mr. William V. Dorsaneo, III
SMU School of Law
Dallas, Texas 75275

Mr. Michael A. Hatchell
500 1st Place
P. O. Box 629
Tyler, Texas 75710

Mr. Luther H. Soules, III
1235 Milam Building
San Antonio, Texas 75205

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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*B.A., 1960, University of Florida; LL.B. replaced by J.D., 1965, University of Florida; LL.M., 1981, University of Virginia. Member of the Florida Bar. Judge, Fourth District Court of Appeal for the State of Florida.

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 62 (1924).

2. *See* Mann & Whaley, *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. Comm'n, 373 So. 2d 1288 (Fla. 1979).

5. FLA. CONST. art. V, § 5b (1980). *See generally* England, Hunter & William, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 117 (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) (on file with 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.

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 Analectic*, APPELLATE CT. ADM. REV. 35, 55 (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
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

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14. *See* Reynolds
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15. *See, e.g.*, STAN
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16. *See, e.g., id.*

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

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

19. *See, e.g.*, N.J.R

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 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 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 (1973) [hereinafter cited as STANDARDS FOR PUBLICATION].

14. *See* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Court of Appeal: The Price of Reform*, 45 U. CHI. L. REV. 573, 588-91 (1901).

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 136. 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.

28. *Id.*

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30. Letter from Donn
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31. *Id.*

32. *See* Jacobstein, *S*
Court Opinions, 27 STAN.
33. *See* Newbern & W
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 206 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. R. LEFLAR, 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 indefinite 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.
>
> [I]t 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 . . . rendered. . . . 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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Id. at 134-35.

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40. *Id.*

41. *See* STANDARDS

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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 aides: 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 Kirkham, *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 § 3.37(2) (1977) (approved draft) [hereinafter 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.

common law tradition and the decided alike. By this process refines and shapes the law. Un in a child's connect-the-dots pic more distinct image of the law becomes sharper; if some dots a

Selective publication advoc but respond that the issue is really material or important t principle is well established, r does little to sharpen the law' conviction relief in Florida, a could have been raised in a Defendants nevertheless conti to deny their petitions, and d would appear to be of little i to point out repeatedly that s appeal. The underlying questi to justify the same writing, researching costs. In other w established legal principles m widespread distribution.

Critics of selective publi apparent precedential value unpublished opinions have b stantial precedential value.[56] opinions contain no precede to the body of case law thro criteria or erroneous applic dicial practice, however, ha for publication.[57] Defenders occur but assert that judges

M. Zander, *supra* note 22, at 15 Soc'y. Pub. L. Texts. 201.

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

54. Foster v. State, 400 So. 2d

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57. Mueller, *Unpublished O* some 1,000 unpublished opini publication criteria in most c circuit's work has provided litt precedent." Reynolds & Richm 26 (judges follow publication c

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 1,000 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 681. *See also* Frank, *supra* note 42, at 55-26 (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

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

59. For example, 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,

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70. R. CARRINGT

71. *Id.*

72. *See* Reynold

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 43, 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 59, at 17 (recommendation that a modified nocitation rule be retained).

69. *See* APPELLATE STANDARDS, *supra* note 48, § 3.37, commentary at 53.

70. R. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 46, at 28-30.

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 courts 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. Witkin, *supra* note 58, at 259.

78. *See* Goldbold, *supra* note 58, at 864.

79. *See* Smith, *supra* note 42, at 30-31.

80. *See* Hopkins, *supra* note 9, at 35.

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 8, 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.[87] 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.[88]

Contrary to present practice, the Florida Supreme Court often used the PCA before the district courts were created.[89] The degree of reliance on the PCA, however, increased dramatically in the district courts. In 1958, the first full year district courts operated, 547 PCAs were issued; by 1981 this figure had grown to 4,133, an approximate increase of twelve hundred percent.[90] 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.[91]

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. 864 (1948); Thalheim v. State, 38 Fla. 169, 210, 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 an award made 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."

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 infra* 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 60.

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. 679 (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)(1)(A)(ii) & (a)(2)(A)(i) to (vi).

106. This limited review has prompted one appellate judge to publically announce his refusal to issue PCA opinions in the future. *See* Davis v. Sun Banks, No. AF-201, 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, 1,926, 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.*

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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. 81-835 (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, 99 So. 2d 852, 853-54 (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]

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 44, at 608.

119. B. CARDOZO, *supra* note 1 and accompanying text, and Pound, *supra* note 84 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. 46, 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. 23. *See also* D.C. CIR. P. 13; 1ST CIR. 14; 2D CIR. R. 9023; 4TH CIR. R. 18; 6TH CIR. R. 11; 7TH CIR. R. 35; 8TH CIR. R. 14; 9TH CIR. R. 21; 10TH CIR. R. 17.

127. *See* Godbold, *supra* note 58, at 581. 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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> 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* Shuchman & 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 68. 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, D. 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. 21, 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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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.[137]

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;[138] 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. 833 (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.

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view, *supra* note 127.

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.

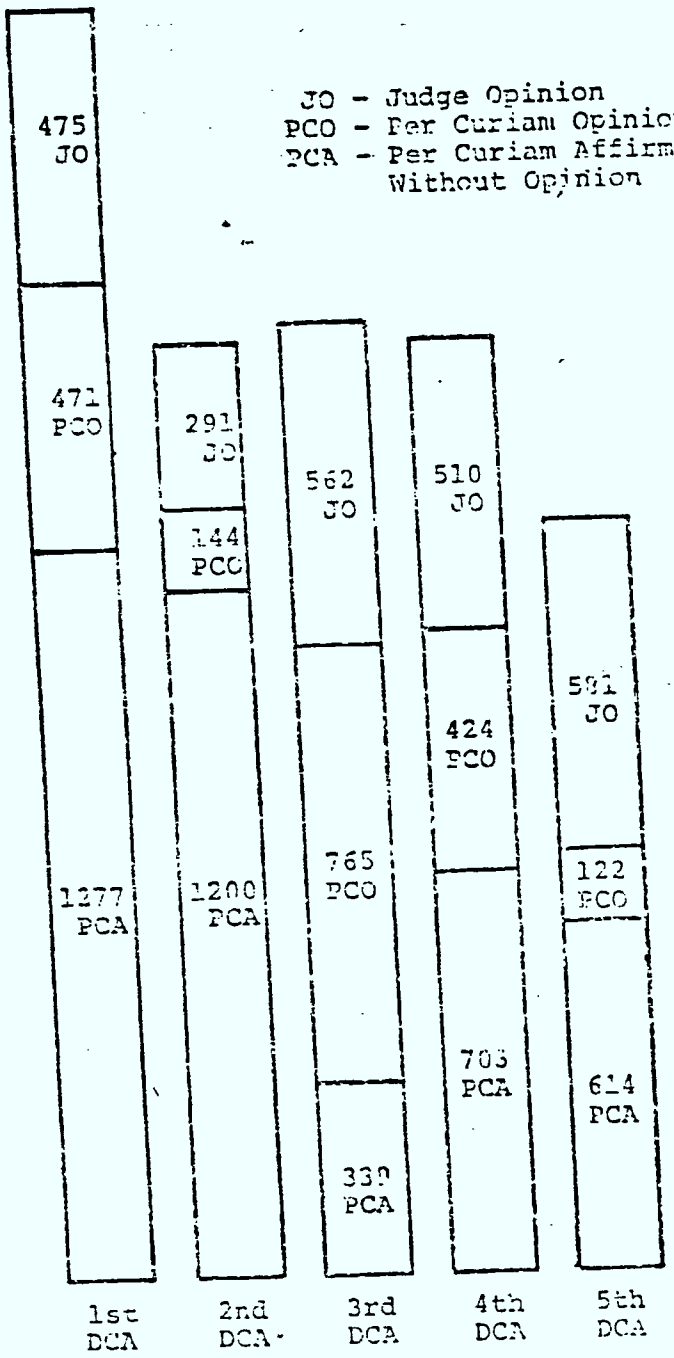
A decision accompanied by reasons should be the rule, rather than the exception. Adding selective publication to the list of opinion options available to Florida appellate judges will not guarantee a written opinion in every case. It will, however, remove one existing obstacle by permitting judges to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

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.

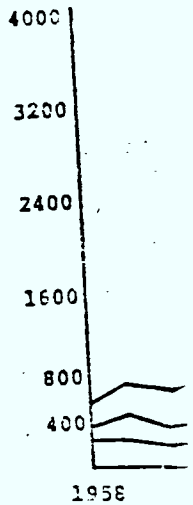
APPENDIX A

FIGURE 1[143]

DISTRICT COURT DECISIONS – 1981

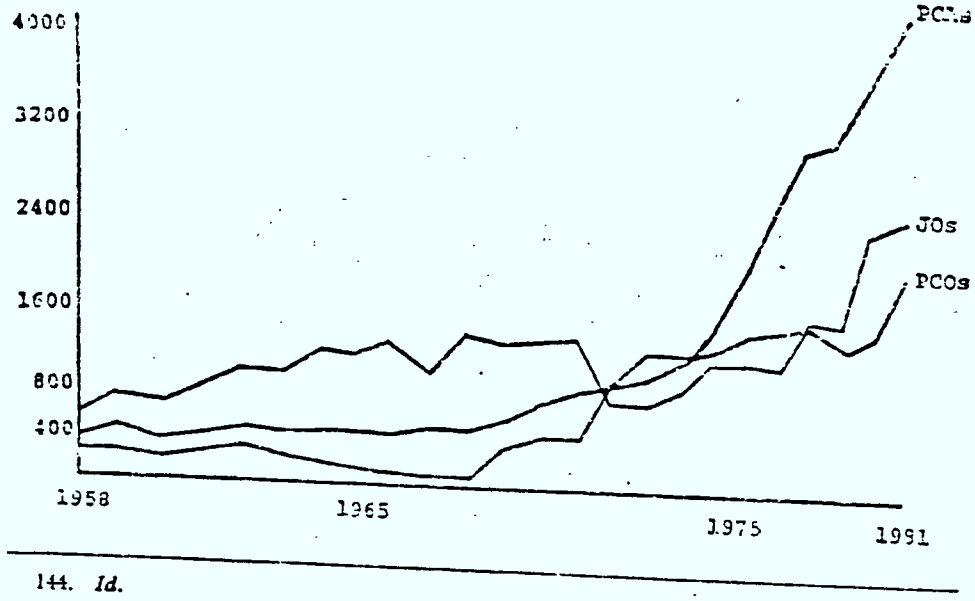


143. *See supra* note 81.



144. *Id.*

FIGURE 2144
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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considerations, have combined
condominiums. *See* DIVISION
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4, 13-14 (1980) [hereinafter cit
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that within twenty years co
units. *See U. S. Department o
Study* (1975) (mandated by th
No. 93-383, § 821, 88 Stat. 63
Symbol of Things to Come, F
population). *See also* Nagin,
Florida!, 55 FLA. B.J. 74 (198

2. *See Condominium De
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AND PRACTICE, PRACTICING LAW
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condominium government offi
Living, 54 FLA. B.J. 756 (1980
CONDOMINIUM REP. 8 (1975).

3. *See* FLA. STAT. § 718.104
developer); *id.* § 718.104(4)(i)
and have voting rights). *See al
FOR PUBLIC OFFICIALS 4 (1980).

4. *See* URBAN LAND INSTI
ROLE 31 (1977) (distinguishing
as DEVELOPER'S ROLE]. The
condominium, which is the

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 private venturers. Indeed, private reporting continued in at least some federal courts until well after the Civil War.[10] These publications only gradually came to reflect an appreciation shared by judge and reporter concerning the form and content of the report.[11] Today, of course, legal reporting is dominated by the West

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

[9] Apparently there is no general work on the history of publication in the United States. Ephraim Kirby's 1789 volume of Connecticut Reports was the first reporter published in this country, *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 282 (1973), although modern historians have unearthed and published reports of colonial cases. *See, e.g.*, D. BOORSTIN, DELAWARE CASES 1792-1830 (1943); PROCEEDINGS OF THE MARYLAND COURT OF APPEALS 1695-1729 (C. Bond ed. 1933). Hence the comment, "Historians actually know more 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 court reporter and a young attorney began publishing colonial Maryland cases as a private venture in 1809. *See* C. BOND, THE COURTS OF APPEALS OF MARYLAND: A HISTORY 111 (1928). In contrast, publication in Massachusetts began with authorization from the legislature in 1804. W. NELSON, AMERICANIZATION OF THE COMMON LAW 168 (1975). Publication of New York cases began in 1794. Johnson, *supra*, at 1264 n.17.

Publication of Supreme Court opinions did not begin until the second volume of *Dallas's Reports* was published in 1798. Even then progress lagged; although the third volume 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 BEGINNINGS TO 1801, at 664-65 (History of the Supreme Court of the United States, vol. 1, 1971).

[10] Samuel Blatchford, both district and circuit judge before joining the Supreme Court, reported Second Circuit decisions until 1887 when the *Federal Reporter*, begun several 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 the reports . . . . The question was much discussed in law journals. . . . Reviewers varied all the way from those who wanted to save money for lawyers by limiting publication to selected opinions, to those who advocated publication of all opinions together with arguments of counsel and other relevant documents.

C. SWISHER, THE TANEY PERIOD, 1835-64, at 295 (History of the Supreme Court of the United States, vol. 4, 1974).

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

Uneven reporting required that both state and federal reports be regularly reviewed in 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 and complete judicial explication of the decision. This is a relatively recent development. Lord

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 1973 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 memoranda, and record in each case, his workdays would be full. In addition, the judge must draft opinions for publication, read the drafts of other judges' opinions, participate in conference, and hear arguments. Each judge must try to keep current on developments in the law, run his staff, help administer his circuit, perhaps serve on professional committees, and so on.

The point of this fairly dreary exposition is that the object of this article is not to criticize the judges. Their dedication and industry is beyond question. We aim only to examine and evaluate 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 and the content of the several publication plans. Finally, we discuss the costs and benefits associated with limited publication: What do the judges gain from nonpublication? Are there any drawbacks associated with those gains? Are there ways to minimize the costs while realizing most of the gains?

II. The Study: Methodology

Our assessment of the impact of the publication plans on the decision-making process of the courts of appeals is based on a study of the published and unpublished opinions of those courts 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 above is somewhat high.)

Average figures, of course, conceal peaks and valleys among the circuits. In the Fourth Circuit, for instance, 1236 cases were decided by judicial action. Multiplication by three yields a total of 3708 votes. Reducing that figure by 20% for votes cast by senior and visiting judges yields 2966. Seven active judges provided 1750 judge-days over the assumed 250 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 judicial action was 699, producing 2097 total votes. This figure must be reduced by 20.7% to account for the contribution of visiting and senior judges. The result of that reduction, 1663, when divided by 2250 total judge-days (9 judges times 250 working days) yields nearly .74 decisions per judge per day. Percentages of votes cast by active circuit judges are from *id.* at 51. Cases decided per circuit is computed from *Statistical Data*, *supra* note 35, Tables 1P, 5U.

[38] Some cases naturally present fewer problems than others; many are frivolous. For a conscientious judge, however, even those present demands on his time. The judge who wishes to supervise even minimally the work of the staff attorneys and his own law clerks 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 statistics

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	4699	7720	12419

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

or submission upon written briefs. Some of these nevertheless are terminations "by judicial action." Examples are motions for summary affirmance, motions for stays, and motions for 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 formal brief contemplated in FED. R. APP. P. 28. Telephone conversation with David Gentry, Research Analyst, Administrative Office of the United States Courts (July 24, 1980). We reasoned that the larger population of appeals terminated "by judicial action" was more appropriate for our study than the smaller set of appeals terminated "after argument or submission" because the larger group more closely reflects the total case-terminating work of the judges.

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

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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[46] 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.

[47] 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(b); 10TH CIR. R. 17(d), (e).

tionate effect to the publication habits of the Eighth Circuit. All of the other circuits with specific standards have publication percentages in the high 20s or low 30s, or less than half the Eighth Circuit's publication percentage of 68.2%. If the Eighth Circuit is excluded, the average percent published for the circuits with specific standards would be 30.2%, and the percentage of opinions unpublished would be 69.8%. These percentages would indicate that a substantially greater proportion of opinions are published in circuits 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 enhance 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 presumption explicit. The First Circuit Plan, for instance, provides that

> While we do not presently attempt to categorize the criteria which should determine publication, we are confident that a significantly larger proportion of cases will result in unpublished 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.[61]

In other circuits the presumption is not explicit, but is inferable.[62] 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.

[61] 1ST CIR. R. app. B(a).

[62] 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 24, 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)[a]	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.

[a] 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.[83] 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[84] 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.[85] 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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[83] *Id.* at 50-51.

[84] 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).

[85] 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 8000 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. 34, 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 7729 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	10.3
Sixth	96	10.0
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	36.0
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.[52]

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.[53] By suppressed precedent, we mean a case that ought to have been pub-

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[52] 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 2, 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*.

[83] *See, e.g.*, Gardner, *supra* note 4; Comment, *supra* note 4.

[84] Our use of the word "suppressed" is not intended to connote in any way that these cases are being deliberately concealed.

[85] *See* note 69 *supra* for a description of the sample.

[86] 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 opinions—that is, opinions that clearly broke new ground on important issues. There were, to be sure, some exceptions.[87] One example is *Trible v. Brown*.[88] There a Congressman sought to compel the Department of Defense to file a report on two shipyard programs. The litigation raised interesting questions of standing,[89] justiciability, and remedy. In spite of its obvious importance, the Fourth Circuit did not publish the opinion.[90]

Cases like *Trible* were unusual.[91] More frequent examples of suppressed precedent involved questions of state law, often in relation to federal statutory or constitutional law. Such opinions certainly should be published if they resolve novel issues. In *DeBona v. Vizas*,[92] for example, the Tenth Circuit decided that two policemen had not been denied due process when their positions were terminated. The decision turned on whether a Colorado statute created a protected property interest,[93] and apparently it was a case of first impression. The importance of the court's resolution of the problem was increased because the state statute involved had not been construed since 1900. In those circumstances, the resolution 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 have spotted more "clear" precedent. But the point is there were few cases that grabbed the attention of the alert general reader. Others who have done more limited studies, particularly in state appellate courts, report reading unpublished opinions that begin, in effect, "This is a case of first impression in our state." *See, e.g.*, Kanner, *supra* note 3, at 391; 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 role effectively. *Compare* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (alleged interference 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 of 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 opinion. That does not detract, however, from its status as a law-declaring opinion. It was a judicial expression on important legal issues.

[91] Often an opinion that at first appeared clearly to warrant publication seemed less 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, should be granted a modification of a protective order so it could gain access to discovered documents, was said by the court to have been resolved in different ways by trial courts and to be "a case of appellate first impression." *Id.*, slip op. at 5. The opinion turned on the particular facts of the case at bar, however, considerably reducing its value as precedent. Although the discussion probably was significant enough to warrant publication, it was not as important as the court's statements might have led the reader to believe.

[92] No. 77-1299 (10th Cir. Dec. 18, 1978).

[93] See Bishop v. Wood, 426 U.S. 341 (1976).

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. 75-3236 (5th Cir. Mar. 27, 1979). *See also* Moorer v. Griffin, No. 77-3560 (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 special problem when an unpublished opinion contains a concurring or dissenting opinion. Two major factors argue for publication in cases that generate separate opinions. First are the stated premises of limited publication, which is a treatment supposedly reserved for cases that do not implicate the lawmaking function of the court[110]—routine, uncontroversial cases. Cases that contain dissents or concurrences are, by definition, controversial; the court disagrees either about the result to be reached or about the method used to reach it. Accordingly, few decisions with separate opinions should go unpublished.

Second is the role played by the separate opinion in our judicial system.[111] Separate opinions serve to restrain judical advocacy. Like all advocates, the judicial advocate can lose sight of the other side. The separate opinion restricts the judicial advocate because it assures him of a public airing of a contrary view of the same facts and law.[112] The separate opinion also performs an important corrective function, for it criticizes the result and reasoning of the majority, appealing for correction by a higher court, a future court, or a legislature. It is "an appeal to the brooding spirit of the law, to the intelligence of a later day."[113]

In order to perform these functions adequately, the separate 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 Seventh Circuit has a commendable record of explaining its decisions. Some incidental suppression of precedent in that process seems a legitimate price to pay; it is preferable to a court's avoiding any risk of suppressing a law-declaring opinion by not providing any reasons for its unpublished decisions.

[110] *See* STANDARDS, *supra* note 17, at 1-2.

[111] *See generally* W. REYNOLDS, *supra* note 6, at 23-27; Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 926-28 (1962); Stephens, *The Function of Concurring and Dissenting 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 dissent in courts of last resort).

[114] One important function of the separate opinion can be accomplished even if the opinion goes unpublished. Judge Fuld wrote that "the dissent is an assurance that the case was fully considered and thoroughly argued by the bench as a whole and was not merely adopted as written by one member." Fuld, *supra* note 111, at 927. An unpublished dissent or concurrence may still provide that assurance, at least to the parties and the lower court. It can, however, fail even that limited function. Consider National Treasury Employees Union v. United States Dep't of the Treasury, No. 78-1282 (D.C. Cir. May 15, 1979). The opinion reads as follows:

> This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues

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. Fara, No. CRA 15889 (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

Published

Circuit	Total Opinions	Dissenting	Concurring	Concurring & Dissenting	Separate Opinions (%)
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

Circuit	Total Opinions	Dissenting	Concurring	Concurring & Dissenting	Separate Opinions (%)
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 of law—a rule that could be settled one way or the other without shaking the legal firmament, but a rule that should be settled. Publication would have advanced the ultimate national resolution of this issue.

Another case that should have been published is *Burrison v. New York City Transit Authority*,[126] which revealed a longstanding disagreement within a circuit. The issue was the res judicata effect of findings in a state criminal or quasi-criminal proceeding upon a subsequent federal civil rights litigation. In *Burrison* and other cases, Judge Oakes has consistently favored a much narrower scope for the doctrine of res judicata than has the majority.[127] The issue has also caused a split between the Second Circuit and the Sixth Circuit,[128] and it has been the subject of scholarly dispute.[129] It seems odd that, faced with such a controversial question, the court should not treat the issues in comprehensive fashion[130] and publish that treatment. Nonpublication surely is inappropriate for cases concerning such a persistently troublesome issue.

It might be argued that the controversial issues in *Burrison* had already been treated by the court in published opinions. Additional publication of dissenting views arguably is unnecessary, as well as damaging to the collegiality of the court. But frequent public airing of disagreement is the only way to settle such stubborn disputes, and it may be the only way to attract sufficient attention from the Supreme Court to provoke a grant of certiorari.

After considering the principles underlying limited publication and separate opinions, it seems clear that the circuits should adopt

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[126] No. 78-7536 (2d Cir. Mar. 23, 1979).

[127] *See* Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.) (in which Judge Oakes disagreed with the majority, but concurred in the result because he felt he was bound by the "law of the circuit," *id.* at 522), *cert. denied*, 434 U.S. 834 (1977); Thistlethwaite v. New York, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 419 U.S. 1093 (1974); Tank v. Appellate Div., 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), *cert. 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*, 79 NW. U. L. REV. 859 (1976).

[130] The problem here is really more serious than nonpublication; the court's opinion contains about 120 words. The facts are omitted entirely and the entire legal discussion consists of three case citations. Judge Oakes joined the majority opinion, limiting his disagreement to the statement that he adhered to his position in *Turco*. This may well be an 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 published cases is nearly three times that figure. With few exceptions, when one court reverses another, it means that the system has not worked properly. Almost by definition, the opinion on appeal is of sufficient interest to warrant publication.

Some reversals reflect mistakes in routine matters on the part of district judges. The inability of judges to apply commonplace law correctly should be a matter of concern to all.[132] Including such reversals among the unpublished opinions conceals the problem. Earlier, we discussed several examples of unpublished opinions correcting plain error by the trial judge.[133] Another is *Wesley v. Green*.[134] The trial court had dismissed a complaint because venue was improperly laid, without establishing in the record the parties' residences. Any such error, however embarrassing, should not be kept from public scrutiny.[135]

Reversal on routine matters may signify more than poor craftsmanship by the trial judge. It may, for example, point to uncertainty about the content of governing law. The court of appeals may not publish a reversal because, to it, the governing law was clear; such may not be the perception of others. Put differently, the unpublished opinion may clarify precedent to such a degree that the opinion should be published. *Sanchez v. Califano*[136] was such a case. Its outcome turned on the allocation of the burden of proof in Social Security disability cases. The court of appeals thought the issue determined by its own published precedent. Although the court probably was correct, the precedent was hardly a

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[132] The major concern, of course, is a general interest in the quality of justice being dispensed. There may also be a more specific concern, however. An example would be a trial judge under consideration for elevation to a higher bench: if his reversal rate were abnormally high it might cause second thought. A high reversal rate was one of the problems that plagued Judge Carswell when he was nominated to the Supreme Court. See N.Y. Times, Mar. 6, 1970, at 24, 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 (9th Cir. Dec. 5, 1978) (failure to permit plaintiff to amend complaint once, which is a matter of right under Fed. R. Civ. P. 15(a)).

[135] A similar analysis applies to mistakes by federal law enforcement officials. Even a remand based on confession of error by the United States Attorney can be interesting enough to warrant publication. United States v. Martin, No. 79-5057 (5th Cir. June 7, 1979), 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 interested 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 non-affirmances 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. 77-1423 (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	1320	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 32% 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(e)(1)(i); 9TH CIR. R. app. ¶ 4(a); 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. e; 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(e)(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(e)(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(e)(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 839. 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(b)(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 1018 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 152 *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.

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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. Stepanak, J.D., for invaluable assistance throughout the encumbering course of the research, preparation and writing of the Article. Thanks also to John Hehman, 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 (1963). Mellinkoff 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 produceth 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. 302 (1974).

4. *See* 1st Cir. R. 14; 2d Cir. R. 0.23; 5th Cir. PUBLICATION PLAN; 4th Cir. R. 18(c); 5th Cir. R. 21; 6th Cir. R. 11; 7th Cir. R. 35-b (2d rev.); 8th Cir. PUBLICATION PLAN; 9th Cir. R. 21(c); 10th Cir. R. 17(c); D.C. Cir. R. Sct., Arriz. R. Sup. Ct. 48(c); Ark. R. Sup. Ct. 21-4; Cal. R. Ct. 976; Colo. App. R. 35(f); Conn. Gen. Stat. § 51-21 (1977); Del. Sup. Ct. R. 41(b); Ind. R. App. P. 15 A(3); Iowa Sup. Ct. R. 19(b); Kan. R. App. Pr. 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 (1977); 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 1976 through 1979.

Year	Filings	Total Terminations*		Terminations by Opinion**		Opinions Published	
	Number	Number	%	Number	%	Number	%
1976	7,201	6,215	87.10	4,074	64.20%	195	4.54
1977	7,392	7,029	92.22	5,357	67.31%	218	4.08
1978	7,546	7,396	97.61	5,047	68.50%	184	3.59%
1979	7,991	7,576	98.52	5,330	70.29%	177	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.

** "Terminations by opinion" includes all cases in which the court filed a signed opinion or a per

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.).

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 merit 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	6,315	97.04%
1977	139	7,929	98.25%
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)-(e). The high peremptory writs include quo 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.* § 4903.13 (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 coverage of official and unofficial publications, see [illegible] & Leach, *Ohio's Reported Decisions — An Integrated System*, 11 Ohio St. L.J. [illegible] (1950); Ingber, *Update on Ohio Judicial Reporting*, 31 Ohio St. L.J. 677 (1970).

In addition, the following computer systems store Ohio cases: Lexis, operated by Mead Data Central, which stores only opinions that are officially published; and Westlaw, operated by West Publishing Company, which stores only those 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 1954).

24. *See* note 6 *supra*.

25. *Id.*

26. Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts 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 Doran F. Seiger, then President, Ohio State Bar Association (OSBA), to Honorable Gilbert Bettman, then Presiding Judge, Ohio Court of Appeals, First Appellate District (Aug. 28, 1981).

28. Through Ohio Fed., 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 policy on publication of lower court opinions appears to be that an opinion will not be reported if the supreme court accepts the case for review, if it exceeds fifteen to twenty 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 1981).

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. Shaw, *The Legal Significance of the Unpublished Cases of Appeal*, Opinion [illegible] Case L. J. Law 303 (1977); 1 Ohio St. L.J. 137 (1935).

33. Cleaning Soc. Equip. Assoc. Co., 154 F. 2d 961 (1946); State v. Grange, 50 Ohio App. 2d 207, 362 N.E. 2d 1223 (1977). But cf. Berger, Ohio Sup. Ct. R. Prac. V, 3 (E) (proposes that an appendix to an appellant's brief may contain "complete copies of any unreported case cited"). *See also* Ohio Sup. Dist. Ct. App. R. 19.

34. Letter from Paul Richert, Law Librarian, University of Akron School of Law, to Ohio law librarians (Feb. 6, 1980). Richert 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. Richert, *supra* note 29, at 630 [illegible].

36. See, e.g., 16 Ohio Assoc. for Civil Trial Attorneys [illegible].

37. Letter from Paul Richert, 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. 14, 1981).

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 appeals 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. § 1701.1 (Page Supp. 1984).

(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 § 1183, was adopted in 1919.

41. P. CARRINGTON, D. MELTZER & M. ROSENBERG, JUDICIAL OPINIONS AT ISSUE 7 (1971) [hereinafter referred to as CARRINGTON]; Kramer, *The Unpublished Appellate Opinion: Justice?*, 18 CASE W. RES. L. REV. 797 (1967); Newberry & Wilson, *Rule 23: Unprecedented and the Disappearing Court*, 32 ARK. L. REV. 57 (1978); *Limited Publication*, *supra* note 3; *Non-Precedential Precedent*, *supra* note 4; Silverman, *The Unpublished Opinion: A Dilemma*, 51 CAL. ST. B.J. 33 (1976); Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A.J. 1247 (1978); Note, *Unreported Decisions in United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977) [hereinafter cited as *Unreported Decisions*].

42. See article 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 "last decision blindly. What certainty 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, 900-01, 384 N.Y.S.2d 419, 425 (1976); State v. Pugh, 43 Ohio St. 98, 123, 1 N.E. 439, 454 (1885); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409, 414 (1924). Its flexibility allows the courts to be guided through the complex affairs of men by the polestar of justice, because it calls for a consistency in the law that will be modified or overruled only by decisions carefully made, reduced to writing and openly available.

43. Carrington, *supra* note [illegible], at [illegible]; Newbern & Wilson, *supra* note 41, at 50-51.

44. *Limited Publication*, *supra* note 1, at 816-21.

45. Kanner, *supra* note 41; Newbern & Wilson, *supra* note 41, at 54-55; *Limited Publications*, *supra* note 1, at 827.

46. Newbern & Wilson, *supra* note 41, at 53. There are few empirical studies of 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 50 *infra*.

48. The concepts underlying the discussion in this section draw extensively from the Model Rule [illegible] *Proposed Publication Rule*, *supra* note [illegible], at 837.

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. Publications Plan para. 1a; 3d Cir. Publications Plan (presumption favors publication of signed opinions and disfavors publication of per curiam opinions); 6th Cir. Publications 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. COMMISSION, *supra* note 11, at 31-41; Smith, *The Selection of Opinions for Publication: An Ohio Court's Experience*, 32 Ohio St. L.J. 295, 313-14 (1971).

52. West Publishing Company has been designated the official publisher of opinions 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;
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> 2) applies an established rule of law to facts significantly different from those in previous published applications of the rule;
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> 3) explains, criticizes or reviews the history of existing decisional or enacted law;
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> 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. Publication Plan para. 1; 7th Cir. R. 21; 8th Cir. Publication Plan para. 2; Conn. Gen. Stat. § 51-21 (1977); Del. Sup. Ct. R. 41; 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. 6.

57 D.C. Cir. Publication Plan; 4th Cir. R. 18(a); 7th Cir. R. 35(e); 8th Cir. Publication Plan para. 4; 9th Cir. R. 21(b); Ark. R. Sup. Ct. R. 21-1; Cal. R. Ct. 976 (b); Ind. R. App. P. 15 A(2); Neb. Rev. Stat. § 24-208 (1979); 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, 1973); 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 disposing 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 88-89. The author has taken the liberty of changing "circuit" to "district" in (1) and of adding the words "or the Ohio" in 9(a) and (b). For another model rule, *see* ABA COMM. 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 (reserving the ability in a single judge to vote a decision not to publish); 1st CIR. PUBLICATION PLAN para. [illegible] consideration to be afforded the author [illegible] determination concerning the decision to publish); 3d CIR. PUBLICATION PLAN para. 2 (author may suggest nonpublication but this is not binding on the majority); 4th CIR. R. 18(b) (published if majority or author find that it meets one or more of the publication criteria); 5th CIR. R. 21; 6th CIR. PUBLICATION PLAN para. 2 (certain types of cases are invariably published; those subject to a measure of discretion are published by majority vote); 7th CIR. R. 35(b)(1)(2) (decided by majority, notwithstanding the right of a single federal judge to make an opinion available for publication although he is expected ordinarily to abide by the majority's decision regarding publication); 8th CIR. PUBLICATION PLAN para. [illegible] (majority decides generally but a judge may make any of his decisions available for publication); 9th CIR. R. 21(c); 10th CIR. R. 17(c); ARK. R. SUP. CT. 21-2; CAL. R. CT. 976(c) (subject to an order to publish from state supreme court).

62. DEL. CODE ANN. tit. 10, § 1961 (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. KY. R. CIV. P. 76.28(4)(a); 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.[66]

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(d); 3D CIR. R. 21(6); CAL. R. CT. 976; WIS. R. APP. P. 809.23(3).

66. See note 21 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. 0.22, 6TH CIR. R. 11; COLO. APP. R. 35(f); KY. R. CIV. P. 76.28(4)(c); OHIO 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) (iv), 8th Cir. Publication Plan, para. 3; 9th Cir. R. 21(e); Mass. R. Civ. App. P. 2(c); Nev. R. Sup. Ct. 21.4; Cal. R. Ct. 977; Iowa Sup. Ct. R. 10(f); Ind. R. App. P. 15(A)(e); Kan. S. Ct. App. Ct. No. 7-04; Wis. R. Civ. P. 809.23(3).

70. Research has disclosed no statute or rule expressly allowing unlimited citation.

71. *See* text accompanying notes 42-46 *supra*.

72. 4th Cir. R. 15(d), 10th Cir. R. 17(e), Ill. Uniform Ad. and L.R. App. Cts. 8(e). *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; Newberry & 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:
73-2561 TELESERV

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.

R. 621a

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JOHN A. PACE
LEWIS CHANDLER
GERARD B. RICKEY
JONATHAN A. PACE

TELEPHONE
AREA CODE 214
741-8988

June 29, 1984

TO: Committee of Administration of Justice
Committee of Consumer Law
Committee of Individual Rights & Responsibilities

RE: T.R.C.P. Rule 621a

Dear Committee Members:

I am sending to the members of the above committees copies of a proposed resolution in connection with Rule 621a T.R.C.P. which I believe should be approved.

If you believe this is a matter which might be under the jurisdiction of your committee, I would appreciate your considering it.

I hope to be in San Antonio for the meeting of the Texas Bar, but other problems may prevent my attendance.

Yours very truly,

John A. Pace

JAP/dvb

Enclosure

RESOLUTION

It is submitted that the provisions of Rule 621a, Discovery in Aid of Enforcement of Judgment, T.R.C.P., do not protect the judgment debtor's rights to privacy but instead make him and the assets of his business fair game to an unscrupulous judgment creditor who has obtained a judgment.

The provisions of Rule 621a authorize the judgment plaintiff to give notice for depositions to enforce the judgment immediately after entry of the judgment. Such a course of discovery can be followed regardless of the finality of the judgment or the rights of the judgment debtor to supersede the judgment under the provisions of Rules 364-368, T.R.C.P.

Art. 627, Time for Issuance, provides "If no supersedeas bond . . . has been filed . . . the clerk of the Court shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed" or motion for new trial overruled.

These rules do NOT require the judgment to be final nor do they require that an execution be issued so the judgment debtor can supersede the judgment. The rules make available to the judgment creditor all of the information which could be secured by deposition prying into his personal and business financial affairs in a manner so thorough and detailed as to lay bare to the judgment creditor all of the business facts and assets of the judgment debtor. An example of the detail of inquiry for a subpoena duces tecum is attached as an exhibit.

This certainly was not the intent upon the issuance of Rule 621a.

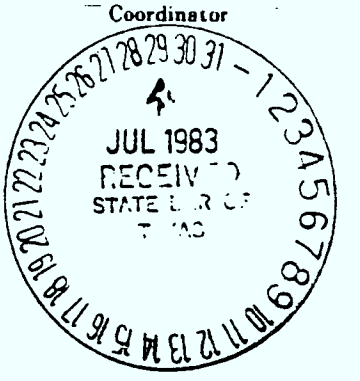
It is believed that discovery proceedings in aid of a judgment should not be authorized until AFTER the issuance of an execution so the judgment debtor can have the right to protect from the prying eyes and ears of creditors and adversaries the innermost facts of his business. The rule should be amended to require that execution be issued BEFORE the discovery proceedings. This gives the judgment debtor the right to keep private his personal and business affairs.

WM C. MARTIN, III
Judge
214-758-6181

MARGARET KUHN
Reporter
PATT LINDSEY
Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601



July 27, 1983

Honorable Hubert W. Green
Attorney at Law
900 Alamo National Bank Bldg.
San Antonio, Texas 78205

Re: Suggested Change to Rule 680

Dear Mr. Green:

Enclosed is a copy of my proposal made on July 6 to Justice Pope and his reply to me. I am forwarding a copy also to Judge George Thurmond in Del Rio and to Professor William Dorsaneo.

As we discussed in our conversation Tuesday, it is difficult for me to visualize how to get interest in this change drummed-up from trial court judges. About the most I can say is that the change will enable them to pattern temporary restraining hearings according to the needs of their courts and their constituencies. Nobody runs court on a 10-calendar-day schedule.

I don't believe that any of the other trial court judges are using the kind of setting system I use, and it is difficult to ask them to fly in the face of present Rule 680. For about 10 years, I "interpreted" the rule to read as I have proposed the change and it is thoroughly accepted by the lawyers in this area who practice regularly in this court. Of course, it could well be that if the local rule was for everyone to go shirtless on Tuesday, the bar would finally get used to it, but I really believe the change would be beneficial as applied to any temporary restraining order -- not just those in Family Law.

In the past, when I urged the change in regard to Family Law cases only through a change in Chapters 3 and 11 of the Family Code, the response from the Family Law Section and the legislative committees of the House and Senate has been that the change should be of general application and that the rule should be modified rather than having a special procedure for Family Law cases. I concur with that view and think that the change would be particularly helpful for courts of general jurisdiction and multi-county courts. I will phone anyone, correspond with anyone, or appear before any subcommittee or full committee that has the change under consideration. I will appreciate hearing from any member of the committee or the Rules Advisory Committee of the Supreme Court.

Kindest regards,

Wm. C. Martin, III

WCM:pl
Encl.
cc: Judge George Thurmond
Professor William Dorsaneo
Ms. Evelyn Avent

M. C MARTIN, III
Judge
214-758-6181

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July 6, 1983

Honorable Jack Pope
Chief Justice
Supreme Court of Texas
Austin, Texas 78710

RE: Proposed Change in Rule 680, Temporary Restraining Order

Dear Judge Pope:

For several years I have had in mind a proposal for changing Rule 680. Although I have mentioned it in various quarters, my ineptitude has prevented my finding the proper forum and procedure to advance the proposal. Therefore, I am writing you directly in the hope that you will put the matter in the proper channels and let me know what to do next to advance the proposal.

The proposed changes arise out of my experience with matters under the Texas Family Code, but the problems with the Rule and the benefits of the proposed change would relate to other Temporary Restraining Orders (hereafter TRO) as well. The volume of family law litigation merely exaggerates the visible effect on trial court litigation and court administration.

The primary problem with the administration of Rule 680 in its present form is the expiration of the TRO within 10 days of its being granted by the court's signature. The time for expiration should run from service of process or appearance for the following reasons:

a. A TRO does not govern a party defendant or respondent until receipt of personal notice of its terms, so the existence of the order cannot inconvenience anyone until notice (which is usually documented by service of process because of the difficulty of documenting notice otherwise).

b. A party inconvenienced by a TRO can, under the presently worded rule, appear and demand an early hearing. This practice should be encouraged in preference to the present dominant ploy (i.e., evading service in the hope the TRO will expire before documentable notice is received).

c. The "ten days from granting" rule guarantees that a good number of TRO's will expire before service or so short a time after service (less than three days, Rule 21, TRCP) that the party restrained would be entitled to continue the hearing as a matter of right, while requiring that the plaintiff or petitioner be prepared at all times to proceed with testimony.

d. Although there is no quarrel with ten days as a reasonable length of time, combined with the expiration time running from "granting", the expiration day often falls on weekends or holidays.

e. A corollary to c. and d. above is that running the expiration from service or appearance allows the court to set a particular date and time in the week to hear these temporary and emergency matters. (For instance, I use the phrase "first Thursday after the expiration of three days following service hereof at 9:00 o'clock a.m.") Any day of the week will count the same way and will allow the court and the bar to pattern its practice accordingly.

f. A further corollary to e. above is that by local rule the trial court could provide for hearing on the pattern day and time a week earlier if the party restrained wants an earlier hearing or becomes confused and appears earlier. The trial court could also provide for obtaining an emergency hearing under such statutes as Family Code Sections 11.11 and 3.58.

Two further matters need to be addressed in the rule.

1. The rule should expressly provide for extension and resetting by the trial court on the docket sheet instead of by written (i.e., minuted) order. This repetitive paper work accomplishes nothing by way of due process notice and runs up costs and attorney fees unnecessarily. It is especially burdensome to the litigants, the bar and the trial court in view of the present running of the expiration time limit and often results in process

having to be recalled so that the extension and resetting can accompany it. If service must be accomplished by mailing to an out of county sheriff or constable, the logistics are nightmarish. If service of process is by certified mail under the rules, the logistics are impossible. This change is somewhat less important if expiration runs as I have suggested above, but it will alleviate the necessity for preparing a detailed, minuted order to last a week or less.

2. The requirement for entering the reason for extension and resetting of record should be eliminated unless the party restrained appears and excepts to the continuance. This change is for the same reason as the change suggested above. It adds nothing of value to the person restrained and is a burdensome formal requirement to keep the TRO in effect.

The Rule as it is written has become the subject of the lowest forms of ambush practice and advantage seeking. Restricting the power of the trial courts to issue emergency orders corrects some abuses by inviting others. The answer lies in phrasing the Rule so that the trial courts can administer it in a fair and orderly manner and afford timely hearings. A suggested rephrasing of the rule is enclosed.

I would appreciate knowing how to get the proposed changes considered and will travel at my own expense to confer or to testify.

Kindest regards,

Wm. C. Martin, III
Judge, 307th Family District Court, Gregg County, Texas

WCM:mk
Enclosure

RULE 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after service of process or appearance of the party restrained, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period by action of the trial court or agreement of the parties contained in a written order or noted on the docket sheet unless the party against whom the order is directed consents that it may be extended for a longer period. ~~The reasons for the extension shall be entered of record.~~ In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

WM. C. MARTIN, III
Judge
214-758-6181

MARGARET KUHN
Reporter
PATT LINDSEY
Coordinator

The Family District Court

307th Judicial District
Gregg County, Texas
P.O. Box 8 • Longview, Texas 75601

January 27, 1984

Honorable James P. Wallace
and The Supreme Court of Texas
Austin, Texas 78711

Honorable Hubert W. Green
and Members of the Committee
on the Administration of Justice

Re: New Version of Rule 680 and 683
Effective 1 April 1984 -- AGAIN!

Honored Court and Committee:

During July and August, 1983, I sent the enclosed suggestion regarding Rule 680 to Chief Justice Pope, then at his suggestion to Mr. Green and other members of the Committee on the Administration of Justice. The suggestion appeared to be well received, and I have awaited the time with patience for the Rule to be considered for revision.

Having been assured that I was addressing the correct forum and was in the process, I was shocked to find the new model Rules 680 and 683 in the January 17 West's TEXAS CASES. After a few days, I called Professor Dorsaneo and discovered that the new version of the Rule was adopted by the Committee on the Administration of Justice back in 1982. Apparently my letter has not come to the attention of the Committee or the Court.

At this point, I hesitate to write because the following polemics may be viewed as pejorative. Let me say that they are not meant to be so. They are presented in the spirit I believe Chief Justice Pope has evoked in his presentations to the Judiciary and to the Legislature, out of a concern for the way our system of justice works at the trial court level and out of thirteen years of experience as a trial court judge.

First, I am not sure either the Committee or the Court can be aware of the impact of Rules 680, et seq., on the trial court docket because of the dearth of statistical information available. Temporary restraining orders may be relatively rare in most civil disputes, but they are commonplace in litigation under the Family Code, which may well constitute half of the civil litagation in the trial courts of Texas. I underline "may" because it is impossible to tell from the structure of the reports filed by the district clerks what the scope of the family law docket is. Only the filing and final disposition of divorce cases is singled out for counting. The

approximately thirty other kinds of cases are scattered among the "non-adversary" category (including at least three matters on which there is an absolute right to a jury trial) and "show causes" (which include at least two matters on which there is an absolute right to a jury trial, but no place on the form to report one).

I digress to stress these matters only because, from the report of the clerks and the Office of Court Administration, both the Committee and the Court would be justified in believing that temporary restraining orders have a very narrow legitimate application in civil litigation. In fact, under the Family Code, temporary restraining orders, temporary injunction hearings and enforcement proceedings are available in eight different categories of suits and constitute 18% of the hearings in this court, which disposed of 70.6% of all civil matters in this county in 1983, by our actual count. Supposing this county to be typical, practice under Rules 680-693 is a very significant part of trial practice in this State, both in terms of numbers of hearings and the time they consume in the trial courts. If this hearing volume is to be handled with justice, efficiency and dispatch and is to be kept within reasonable economic bounds so that effective access to the courts is widely available, close and informed attention needs to be paid to this section of the rules.

Second, if the new rule changes effective April 1 were recommended by the Committee as early as 1982, then I would suppose they were put forward as early as 1981, and I would suggest that any "evils" or "abuses" they would have been designed to redress were probably addressed by legislative changes to Family Code Sections 3.58, 3.581, and 11.11 in the 1981 and 1983 sessions. The requirements for and scope of ex parte relief were extensively addressed, especially in 1983. The changes effective April 1, 1984, run counter to the thrust of those amendments. Is the Court really out of countenance with the legislative changes, or has delayed implementation resulted in "fixing" something that is no longer "broken", and that in an inappropriate manner?

Certainly, the Rules and the practice under them need attention and revision, especially in their application to family law litigation, as my enclosed correspondence discusses. This raises the question whether family law should be excluded from operation of the Rules, at least as regards ex parte equitable relief and turned over to the legislature to regulate, or should be kept in the mainstream of civil rules application. I understand that there may be some tension involved in both efficiently handling a major and qualitatively different part of the trial docket and keeping the civil rules applicable to all civil litigation. My letter of July, 1983, is premised on keeping family law procedure in the mainstream. If this is to be acomplished, the Rules must be evaluated for their effect on practices in this 18% of

the trial docket. The only reasonable alternative is specifically to exempt litigation under the Family Code from operation of Rules 680-693.

Third, on the merits of the changes to Rules 680 and 683, the problem of extensions is discussed in my July, 1983, letter. Limiting the extensions would usually be unnecessary if the expiration date ran from notice to the party restrained, and more especially on a seven or fourteen day schedule. The Gregorian calendar, which predates our State constitution by some centuries, just does not accommodate a ten-day work cycle. The requirement that reasons for extensions shall be entered of record, if taken seriously, will require a weekly "no service" docket call and entry of written orders, involving extra, totally useless appearances of counsel, higher fees and costs and fatter court minutes to no real effect except to prevent expiration of a fiat that is not effective until notice in any event. Continuing present pleading formalities in a revised Rule raises the question whether the Court is overruling the legislative changes to the Family Code cited above.

In regard to Rule 683, the requirement that every temporary injunction include an order setting the final hearing is impracticable and unnecessary. Injunctive relief is both adjusted and usually made mutual at a contested temporary hearing. Final hearings are governed by sixty day, thirty day or twenty day minimum filing and notice requirements which are often longer than the trial court's average "request-to-hearing" lag. Few counsel on either side are in a position to respond meaningfully to a proposed setting for final hearing at the temporary order hearing.

I regret the nagging, preachy tone of this letter. I am at a loss to know how else to assist, as I am obliged to do under Canon Four. I confess that if the Committee and the Court are disinclined to consider this matter, I may follow the tongue-in-cheek suggestion of a colleague and start following the Rules just as they are written. As he remarked, "That'll fix 'em! The whole d----d docket will fall apart."

As an example of how far typical trial court thinking on the matter diverges from the spirit of the new Rules, I enclose an actual set of local rules from a set of courts in another Texas county (identity blanked). I'm not sure I would go as far in streamlining as they have, but you can imagine what they will say about the new Rules if they do decide to write.

The cumbersome procedures set out in the Rules have already resulted in enactment of Title 4 of the Family Code. Title 4 "invented" and limited existing equitable remedies. It is in conversation neither with the Rules nor with the scope of

injunctive relief and enforcement generally existing in Texas law. The additions to the Rules worsen the situation to which Title 4 was a response. If this keeps up, we can expect more of the same responses and can almost guarantee an unwanted increase in the criminal caseload from domestic violence.

Sincerely and Respectfully,

Wm. C. Martin, III

WCM:pl
Encl.

Rules 680 & 683

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ROBERT E. HOLMES, JR.

February 10, 1984

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

Revision of T.R.C.P. 680 and 683

Dear Mr. Soules:

I am sorry we have been unable to make contact by phone in order to discuss possible revisions of Texas Rules of Civil Procedure 680 and 683.

On Friday, February 3, 1984, I had a conference with Associate Justice James Wallace of the Texas Supreme Court regarding what I perceive to be possible problems with rules 680 and 683. These problems came to light when I was meeting in my capacity as Chairman of the Family Law section with the committee revising the Family Law Practice Manual.

It came to our attention that the January 1, 1981 version of rule 680 dealing with temporary restraining orders provided:

> "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed ten days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period of time."

The new rule as promulgated in the February issue of the Texas Bar Journal provides:

> "No more than one extension may be granted unless subsequent extensions are unopposed."

This new provision works an undue hardship in many cases involving family law. Temporary restraining orders are issued in better than fifty percent of the cases that are expected to be contested. It is not unusual for these ten-day restraining orders to expire prior to service being affected, particularly in metropolitan areas where large numbers of papers must be served. The problem is not limited to merely divorce cases but cuts across many areas of family law including suits affecting the parent-child relationship, Title IV suits for the protection of families, annulments and suits to declare marriages void as well as after-judgment suits for clarification and to enforce orders regarding property division.

I have discussed this problem with several of my colleagues on the Family Law Council who are involved in drafting the Family Law Practice Manual. It is our suggestion that Rule 680 be amended to read as follows:

> "No more than one extension may be granted unless subsequent extensions are unopposed <u>except in suits governed by the Texas Family code</u>."

I can likewise envision that this provision might cause problems in other types of litigation and I only address the wording of the language as it would affect the family law practice.

We likewise have a problem with the proposed change to rule 683 because the following language was added which had not previously been a part of the rule:

> "Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought."

This language also causes considerable problems for the family law practitioner. In most cases where

temporary restraining orders are granted they are generally followed by some form of a temporary injunction which, as a general rule, is not carried over into a permanent injunction. The state of the crowded dockets and the nature of the type injunctive relief generally sought in family law cases does not lend itself to a setting on the merits at the time of the granting of the temporary injunction. Again our suggestion would be that the proposed rule will be amended to read as follows:

> "Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought except in suits governed by the Texas Family Code."

Again I would think the language in the rule as now proposed would cause problems for judges, attorneys and litigants involved in other types of litigation other than family law.

I have written this letter at the suggestion of Mr. Justice Wallace. I have also discussed this problem with our family law council representative in San Antonio, Mr. John Compere, whose phone number and address is The North Frost Center, 1250 Northcast Loop 410, Suite 725, San Antonio, Texas 78209, 915/682-2018. I would invite your thoughts regarding these proposed recommended changes or other language that would cure the problem. If either myself or Mr. Compere can be of assistance in anyway regarding this matter please feel free to call. I have likewise written a similar letter this one to Hubert Green, Chairman of the Administration of Justice Committee.

Respectfully,

Kenneth D. Fuller

Kenneth D. Fuller

KDF/kap

cc: The Honorable William C. Martin, III
Judge, 307th District Court, Greeg County, Texas
John Compere
Scott Cook
Larry Schwartz
Harry Tindall

IRVIN & RAY
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January 16, 1985

Luther H. Soules, III, Esq.
Soules, Cliff & Reed
Attorneys at Law
800 Milam Building
San Antonio, Texas 78205

Re: Revisions to the Texas Rules of Civil Procedures,
Especially Rules 738 through 755,
Forcible Entry and detainer Rules

Dear Mr. Soules:

Congratulations upon being named to chair the Advisory Committee to the Supreme Court of Texas concerning revisions to the Texas Rules of Civil Procedure. Our Chief Justice and his companions on the Court have shown a great deal of confidence in you.

This firm has its own peculiar area of expertise and would like to volunteer to assist you in the area of Rules 735 through 755, concerning forcible entry and detainer suits. During the past few years we have filed over six thousand forcible detainer suits. This experience has shown the two of us where the problems lie in eviction suits at this time and where improvements to the rules might assist the administration of justice. I should also add that our firm specializes in landlord-tenant law, representing the owners/management of something over seventy-five thousand residential and commercial rental units.

The attorney for the Texas Apartment Association, Mr. Larry Niemann of Austin, Texas, has brought to our attention the fact that he intends to request a number of changes to Rules 789 through 755 from the Supreme Court in the near future. Assuming that such request(s) are sent to you for examination, our firm would gladly assist in the evaluation of the same, if such be your wish.

Your consideration of our offer would be greatly appreciated.

Very truly yours,

Jefferson J. Irvin

Robert N. Ray

JJI/fs
RNR/fs

NELSON, WILLIAMSON & YAÑEZ

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June 2, 1983

Mr. Jack Eisenberg, Chairman
Committee of Administration of Justice
P. O. Box 4917
Austin, Texas 78785

RE: Rule 792

Dear Jack:

This letter is written as a report on the action of the subcommittee you appointed in response to a letter from a Texas attorney concerning Rule 792. This rule requires the opposite party in a trespass to try title action, upon request, to file an abstract of title within twenty days or within such further time as the court may grant. If he does not, he can give no evidence of his claim or title at trial. The attorney suggests that the the obtaining of an abstract of title in a trespass to try title action should done under the discovery rules which govern other civil cases.

The subcommittee noted that bringing the action as a declaratory judgment or simple trespass action, would have such an effect.

The attorney who requested the change was contacted. It seems that his real concern is that Rule 792 operates as an automatic dismissal of the opposite party's claim or title unless the abstract of title is filed within twenty days or an extension is obtained. In Hunt v. Heaton, 643 S.W.2d 677 (Tex.1982), the defendant in a trespass to try title action answered the petition by answering not guilty and demanded that the plaintiff file an abstract of the title he would rely on at trial. The plaintiff did not request an extension of time to file the abstract. Five years after the demand and 39 days before the trial, the plaintiff filed an abstract. The supreme court upheld the trial court's refusal to allow the plaintiff any evidence of his claim or title.

The concern is that in a trespass to try title action Rule 792 operates to cause an automatic dismissal of the opposite parity's claim or title unless the abstract of title is filed within twenty day or an extension is obtained.

The subcommittee believes that the harshness of Rule 792 can be eliminated if, prior to the beginning of the trial, there must be notice and a hearing. Then the court may order that no evidence of the claim or title of such opposite party be given at trial, due to the failure to file the abstract. The following amendment is suggested for consideration:

791 - 798

Rule 792. Time To File Abstract
Such abstract of title shall be filed with the papers of the cause within [~~twenty~~] thirty days after service of the notice or within such further time as the court on good cause shown may grant; and in default thereof after notice and hearing prior to the beginning of the trial, the court may order that no evidence of the claim or title of such opposite party [~~shall~~] be given on trial.

The attorney who wrote the letter requesting the changes would welcome the opportunity to address the committee in person.

Sincerely yours,

John Williamson

JW:ps

cc: Evelyn Avent
Jeffery Jones
Orville C. Walker

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KARL C. HOPPESS

January 27, 1983

Honorable Jack Pope, Chief Justice
Supreme Court of Texas
Supreme Court Building
Post Office Box 12248
Austin, Texas 78711

Re: Rule 792 - Abstracts of Title

Dear Judge Pope:

Due to my active participation in the trial of land litigation matters, it has become apparent over the past years that in certain counties in Texas today the obtaining of an abstract of title is impossible unless prepared by the attorney himself. As an example, in Brazos County the Clerk no longer has the capability or the time to aid in the compiling of an abstract of title without the attorney having to personally pull all records, set up special dates, remove the records in the presence of the Clerk, make copies at his own location, and thereafter obtain the various indices of said documents and the appropriate certification, after having presented each of those documents and the recording legends to the Clerk. For this reason, although Rule 792, of course, expands the time for which an abstract can be filed in a trepass to try title case from twenty days to that which the Court finds reasonable, it appears to me that serious consideration should be given to the question of putting this discovery under the same rules as that related to other discovery. I am fully aware of the reason for Rule 792; however, in my opinion, the rule is more and more frequently used not for the purposes of discovery, but where the defense counsel is aware that the availability of the County Clerk's books and records are almost nonexistent and there are no abstract services available to plaintiff's counsel, especially if it involves issues of title of minerals, to harass and put undue pressure on plaintiff's counsel. This can be especially unjust and onerous when the defendant is a trespasser with little or no indicia of title. I am certainly in agreement that no one should be able to prosecute a trespass to try title action without proper facts and circumstances surrounding his right of title and that he should be prepared to prove that title to the exclusion

of all others. However, I feel that the urbanization of the State of Texas has created circumstances that are far removed from those that existed when Article 7376 was originally passed by the Texas Legislature and strong consideration should be given as to putting the plaintiffs and defendants on more equal footing regarding the discovery procedure in this type of action.

I congratulate you on your recent appointment as Chief Justice of the Court and extend to you best wishes from both myself and my father.

Sincerely yours,

Karl C. Hoppess

KCH/lsb

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August 25, 1983

Mr. Michael A. Hatchell, Chairman
Committee on Administration of Justice
500 1st Place
P. O. Box 629
Tyler, Texas 75710

RE: COAJ; Rule 792

Dear Mike:

I attach the report of the subcommittee appointed to study Rule 792 and the attorney's correspondence that requested the revision. At the June 4, 1983 meeting there was discussion that:

1. Trespass to try title pleading requirements be done away with and,
2. If TTTT is retained, that the Abstract be filed at least thirty (30) days before trial.

I did not want the consideration of Rule 792 to fall through the cracks due to the summer inactivity.

In another vein, this summer I called my state representative, Rene Oliveira, to ascertain whether or not House Bill 1186, adopting a "Civil Code," had been vetoed by the governor. I was informed that it had. Rene, who is an attorney, then proceeded to tell me that not only the sponsor of the bill but many of the legislator's noses were bent out of shape by what they perceived to be "after the fact" and "behind the scene" maneuvering by the bar to have the bill vetoed. I explained the circumstances of the bill being introduced late in the session as unopposed, that the bill contained various conflicts with existing substantive law, and that further study was essential. That triggered his observation that the bar's efforts at informing itself and the legislators were dismal.

It is suggested that the chairman or a member of the Judicial Affairs Committee be appointed as either a member or liaison member of the COAJ.

As far as the Bar in general, I believe that Blake Tartt has the experience and expertise to insure that the Bar has outstanding legislative advisors for the next legislative session.

Sincerely yours,

NELSON & WILLIAMSON

John Williamson

JW:lw

Enclosures

cc: The Honorable Blake Tartt, President
The Honorable Rene O. Oliveira
Mrs. Evelyn A. Avent

LAW OFFICES

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April 17, 1985

Luther H. Soules, III
800 Milam Bldg.
San Antonio, Texas 78205

Re: Attorney of Record

Dear Luke:

In 1972, you advised me to never sign a pleading in court with the name of the firm, and to only sign the pleading in my name as an individual attorney. You advised me that if the firm name was subscribed to a pleading, then the Court could call any lawyer in the firm to come try the case in the event the trial attorney to whom the case was assigned had a conflict in another court.

On January 24, 1985, the Ft. Worth Court of Appeals issued its decision in A. Copeland Enterprises, Inc. v. Tindall, 683 S.W.2d 596. The Court, at page 599, makes the following statement:

> Logic dictates that an attorney who enters an appearance in a lawsuit does so on behalf of his firm as well as himself. When Appellants retained counsel it is reasonable to assume they retained the firm as a whole to represent their interest and not one particular attorney.

I first saw the case reported in Texas Lawyers Civil Digest, Volume 22, No. 8, at pages 4-5, which was published February 25, 1985.

In the above-cited case, it is not clear from the opinion how the appellants subscribed the Plaintiff's Original Petition. The court states that there were only two pleadings which were signed by appellant's counsel: a Motion to Reinstate and a Request to Enter Findings of Fact. In the Motion to Reinstate, the attorney of record was the law firm name and beneath it the signature of the attorney. The Request to Enter Findings of Fact had the attorney's name first and contained the name of the firm below the attorney's signature.

Recently, I experienced an incident where I was already set for trial in Dallas, and then Courts in Victoria and Brownsville set me for trial and hearings on the same date. The Victoria and Brownsville trial notice settings were subsequent to the Dallas trial notice setting, which was prior in time. In both instances, the Deputy Clerks of the Court made reference to the above-cited case and what they had read in Texas Lawyers Civil Digest, Volume 22, No. 8, at page 4.

The Copeland case has to do with the dismissal of a case for want of prosecution under Rules 165a and 306a, and the notice to the attorney of record pursuant to those rules. However, I have already seen and suspect that we will see more courts applying the case for purposes of resolving conflicts in court settings by taking the above-quoted language from the case to direct that someone from the law firm must appear in spite of a conflict in settings for the trial attorney.

The above-cited case is bad enough regarding the way the court interprets "attorney of record" for the purposes of Rule 165a and 306a. I would request that the Rules Advisory Committee, of which you are Chairman, amend the Rules to override the decision in this case regarding notice and dismissal for want of prosecution under Rules 165a and 306a.

I had a similar experience in Frio County. Stanley L. Blend signed and filed a petition in Frio County. A notice of docket call was sent to the law firm of Oppenheimer, Rosenberg. It was not addressed to Stanley L. Blend. The notice of docket call did not contain the law firm name or the name "Stanley L. Blend." The notice did not get to Stanley L. Blend because it was not addressed to him and his name was not contained on the docket notice, nor was the firm name contained on the docket notice. Needless to say, no one showed up at the docket call, and the case was dismissed for want of prosecution.

On a Bill of Review, the evidence was developed that the notices had been sent only in care of the firm name Oppenheimer, Rosenberg, which name did not appear in any of the pleadings. The only name that appeared in the pleadings was that of Stanley L. Blend.

Then the Court started listing the name of the subscribing attorney on subsequent docket call notices, but still only addressed the envelope containing the docket call notice to

the firm name and not to the attorney whose name was subscribed to the pleadings. Consequently, when you receive the docket call notice, you must look through the notice to see if any lawyers in the firm have cases on the docket.

On Bill of Review, the above-referenced case in Frio County was reinstated and ultimately settled to the satisfaction of the client.

The holding in the Copeland case at page 599 regarding what logic dictates is not well founded. In my experience, the statement of logic by the Copeland court at page 599 is the exception rather than the rule. Most clients who hire attorneys in our firm never ask about the law firm with which we are associated. In fact, many clients could care less about the law firm. The client is interested in you as their attorney.

I am now aware of court officials in at least two courts having taken the holding in the Copeland case and used it to resolve conflicts where counsel was set in more than one court on the same date. Court officials who use the Copeland case to tell you to send someone else to try the case are not being realistic, because it is unrealistic and illogical to assume that when a client retains counsel they retain the firm as a whole to represent their interests and not one particular attorney.

Accordingly, I request that Rule 10, defining "attorney of record," be revised to make clear that when a lawyer enters an appearance in a lawsuit in his name alone, he does so on his behalf only and does not enter an appearance on behalf of the law firm unless the firm name also is subscribed to the pleadings.

If you agree with my analysis, please bring this matter before the Rules Advisory Committee in order to achieve a change in the court's decision regarding Rules 165a and 306a, and to change Rule 10 to prevent the Copeland case from being used against counsel when there is a conflict in court settings.

Very truly yours,

Reese L. Harrison, Jr.

RLHJr:lv

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TEXAS BOARD OF LEGAL SPECIALIZATION

February 27, 1985

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, Texas 78711

Re: Proposed amendments to Rules 106 and 107, T.R.C.P.

Dear Evelyn:

Enclosed herewith are proposed amendments to Rules 106 and 107 of the Rules of Civil Procedure.

Also enclosed, as background material, is a copy of Senate Bill No. 253 which relates to the same matter. This Bill was passed by both houses of the last legislature, but was vetoed by the Governor.

I think that it would be helpful to the committee members to have a copy of the Bill in addition to the proposed amendments to Rules 106 and 107.

Thank you very much for your help in this matter.

Very truly yours,

Jeffrey W. Jones

JWJ:rmm
encls.

cc: Mr. Michael T. Gallagher
Fisher, Gallagher, Perrin & Lewis
[illegible] Floor
Allied Bank Plaza
1000 Louisiana
Houston, Texas 77002

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL PROCEDUR

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

Rule 106. Service of Citation

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other pla where the defendant can probably be found and stating ~~specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful~~, good cause therefor, the court may authorize service

(1) by any disinterested adult in the manner provided in section (a)(2) of this Rule, or

~~(b)~~ (2) where service has been attempted under either (a)(1) or (a)(2), but has not been successful, by an officer or by any disinterested adult named in the court's order by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, o

~~(2)~~ (3) in any manner that the affidavit or other evidence before t court shows will be reasonably effective to give the defendant notice of the suit.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

To allow service of citation by any disinterested adult by order of the court, upon showing of good cause.

Respectfully submitted,

Jeffrey M. Jones
JOHNSON & DAVIS
402 East Van Buren
Harlingen, Texas 78550
(512) 423-1311

DATE February 27, 1995

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE - TEXAS RULES OF CIVIL PROCEDUR

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

Rule 107. Return of Citation

The return of the officer executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer must also contain the return receipt with the addressee's signature. When the officer has not served the citation the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ~~ordered by the court.~~ provided above or in any such other manner as may be ordered by the court.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court for ten days, exclusive of the day of filing and the day of judgment.

etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

To provide for returns on citations where service is by a disinterested adult pursuant to revised Rule 106.

Respectfully submitted,

Jeffrey W. Jones
[illegible]
[illegible]
[illegible]
[illegible]

DATE February 27, 1985

JOHNSON & SWANSON

ATTORNEYS AND COUNSELORS

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April 9, 1985

Ms. Evelyn A. Avent
Executive Assistant
State Bar of Texas
Box 12487, Capitol Station
Austin, Texas 78711

216/204

Re: Committee on Administration of Justice

Dear Evelyn:

Please find enclosed a proposed rule change that should be distributed as you see fit to the other members of the committee.

Sincerely yours,

Charles R. Haworth

CRH/cmr
enclosure

4800 InterFirst Two
1201 Elm Street
Dallas, Texas 75270
214-977-9800

1200 Pacific Place
1910 Pacific Avenue
Dallas, Texas 75201
214-977-9700

2200 One Galleria Tower
13355 Noel Road
Dallas, Texas 75240
214-851-5000

1000 Norwood Tower
114 West 7th Street
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STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE – TEXAS RULES OF CIVIL PROCEDURE.

I. Exact wording of existing Rule:

A
B
C
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L
M
N
O
P
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R

NONE

II. Proposed Rule: (Mark through deletions to existing rule with dashes or put in parenthesis; underline proposed new wording; see example attached).

New Rule 216.

Rule 216. Stipulations Regarding Discovery Procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

etc.

Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:

(see attached comment)

April 9 19 85

Respectfully submitted,

Charles R. Haworth
Name

Charles R. Haworth

900 Jackson St., Dallas, TX
Address

COMMENT

The proposed Rule 216 is basically Federal Rule 29, which provides in full that:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

It should initially be noted that the underlined portion of Federal Rule 29 is not recommended for adoption in Texas.

The proposed rule is submitted in response to an expressed desire for more flexibility in the rules to acommodate proposed agreements among parties to litigation during discovery, especially in the manner of taking depositions upon oral examination. Texas practitioners have historically entered into stipulations regarding many aspects of discovery without question of their authority to do so. Recently, concerns have been expressed that because the Texas Rules of civil Procedure do not contain express authorization to vary the terms of the rules, the rules may not be varied by agreement. In paticular, concerns have been expressed that objections to the form of questions or nonresponsiveness of answers required by Texas Rule 204-4 may not be reserved until time of trial. This proposed rule change will clearly allow that reservation.

It could perhaps be argued that Rule 11 would apply to stipulations under Rule 216. Caution may dictate, therefore, that an additional sentence be added to the proposed Rule 216 to the effect that "an agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the transcript of deposition."

The provision of Federal Rule 29 regarding court approval for stipulations extending the time limits regarding Interrogatories to Parties (Rule 33), Production of Documents (Rule 34), and Requests for Admission (Rule 36) is not recommended for adoption. Under the proposed Rule 216 the court may always override the parties' stipulation. See C. Wright and A. Miller, Federal Practice and Procedure § 2092, at 359 (1970). The order required by Federal Rule 29 is a nuisance to the court and almost always approved. Thus, some juge-time could be saved by eliminating requirement contained in the exception.

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April 8, 1985

213/760-5441

Ms. Evelyn Avent
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, Texas 78711

Re: Committee on the Administration of Justice

Dear Ms. Avent:

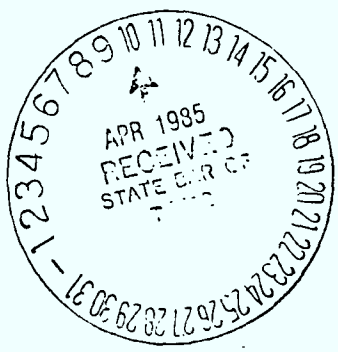
Enclosed please find the proposed changes to Rules 296, 306a and 306c. I would appreciate it if you would place them on the agenda for the next meeting.

Respectfully,

R. Doak Bishop

RDB/ls
Enclosures

cc: Michael T. Gallagher, Esq.
Prof. Bill Dorsaneo



Rule 306c. Prematurely Filed Documents

No motion for new trial, request for findings of fact and conclusions of law, appeal bond or affidavit in lieu thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the ~~date of~~ signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment, and every such appeal bond or affidavit or notice of appeal of notice of limitation of appeal shall be deemed to have been filed on the date of but subsequent to the ~~date of~~ signing of the judgment. ~~or the date of the overruling of motion for new trial, if such a motion is filed~~.

time

time

on the overruling of a motion for new trial, if such a motion is filed.

Rule 296. Conclusions of Fact and Law

In any case tried in the district or county court without a jury, the judge shall, at the request of either party, state in writing his findings of fact and conclusions of law. Such request shall be filed within ten days after the final judgment or order overruling motion for new trial is signed or the motion for new trial is overruled by operation of law. Notice of the filing of the request shall be served on the opposite party as provided in Rule 21a.

Rule 306a. Periods to Run from Signing of Judgment

1. Beginning of periods. The date a judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to reinstate a case dismissed for want of prosecution or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents in connection with an appeal, including, but not limited to an original or amended motion for new trial, a request for findings of fact and conclusions of law, findings of fact and conclusions of law, an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the appellate court of the transcript and statement of facts, but this rule shall not determine what constitutes rendition of a judgment or order for any purpose.

MEMORANDUM

TO: The Supreme Court Advisory Committee

FROM: Judge Wallace

DATE: May 8, 1985

RE: MEETING, May 31, 1985

At Luke Soules' request, the attached material will be considered at the Supreme Court Advisory Committee Meeting to be held at 10:00 A.M. on May 31, 1985, at the Texas Law Center.

STATE BAR OF TEXAS

May 1, 1985

Hon. John L. Hill, Jr.
Chief Justice
The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Dear Justice Hill:

The State Bar of Texas Committee on the Administration of Rules of Evidence in Civil Cases, after deliberation at its April 12, 1985 meeting, recommends to the Supreme Court that the Rules of Evidence be amended as described in the enclosed list dated May 1, 1985.

Also enclosed for the Court's information is a copy of the agenda for the April 12, 1985 meeting. Comparison of the agenda with the May 1 list of recommendations will reflect the substantial number of proposals not approved by the committee.

Respectfully yours,

Newell H. Blakely, Chairman
Committee on Administration of Rules
of Evidence in Civil Cases

NHB:jt
encl.
cc: Hon. James P. Wallace, Justice
Rules Member
The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, Texas 78711

Committee file c/o (agenda previously sent)
Ms. Barbara Earle
Committees and Sections
State Bar of Texas
P. O. Box 12487
Austin, Texas 78711

Members, Committee on Rules of Evidence
in Civil Cases (agenda previously sent)

THE 1984-85 STATE BAR COMMITTEE ON THE ADMINISTRATION OF RULES OF EVIDENCE IN CIVIL CASES RECOMMENDS TO THE SUPREME COURT OF TEXAS THE FOLLOWING CHANGES IN THE RULES OF EVIDENCE.

May 1, 1985

RULE 509(d)(4).

The committee recommends to the Court that rule 509(d)(4) be amended by deleting the present rule and substituting the language "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as an element of his claim or defense;" as shown below.

Rule 509. Physician/Patient Privilege.
(a). . .
(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:
(1) . . .
(4) [in any litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters;] as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as an element of his claim or defense;

The reasons for the change follow. Elimination of the second sentence relating to discovery leaves discovery to the Texas Rules of Civil Procedure. That has been the approach under the other privileges in the Rules of Evidence.

The committee discussed 509(d)(4) and 510(d)(5) together, prompted by agenda items 3, 5 and 6. The reporter notes to those items suggest the basis of the committee discussion. The following two paragraphs are taken from the Reporter's Note to agenda item 3:

"First, it is illogical to have a narrower exception to the physician/patient privilege than to the psychotherapist/patient privilege. There is little doubt that communications to psychotherapists tend to be of a much more sensitive nature than communications to physicians and that disclosure of

communications made during psychotherapy present a greater danger of embarrassment and humiliation to the patient. Thus, if any difference is to exist between the patient-litigant exceptions to these privileges, the narrower exception ought to apply to the psychotherapist/patient privilege.

"Second, the change would address one of the concerns which has been raised with regard to the effect of the physician/patient privilege. The privilege has been asserted in will contests by the personal representative of the estate in order to shield from disclosure evidence of the testator's physical and mental condition. The comment has been made that this places the key to the truth of the case in the hands of the person most likely to benefit from a will written by an incompetent testator. By providing for any exception "after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense," the rule would no longer allow the personal representative of an estate to claim the privilege on behalf of the testator where the testator's capacity is at issue."

The following is taken from the Reporter's Notes to both agenda items 5 and 6:

"It is my opinion that these two provisions should be made uniform not only for the sake of uniformity, but also because it is somewhat confusing as to which one will apply when the treating professional is a person authorized to practice medicine, which all psychiatrists are required to be."

The committee discussions finally led to policy decisions to recommend alignment of 509(d)(4) and 510(d)(5), to recommend enlargement of this exception to the two privileges and to eliminate distinctions between the scope of the exception before and after death of the patient.

RULE 509(d)(5).

The committee recommends to the Court that rule 509(d)(5) be amended by adding the words "or of a registered nurse under or pursuant to arts. 4525, 4527a, 4527b, and 4527c, Vernon's Texas Civil Statutes" as shown below.

Rule 509. Physician/Patient Privilege.
(a) . . .
(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:
(1) . . .
(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, art. 4495b, Vernon's Texas Civil Statutes, or of a registered nurse under or pursuant to arts. 4525, 4527a, 4527b, and 4527c, Vernon's Texas Civil Statutes, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under

subparagraph (d)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (e);

The reason for the change is stated in the Reporter's Note following.

Reporter's Note: This change was instigated by counsel to the Board of Nurse Examiners. That Board has the same statutory dut and investigatory needs regarding unprofessional conduct of registered nurses as the Board of Medical Examiners has regardin physicians. Cases brought before the Board frequently involve allegations of drug abuse or theft of drugs by nurses. Investigating such claims frequently requires examination of patient records to determine whether the accused nurse has falsified them in order to divert drugs to his or her own use. An exception to the physician/patient privilege already exists tc allow the Board of Medical Examiners to carry out its statutory duties. The addition of the proposed language would permit the Board of Nurse Examiners to carry out its important responsibilities as well.

RULE 510(d)(5).

The committee recommends to the Court that rule 510(d)(5) be amended by deleting "he" and substituting "any party," by deleting the comma after the first use of the word "defense" and substituting a semi-colon, and by deleting the words "or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense;" all as shown below.

Rule 510. Confidentiality of Mental Health Information.
(a) . . .
(d) Exceptions. Exceptions to the privilege in court proceedings exist:
(1) . . .
(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which [he] any party relies upon the condition as an element of his claim or defense [,] ; [or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense;]

The reasons for the change follow. The committee discussed 509(d)(4) and 510(d)(5) together, prompted by agenda items 3, 5 and 6. The reporter notes to those items suggest the basis of the committee discussions. In the Reporter's Notes to both agenda items 5 and 6, he stated: "It is my opinion that these two provisions should be made uniform not only for the sake of uniformity, but also because it is somewhat confusing as to which one will apply when the treating professional is a person authorized to practice medicine, which all psychiatrists are required to be."

The committee discussions finally led to policy decisions t recommend alignment of 509(d)(4) and 510(d)(5), to recommend enlargement of this exception to the two privileges and to eliminate distinctions between the scope of the exception before and after death of the patient.

RULE 601(a)(2).

The committee recommends to the Court that rule 601(a)(2) be amended by deleting the words "or who do not understand the obligation of an oath" as shown below.

Rule 601. Competency and Incompetency of Witnesses.

(a) Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) Insane persons. . . .

(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated. [, or who do not understand the obligation of an oath.]

The reason for the deletion is explained in the Reporter's Note.

Reporter's Note: Texas State Representative Mike Toomey has introduced in the 1985 legislature HB 240 which would, among other things, add to Texas Rule of Evidence 601(a)(2) the words: "However, no child nine years of age or younger may be excluded from giving testimony for the sole reason that such child does not understand the obligation of an oath. Such child's testimony shall be admitted to the trier of fact and the trier of fact shall be the sole judge of the credibility of the testimony."

Justice James P. Wallace has written to representative Toomey the following letter:

"For a number of years the Court has had a tacit agreement with the Legislature that we would try to work out any suggested changes in the rules as may be needed. That has been carried over into the Rules of Evidence. The understanding has been that the Court should make the changes rather than the Legislature if at all possible. This gives an opportunity for a wider range of input from those practitioners and judges who work with the rules on a regular basis.

The Standing Committee on Rules of Evidence will meet in Austin on April 12, at 10:00 A.M. at the Texas Law Center. Would you agree to hold up action on H.B. 240 until that time? We would like for you and someone from the group who is asking for the change to appear at this meeting and give us your views to the end that we can attempt to work out this matter."

All of the foregoing was placed before Professor Black, who responded as follows:

"I have received your note dated February 22, 1985 enclos House Bill 240 which proposes a change in the provisions of Te Rules of Evidence 601(a)(2).

It is my recommendation that the objectives sought by thi bill can be better accomplished by simply deleting from the present rule the final clause which reads, "or who do not understand the obligation of an oath" so that the rule hereinafter read:

"(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated."

I can see good reasons for not wanting a witness' testimon to be excluded solely because the witness does not understand t obligation of an oath but I do not see any reason for cutting this off at nine years of age. Moreover, it is unlikely that many witnesses will "appear not to possess sufficient intellect to relate transactions" but can understand the obligation of an oath; thus we are losing very little by this recommended change

RULES 610, 611, 612, 613, 614.

The committee recommends to the Court that a new rule 610 (i.e., federal rule 610) entitled Religious Beliefs or Opinions, be adopted and that existing rules 610, 611, 612, and 613 b renumbered accordingly, as follows.

Rule 610. Religious Beliefs or Opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Rule [610] 611. Mode and Order of Interrogation and Presentation

Rule [611] 612. Writing Used to Refresh Memory.

Rule [612] 613. Prior Statements of Witnesses: Impeachment and Support.

Rule [613] 614. Exclusion of Witnesses.

The reason for the proposal is stated in the Reporter's Note and a supplementary letter.

Reporter's Note. This innocuous Rule was deleted by the Supreme Court for unknown reasons. Its deletion is apt to cause confusion and dispute. Surely the Court did not mean to imply that a witness can be impeached or supported by showing the nature of his religious beliefs or opinions, e.g., his beliefs concerning the existence of an afterlife and the possibility of Divine punishment for false swearing. Yet the conspicuous absence of this Rule from our adopted Rules could be argued to support such a ridiculous inquiry.

Perhaps the Court was concerned that Rule 610 would operate to bar inquiry for any purposes into the religious affiliation,

practices, or beliefs of a witness, which sometimes have a legitimate relevancy, for impeachment or on the merits of a case. In fact Rule 610 is quite narrow, as the Advisory Committee's Note to the Federal Rule explains:

> While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.

In addition to permitting such bias or interest impeachment, Rule 610 would have no bearing on cases where a person's religious affiliation or practices are relevant to the merits of the case, such as where, in a child custody case, a parent's bizarre "cult" practices might be relevant to whether custody with that parent would be in the best interests of the child.
Supplementary letter. Both the Texas Constitution and the civil statutes provide that religious opinion is not a grounds for declaring a witness incompetent to testify. Tex. Const. Art. I, Sec. 5 provides, "No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief . . ." Similarly, Tex. Rev. Civ. Stat. Ann. art 3717 states, "No person shall be incompetent to testify in civil cases on account of his religious opinion, or for the want of any religious belief . . ." This provision was not repealed by the Supreme Court. Neither, however, addresses the question of the propriety of impeaching a witness on such grounds. Introducing Federal Rule 610 into the Texas rules would, therefore, be a salutary measure.

RULE 610(c).

The committee recommends to the Court that rule 610(c) be amended by adding the words "except as may be necessary to develop his testimony" as shown below.

Rule 610. Mode and Order of Interrogation and Presentation.
(a) . . .
(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. . .

The reason for the change is stated in the Reporter's Note.

Reporter's Note: The 1982 Texas Rules of Evidence Proposed Code contained the sentence "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." The Supreme Court dropped from the sentence the phrase "except as may be necessary to develop his testimony." It may be that the Court had been given an inadequate explanation of the purpose of the phrase. That

purpose is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law, C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE secs. 576-579 (2d ed. 1956); C. McCORMICK, EVIDENCE sec. 6 (3rd ed. 1984). The federal counterpart contains the exception for the reasons suggested above, see Fed. R. Evid. 611(c) advisory committee note. Without this exception phrase, the sentence appears to be an absolute ban on leading questions in the instances listed above.

RULE 611.

The committee recommends to the Court that rule 611 be amended by adding the phrase "for the purpose of impeaching the testimony of the witness," as shown below.

Rule 611. Writing Used To Refresh Memory.

If a witness uses a writing to refresh his memory for the purpose of testifying either -

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and, for the purpose of impeaching the testimony of the witness, to introduce in evidence those portions which relate to the testimony of the witness . . .

The reason for the amendment is given in the Reporter's Note.

Reporter's Note: The present language apparently makes the portions of the statement which relate to the testimony of the witness admissible without restriction, and it has locally been so construed. No justification is seen, however, for making such writings generally admissible simply because they were used by a witness to assist him in recalling certain historical facts. See 125 A.L.R. 78. If the drafters of the rules had intended such writings to be admissible for the truth of the matters asserted, it must be assumed that they would have added such a provision to Rule 803.

RULE 801(e)(1)(A).

The committee recommends to the Court that rule 801(e)(1)(A) be amended by deleting the words "and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding," as shown below.

Rule 801 DEFINITIONS.
The following definitions apply under this article:
(a) . . .
(e) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, [and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding,] or (B) . . .

The reason for the recommended deletion is stated in the Reporter's Note.

Reporter's Note: The bracketed restriction on the use of prior inconsistent statements of a witness as substantive evidence was taken from the Federal Rules. It was not in the U.S. Supreme Court's version of those Rules. It was added by Congress out of concerns that had solely to do with criminal cases. Our Rules, which apply only to civil cases, should permit substantive use of any prior inconsistent statement by one who "testifies at the trial or hearing and is subject to cross-examination concerning the statement." The trial cross-examination and demeanor are adequate to permit the jury to choose which version to believe. There is absolutely no reason in civil cases not to implement fully this reform of the common law that was avidly supported by Wigmore, Morgan, McCormick, Holmes, Learned Hand, and, so far as we know, every other reputable authority on the law of evidence.

RULE 801(e)(3).

The committee recommends to the Court that rule 801(e)(3) be changed by substituting the word "used" for the word "offered" and by adding a comment to the rule, all as follows.

Rule 801. DEFINITIONS.
The following definitions apply under this article:
(a) . . .
(e) Statements which are not hearsay. A statement is not hearsay if--

(3) Depositions. It is a deposition taken and [offered] used in accordance with the Texas Rules of Civil Procedure.

Comment. See rule 207, Texas Rules of Civil Procedure, regarding use of depositions.

The reason for the change and for adding the comment is as follows. When the Liaison Committee first proposed the new Rules, it wanted to preserve existing Texas deposition practice, particularly the practice of not requiring unavailability of deponent. It wanted no conflict on this point between the Rules and the Texas Rules of Civil Procedure. It felt that the best

approach was to take out of the definition of hearsay, depositions taken and offered under or in accordance with the Texas Rules of Civil Procedure.

This year's committee felt that the original intent is better stated in the Rules by the changes proposed above and by adding also a comment to Rule 804(b)(1). The party offering a deposition would first seek admission under 801(e)(3). Failing there, he would fall back to 804(b)(1).

RULE 803(6).

The committee recommends to the Court that rule 803(6) be amended by inserting the phrase "or by affidavit that complies with rule 902(10)" as shown below.

Rule 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) . . .

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not."

The reason for the addition is to cause 803(6) better to conform to, comply with, or accommodate the procedure when the record is authenticated not by testimony but by the 902(10) affidavit.

RULE 804(b)(1).

The committee recommends to the Court that a comment be added to rule 804(b)(1) as follows.

Rule 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) . . .

(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness--

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Comment. A deposition in some circumstances may be admissible without regard to unavailability of the deponent. See rule 801(e)(3) and comment thereto.

The reason for adding the comment is as follows. When the Liaison Committee first proposed the new Rules, it wanted to preserve existing Texas deposition practice, particularly the practice of not requiring unavailability of deponent. It wanted no conflict on this point between the Rules and the Texas Rules of Civil Procedure. It felt that the best approach was to take out of the definition of hearsay, depositions taken and offered under or in accordance with the Texas Rules of Civil Procedure.

This year's committee felt that the original intent is better stated by the change and comment to 801(e)(3) and by adding the above comment to 804(b)(1). The party offering a deposition would first seek admission under 801(e)(3). Failing there, he would fall back to 804(b)(1).

RULE 902(10)(b).

The committee recommends to the Court that the notary's jurat in rule 902(10)(b) be changed in form as follows.

Delete:

_____

Notary Public in and for _____ County, Texas.

Substitute:

My commission expires:

_____

_____

Notary Public, State of Texas

Notary's printed name:

The reason for the change is given in the Reporter's Note. Reporter's Note: The notary's jurat form we presently have in the Rules is obsolete. Amendments to TEX.REV.CIV.STAT.ANN. arts. 5949(1), 5954 and 5960, (Vernon Supp 1985), give notaries statewide jurisdiction, direct that the notary print or stamp his name and the expiration date of his commission, and that the seal carry the words "Notary Public, State of Texas," without mention of the county.

RULE 1007.

The committee recommends that the Court change the title of the rule by deleting the word "permission" and substituting the word "admission," to read:

Rule 1007. Testimony or Written [Permission] Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

The reason for the change is given in the Reporter's Note. Reporter's Note: Texas rule 1007 was copied from Federal 1007. The title to Federal 1007 is: "Testimony or Written Admission of Party." The title recommended by the State Bar Liaison Committee to the Supreme Court was: "Testimony or Written Admission of Party." The rule relates to "admissions" and not to "permissions." One suspects that the change to "Permission" was a typographical error somewhere along the line. It should be corrected.

AGENDA FOR MEETING

10 A.M., FRIDAY, APRIl 12, 1985, ROOM 104, TEXAS LAW CENTER

COMMITTEE ON ADMINISTRATION OF RULES OF EVIDENCE IN CIVIL CASES

Rule 301. Presumptions In Civil Cases.

(a) Scope of rule. This rule governs only those presumptions listed below and others that function predominantly to facilitate the determination of an issue in the action. It does not govern assumptions of fact which are not required to be made, assumptions which are conclusive on the factfinders, or assumptions controlled by the Constitution, by statute, or by other rules prescribed by the Supreme Court pursuant to statutory authority. To the extent not inconsistent herewith, statutes which state that a presumption exists or which provide that a fact or facts is prima facie evidence of other facts establish presumptions within the scope of this rule.

(b) Definition. Under this rule, a presumption is a rebuttable assumption of fact which must be drawn from another fact or group of facts established in the action.

(c) Rebuttal of presumptions. A presumption under this rule is rebutted when convincing evidence of the nonexistence or non-truth of the presumed fact has been admitted. The adequacy of the convincing power of evidence adduced in rebuttal of a presumed fact shall in all cases be determined by the judge. When the presumed fact has been rebutted with adequate evidence, the mandatory effect of the presumption ceases to be effective in the action.

(d) Existence of basic fact or facts. The existence of the fact or facts necessary to give rise to a presumption, if any, shall be determined by the factfinders unless reasonable minds would necessarily agree that such fact or facts are more probably true than not, or are more probably not true, in which case the judge shall determine their existence, or unless the existence of such fact or facts has otherwise been conclusively determined or established.

(e) Effect of presumptions. Presumptions under this rule operate to impose on the party against whom they operate the burden of going forward with evidence to rebut or meet the presumed fact, but do not shift to such party the burden of persuasion of the nonexistence or non-truth of the presumed fact.

(f) Instructions. In any case in which the factfinders under (d) above have the responsibility of determining the existence of the facts necessary to give rise to a presumption, if all evidence in the case does not amount to convincing proof of the nonexistence or non-truth of the presumed fact, the judge shall instruct the jury in a proper case that if they find the basic facts proved by a preponderance of the evidence, they must find the presumed fact proved.

(g) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of presumptions within the scope of this rule. It is presumed that:

(1) Money delivered by one to another was due the latter.
(2) A thing delivered by one to another belonged to the latter.
(3) An obligation delivered up to a debtor has been paid.
(4) A person in possession of an order on himself for the payment of money or the delivery of a thing paid the money or delivered the thing accordingly.
(5) An obligation possessed by the creditor has not been paid.
(6) Former rent or installments have been paid when a receipt for later rent or installments has been produced.
(7) The things that a person possesses are owned by him.
(8) A person who exercises acts of ownership over property is the owner of it.
(9) State and federal courts of the United States and courts of general jurisdiction of other nations, and judges of such courts, acted in the lawful exercise of the court's jurisdiction.
(10) A duly entered judgment correctly determined or set forth the rights and obligations of the parties.
(11) Official duty was duly and regularly performed, except that this presumption does not apply to an arrest or search made without a warrant.
(12) A person acting in a public office was regularly appointed or elected to that office.
(13) Private transactions were conducted fairly, honestly, and in good faith.
(14) A person takes ordinary care of his own concerns.
(15) Things happened according to the ordinary course of nature and the ordinary habits of life.
(16) A person or entity obeyed the law and performed a duty imposed upon him or it by law.
(17) The ordinary course of regularly organized activity has been followed.

(18) A fact, condition, or state shown to exist continued as long as was usual for such fact, condition, or state to continue.

(19) A fact, condition, or state shown to exist at one time existed prior thereto for a continuous period usual for such fact, condition, or state to exist.

(20) A writing was truly dated.

(21) A communication correctly addressed, stamped, and properly mailed was received by the addressee thereof in the ordinary course of mail.

(22) A communication delivered to a telegraph company, ordered transmitted to an addressee, and paid for or agreed to be paid for, was delivered to the addressee thereof in due course.

(23) A communication received in the ordinary course of mail, or within a brief period, purportedly in response to an earlier communication from the recipient, was from the person or entity to whom the earlier communication was addressed.

(24) A book purporting to have been printed or published by public authority was so printed or published.

(25) A book purporting to contain reports of cases adjudged in tribunals of the state or nation where the book was published contains correct reports of such cases.

(26) Evidence willfully suppressed or withheld by a party would have been adverse to him if produced unless the suppression or withholding was satisfactorily explained.

(27) Testimony of a party about a material fact within his knowledge not produced would have been adverse to him if produced unless the non-production was satisfactorily explained.

(28) Testimony of an available witness related to or under the control of a party not produced by that party would have been adverse to him if produced.

(29) A person who performed work or services for another was employed by that other person.

(30) Persons acting as partners have entered into a contract of partnership.

(31) The driver of a vehicle owned by another was at the time of an injury to a third person the agent of the owner and was acting within the scope of his agency.

(32) Acquiescence followed from a belief that the matter acquiesced in was conformable to the right and to fact.

(33) A person is and was in average, normal health.

(34) A person is and was sane and mentally competent.

(35) A child over ten years of age is competent to testify.

(36) An adult female is capable of bearing children and an adult male is capable of procreation.

(37) A child was alive when born.

(38) A person is the same person as another whose name is identical.

(39) A person intended the ordinary, natural, and probable consequences of his voluntary act.

(40) An unexplained death from external causes was not suicide.

(41) The law of a sister state is the same as that of the forum state.

Reporter's Note: The draft of a rule concerning certain presumptions is recommended for inclusion in the Texas Rules of Evidence. Since no Rule 301 is presently in such rules, this proposal is for an addition to the rules rather than a change.

The vast bulk of presumptions generally recognized in Texas and elsewhere are those that have been created primarily to facilitate or simplify proof of certain facts. The application of such presumptions in the trial of cases has, however, been attended by extensive confusion, divergent views, inconsistent subordinate rules, and imprecise language that has done little to clarify problem areas. It is suggested, therefore, that clarification of the subject by a rule that will control most of the troublesome areas will be most valuable to bench and bar alike.

It will be noted that the proposed rule covers only those presumptions which were created primarily to facilitate proof and to simplify the determination of issues of fact. It expressly does not cover those so-called presumptions which are based upon social policies or significant equitable considerations. Thus, it does not cover, for example, presumptions favoring the validity of marriages, the legitimacy of children, or the security of persons who entrust themselves or their property to fiduciaries, or which affect various individual rights, as the presumption of death after seven years of absence. Presumptions of such nature are very often held to shift, to the party against whom they operate, burdens of proof as the to non-existence of the presumed facts, which burdens are of varying weights; often produce results which are beyond the scope of evidentiary considerations; and often operate to aggravate already excessive confusion and ambiguity that exist in the area. It has been convincingly argued that in many of the situations covered by such presumptions the task should be one of substantive law and the problems to which the presumptions are addressed should be resolved by providing rules of decision by statute or decisional law. Thus, the affairs of persons affected by the presumption of death of a person absent for seven years should be determined on the basis of factors relevant to each effect and not exclusively upon the operation of evidentiary device. See, e.g., Uniform Absence as Evidence of Death and Absentee's Property Act, 8A U.L.A. 5-14. Such rules of decision have been adopted in Texas in the case of simultaneous deaths in lieu of presumptions

formerly operative in the area. See Sec. 47, Texas Probate Code. In summary, any attempt in the rules of evidence to cover presumptions of this nature should be left to the legislature or to further development by decisional law.

Although variant language exists in Texas decisional law, subsections (a) through (f) of the proposed rule probably reflects the consensus of the several cases dealing with this subject except that the provision in (c) that convincing evidence is required effectively to rebut a presumption of the nature covered by the rule is not so reflected. Although this is a departure from those cases that have considered this matter, it is included for the following reasons: basically, if the circumstances that motivate the creation of a presumption are sufficient for that purpose, the presumption itself should be strong enough to survive rebuttal evidence that is nothing more than "a mere tapping at the window," but further, other tests are unsatisfactory for other reasons. If evidence only sufficient to justify a finding of the non-existence of the presumed fact should be the criterion, not only would this possibly remove from the province of the judge the determination of the credibility of witnesses but it would also constitute an inappropriate test in this connection for it is most commonly the basis for judicial admission of evidence concerning which the factfinders have a function to determine admissibility. If evidence amounting to a preponderance of the evidence should be the criterion, again the convincing quality of such evidence might be extremely slight for in most cases the only "evidence" supporting the presumed fact will be the inference logically drawable from the fact or facts which give rise to the presumption, and very little evidence may be needed to preponderate over such inference. On the other hand, "convincing evidence" is a standard that can easily be applied, offers considerable flexibility, and would not restrict the discretion of judges as other tests logically could.

Again, although variant language exists in Texas decisional law, substantially all of the listed presumptions in subsection (g) are either directly or indirectly supported, in letter or in general substance, by Texas cases. There are two notable exceptions: no cases have been located which directly support either the presumption in subsection (12) or in (35). Respecting (12), however, it would appear to be a logical corollary of (11); and respecting (35), it would appear to be valuable in obviating voir dire examination of children as to whom normally no question of competency will be presented.

Rule 413. Film or Videotape Recording of Execution of Will.

A film or videotape recording of the execution of a will, is admissible as evidence of the identity and competency of the person making the will, and of any other matter relating to the will and its validity.

Reporter's Note. Texas State Representative Frank Collazo has introduced HB 247 in the 1985 legislature. The bill is set out below.

Representative Collazo and Justice James Wallace have discussed the matter and Justice Wallace has written Representative Collazo as follows [reporter has edited the letter]:

"Rules of Evidence 401 defines relevant evidence as any evidence which has a tendency to make the existence of a fact that is of consequence in the determination of the action, (identity and/or competency of the testator) more probable or less probable than it would be without the evidence.

Rules of Evidence 402 provides that all relevant evidence is admissible. (with certain exceptions not applicable here). Rules of Evidence 1001(2) defines photographic evidence as including video tapes and movie films.

Thus, the Rules of Evidence now require a trial judge to admit into evidence any film or videotape which would tend to prove or rebut the identity or competency of a testator. All that would be required is that the film or videotape be authenticated so as to convince the judge that it is what it purports to be and not an attempt to defraud the court.

As we discussed, the Supreme Court and the Legislature have had a tacit understanding that the Court will research, study and promulgate Rules of Procedure and Evidence, and submit them to the bench, bar and Legislature. If the Legislature disapproves of a specific rule, they will then amend it by statute.

I truly believe that the above rules provide for what H.B. 247 attempts to accomplish. The State Bar Committee on the Rules of Evidence will meet in Austin on April 12, 1985. I appreciate your consideration in holding up on H.B. 247 until that time. The Committee welcomes any input you wish to give us on the above rules. I am, by a copy of this letter, requesting Dean Newell Blakely, Chairman of the Committee, to put this on the Agenda for the April 12th meeting."

This reporter agrees with Judge Wallace that no addition to the present Rules of Evidence is necessary to achieve Representative Collazo's objectives.

By _____ B. No. _____

A BILL TO BE ENTITLED

AN ACT

relating to the use as evidence of a film or videotape of the execution of a will.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 5, Texas Probate Code, is amended by adding Section 84A to read as follows:

Sec. 84A. FILM OR VIDEOTAPE AS EVIDENCE. (a) A film or videotape recording of the execution of a will, is admissible as evidence of the identity and competency of the person making the will, and of any other matter relating to the will and its validity.

(b) This section does not prevent the supreme court from adopting rules of evidence relating to the use of film and videotape evidence in other proceedings, or from supplementing this section with other rules not inconsistent with the section.

SECTION 2. This Act takes effect September 1, 1985.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

3.

Rule 509. Physician/Patient Privilege

(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:

* * *

(4) [In any litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters:] as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Reporter's Note: As the rules presently stand, the patient-litigant exception to the physician/patient privilege is narrower than that of the psychotherapist/patient privilege. This disparity appears to be inadvertant rather than the product of any rationally ordered scheme. Last year, this Committee recommended, and the Supreme Court adopted, an amended patient-litigant exception to the psychotherapist/patient privilege. The Committee acted only after a good deal of debate and consideration was given to the proposed amendment. Unfortunately, however, the Committee neglected to propose that a similar change be made in the physician/patient privilege. The change proposed here is simply to amend the patient-litigant exception to the physician/patient privilege so that it conforms to that of the psychotherapist/patient privilege. In addition to promoting uniformity, such a change makes sense for two reasons.

First, it is illogical to have a narrower exception to the physician/patient privilege than to the psychotherapist/patient privilege. There is little doubt that communications to psychotherapists tend to be of a much more sensitive nature than communications to physicians and that disclosure of communications made during psychotherapy present a greater danger of embarrassment and humiliation to the patient. Thus, if any difference is to exist between the patient-litigant exceptions to these privileges, the narrower exception ought to apply to the psychotherapist/patient privilege.

Second, the change would address one of the concerns which has been raised with regard to the effect of the physician/patient privilege. The privilege has been asserted in will contests by the personal representative of the estate in order to shield from disclosure evidence of the testator's physical and mental condition. The comment has been made that this places the key to the truth of the case in the hands of the

person most likely to benefit from a will written by an incompetent testator. By providing for any exception "after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense," the rule would no longer allow the personal representative of an estate to claim the privilege on behalf of the testator where the testator's capacity is at issue.

4. Rule 509. Physician/Patient Privilege

(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:

* * *

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to the Medical Practice Act, art. 4495b, Vernon's Texas Civil Statutes, or of a registered nurse under or pursuant to arts. 4525, 4527a, 4527b, and 4527c, Vernon's Texas Civil Statutes, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under subparagraph (d)(1) or those patients who have submitted written consent to the release of their medical records as provided by paragraph (e);

Reporter's Note: This change was instigated by counsel to the Board of Nurse Examiners. That Board has the same statutory duty and investigatory needs regarding unprofessional conduct of registered nurses as the Board of Medical Examiners has regarding physicians. Cases brought before the Board frequently involve allegations of drug abuse or theft of drugs by nurses. Investigating such claims frequently requires examination of patient records to determine whether the accused nurse has falsified them in order to divert drugs to his or her own use. An exception to the physician/patient privilege already exists to allow the Board of Medical Examiners to carry out its statutory duties. The addition of the proposed language would permit the Board of Nurse Examiners to carry out its important responsibilities as well.

5. Rule 509. Physician/Patient Privilege.

(a) . . .

(d) Exceptions. Exceptions to confidentiality or privilege in court or administrative proceedings exist:

(1) . . .

(4) [in any litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient.] as to a communication or record relevant to an issue of the

physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters.

Reporter's Note: Another matter which I believe should be considered by the committee during its April 12th meeting concerns Rule 509(d)(4) and Rule 510(d)(5), these being the litigation exceptions to the physician/patient and mental health information privileges respectively.

These two provisions appear to be different in that Rule 509(d)(4) appears to apply only when the patient is a plaintiff whereas 510(d)(5) applies when the patient is relying upon his condition as an element of his claim or defense.

It is my opinion that these two provisions should be made uniform not only for the sake of uniformity, but also because it is somewhat confusing as to which one will apply when the treating professional is a person authorized to practice medicine, which all psychiatrists are required to be.

6. Rule 510. Confidentiality of Mental Health Information.

(a) . . .

(d) Exceptions. Exceptions to the privilege in court proceedings exist:

(1) . . .

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which [he] any party relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters.

Reporter's Note: Another matter which I believe should be considered by the committee during its April 12th meeting concerns Rule 509(d)(4) and Rule 510(d)(5), these being the litigation exceptions to the physician/patient and mental health information privileges respectively.

These two provisions appear to be different in that Rule 509(d)(4) appears to apply only when the patient is a plaintiff whereas 510(d)(5) applies when the patient is relying upon his condition as an element of his claim or defense.

It is my opinion that these two provisions should be made uniform not only for the sake of uniformity, but also because it is somewhat confusing as to which one will apply when the treating professional is a person authorized to practice medicine, which all psychiatrists are required to be.

7. Rule 601. Competency and Incompetency of Witnesses.

(a) Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) Insane persons . . .

(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated. [, or who do not understand the obligation of an oath.]

Reporter's Note: Texas State Representative Mike Toomey has introduced in the 1985 legislature HB 240 which would, among other things, add to Texas Rule of Evidence 601(a)(2) the words: "However, no child nine years of age or younger may be excluded from giving testimony for the sole reason that such child does not understand the obligation of an oath. Such child's testimony shall be admitted to the trier of fact and the trier of fact shall be the sole judge of the credibility of the testimony."

Justice James P. Wallace has written to representative Toomey the following letter:

"For a number of years the Court has had a tacit agreement with the Legislature that we would try to work out any suggested changes in the rules as may be needed. That has been carried over into the Rules of Evidence. The understanding has been that the Court should make the changes rather than the Legislature if at all possible. This gives an opportunity for a wider range of input from those practitioners and judges who work with the rules on a regular basis.

The Standing Committee on Rules of Evidence will meet in Austin on April 12, at 10:00 A.M. at the Texas Law Center. Would you agree to hold up action on H.B. 240 until that time? We would like for you and someone from the group who is asking for the change to appear at this meeting and give us your views to the end that we can attempt to work out this matter."

All of the foregoing was placed before Professor Black, who responded as follows:

"I have received your note date February 22, 1985 enclosing House Bill 240 which proposes a change in the provisions of Texas Rule of Evidence 606(a)(2).

It is my recommendation that the objectives sought by this bill can be better accomplished by simply deleting from the present rule the final clause which reads, "or who do not understand the obligation of an oath" so that the rule will hereinafter read:

> "(2) Children. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated."

I can see good reasons for not wanting a witness' testimony to be excluded solely because the witness does not understand the obligation of an oath but I do not see any reason for cutting this off at nine years of age. Moreover, it is unlikely that many witnesses will "appear not to possess sufficient intellect to relate transactions" but can understand the obligation of an oath; thus we are losing very little by this recommended change.

Please place this on the agenda for the meeting scheduled for April 12th."

8. Rule 610. See proposal.

Add as new Rule 610, Federal Rule 610; renumber existing Rules 610-613 accordingly.

Federal Rule 610 provides:

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Reason for proposal:

This innocuous Rule was deleted by the Supreme Court for unknown reasons. Its deletion is apt to cause confusion and dispute. Surely the Court did not mean to imply that a witness can be impeached or supported by showing the nature of his religious beliefs or opinions, e.g., his beliefs concerning the existence of an afterlife and the possibility of Divine punishment for false swearing. Yet the conspicuous absence of this Rule from our adopted Rules could be argued to support such a ridiculous inquiry.

Perhaps the Court was concerned that Rule 610 would operate to bar inquiry for any purposes into the religious affiliation, practices, or beliefs of a witness, which sometimes have a legitimate relevancy, for impeachment or on the merits of a case. In fact Rule 610 is quite narrow, as the Advisory Committee's Note to the Federal Rule explains:

> While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.

In addition to permitting such bias or interest impeachment, Rule 610 would have no bearing on cases where a person's religious affiliation or practices are relevant to the merits of the case, such as where, in a child custody case, a parent's bizarre "cult" practices might be relevant to whether custody with that parent would be in the best interests of the child.

Submitted by Guy Wellborn,
Mike Sharlot, and
Steve Goode

9.

Rule 610. Mode and Order of Interrogation and Presentation.

(a) . . .

(c) Leading questions. Leading questions should not be used on the direct examination of a witness <u>except as may be necessary to develop his testimony</u> . . .

Reporter's Note: The 1982 Texas Rules of Evidence Proposed Code contained the sentence "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." The Supreme Court dropped from the sentence the phrase "except as may be necessary to develop his testimony." It may be that the Court had been given an inadequate explanation of the purpose of the phrase. That purpose is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law, C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE secs. 576-579 (2d ed. 1956); C. McCORMICK, EVIDENCE sec. 6 (3rd ed. 1984). The federal counterpart contains the exception for the reasons suggested above, <u>see</u> Fed. R. Evid. 611(c) advisory committee note. Without this exception phrase, the sentence appears to be an absolute ban on leading questions in the instances listed above.

'9, Rule 611. Writing Used To Refresh Memory.

If a witness uses a writing to refresh his memory for the purpose of testifying either -

(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and, for the purpose of impeaching the testimony of the witness, to introduce in evidence those portions which relate to the testimony of the witness . . .

Reporter's Note: The present language apparently makes the portions of the statement which relate to the testimony of the witness admissible without restriction, and it has locally been so construed. No justification is seen, however, for making such writings generally admissible simply because they were used by a witness to assist him in recalling certain historical facts. See 125 A.L.R. 78. If the drafters of the rules had intended such writings to be admissible for the truth of the matters asserted, it must be assumed that they would have added such a provision to Rule 803.

11. Rule 613. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or a party's spouse who has a financial interest in the outcome, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Reporter's Note: Under Rule 267 of the Texas Rules of Civil Procedure it has been held error to exclude "under the rule" the spouse of a party, the spouse having a financial interest in the outcome. Martin v. Burcham, 203 S.W.2d 807 (Tex.Civ.App.--Fort Worth 1947, no writ).

12. Rule 613. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence, during the testimony of one or more persons or the presentation of certain evidence, is shown by a party to be essential to the presentation of his cause.

Reporter's Note: The reporter does not feel the change is necessary. It is, however, a possible response to a problem raised in a March 23, 1983 letter to Justice James Wallace from Judge James C. Onion, 73rd District Court, Bexar County. The reporter has so edited the letter as to omit parts not directly bearing on the problem. The letter, as edited, follows:

". . . I do want to call to your attention something that has occurred to me and I think will cause us trial judges problems in the future . . . rule 613 entitled 'Exclusion of Witnesses' which we have always called commonly, 'Invoking the Rule'. The last exclusion saying the rule cannot be invoked as to three (3) . . . . 'A person whose presence is shown by a party to be essential to the presentation of his cause'. . .This is the last sentence in rule 613. A close reading would indicate that a party would say that every person that he has called is essential to the presentation of his case and therefore should be excused from the rule because the rule itself does not authorize the exclusion of that party. I know that there was undoubtedly another purpose in mind for section three. . . the real reason behind this was possibly allowing another expert to sit in while the defendant's expert testified or allowing the defendant's expert too sit in while a plaintiff's expert testified. But a plain reading of the language in the rule indicates that every witness that a party thinks is essential to his case can be excluded from the rule and hence, defeats rule 613 to start with. I think someone should change the language because while it may be clear . . . to the trial court, what was possibly intended is certainly not going to be . . . clear to the lawyers who want to have their witnesses remain in the court room . . . And they are going to urge that the language is clear to the effect that any one that they think is essential to the presentation of their case be excluded. A lot of unnecessary court time is to be consumed unless better language is utilized. Maybe I'm misreading the whole idea, but, I'm not misreading it the way a trial lawyer is going to use it . . .

Rule 801. Definitions.

The following definitions apply under this article:

(a) . . .

(e) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, [and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding,] or (B) . . .

Reporter's Note: The bracketed restriction on the use of prior inconsistent statements of a witness as substantive evidence was taken from the Federal Rules. It was not in the U.S. Supreme Court's version of those Rules. It was added by Congress out of concerns that had solely to do with criminal cases. Our Rules, which apply only to civil cases, should permit substantive use of any prior inconsistent statement by one who "testifies at the trial or hearing and is subject to cross-examination concerning the statement." The trial cross-examination and demeanor are adequate to permit the jury to choose which version to believe. There is absolutely no reason in civil cases not to implement fully this reform of the common law that was avidly supported by Wigmore, Morgan, McCormick, Holmes, Learned Hand, and, so far as we know, every other reputable authority on the law of evidence.

14. Rule 801. Definitions.

The following definitions apply under this article:

(a) . . .

(e) Statements which are not hearsay. A statement is not hearsay if--

(1) . . .

(3) Depositions. It is a deposition taken in the same proceeding and offered in accordance with the Texas Rules of Civil Procedure.

Reporter's Note: "I have a proposal that I would like to submit for the Committee's consideration. As I pointed out at the end of the meeting last year there seems to be a conflict between Rule 801(e)(3), which provides as "not hearsay . . . a deposition taken and offered in accordance with the Texas Rules of Civil Procedure" and Rule 804(b)(1) which provides as an exception to the hearsay rule "a deposition taken in the course of the same . . . proceeding . . ."

It is my impression that the intent of the Committee in recommending these rules was that depositions taken in the same proceeding would be nonhearsay and that depositions taken in another proceeding would be admitted as an exception to the hearsay rule under the limitations of the "former testimony" exception in 804(b)(1). This intention is consistent with the Texas Rules of Civil Procedure which, unlike the Federal Rules of Civil Procedure, allow the free use of depositions taken in the same proceeding.

I therefore propose that Rule 801(e)(3) be changed to read as follows:

> "(3) Depositions. It is a deposition taken in the same proceeding and offered in accordance with the Texas Rules of Civil Procedure."

And that Rule 804(b)(1) be changed to read as follows:

"(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of [the same or] another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." "

15. Rule 803(6). Records of Regularly Conducted Activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, received or made at or near the time by, or from information transmitted by, a person with knowledge, if made or kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make or keep the memorandum, report, record, or data compilation, all as [shown] proven by [the testimony of] the custodian or other qualified [witness] person, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or note.

Comment: This provision rejects the doctrine of Loper v. Andrews, 404 S.W. 2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty."

Reporter's note: The changes made in lines 3-6 are to cover the situation where the business does not create the writing but, having received it from others, retains it, thus utilizing the received writing as a part of its records.

The alterations in lines 8-9 are better to conform to, comply with, or accomodate the procedure when the record is authenticated not by testimony but by the 902(10) affidavit.

16. Rule 804. Hearsay Exceptions: Declarant Unavailable.

(a) . . .

(b) Hearsay exceptions. The following are not excluded if the declarant is unavailable as a witness--

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of [the same or] another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Reporter's Note:

"I have a proposal that I would like to submit for the Committee's consideration. As I pointed out at the end of the meeting last year there seems to be a conflict between Rule 801(e)(3), which provides as "not hearsay . . . a deposition taken and offered in accordance with the Texas Rules of Civil Procedure" and Rule 804(b)(1) which provides as an exception to the hearsay rule "a deposition taken in the course of the same . . . proceeding . . ."

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17. Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) . . .
(10) Business records accompanied by affidavit.

a. . . .
b. Form of affidavit. . . .

SWORN TO AND SUBSCRIBED before me on the __ day of __, 19__.

[_____
Notary Public in and for _____ County, Texas.]

My commission expires:

_____

_____
Notary Public, State of Texas
Notary's printed name:

Reporter's Note: The notary's jurat form we presently have in the Rules is obsolete. Amendments to TEX.REV.CIV.STAT.ANN. arts. 5949(1), 5954 and 5960, (Vernon Supp 1985), give notaries statewide jurisdiction, direct that the notary print or stamp his name and the expiration date of his commission, and that the seal carry the words "Notary Public, State of Texas," without mention of the county.

18. Rule 1007. Testimony or Written [Permission] Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Reporter's Note: Texas rule 1007 was copied from Federal 1007. The title to Federal 1007 is: "Testimony or Written Admission of Party." The title recommended by the State Bar Liaison Committee to the Supreme Court was: "Testimony or Written Admission of Party." The rule relates to "admissions" and not to "permissions." One suspects that the change to "Permission" was a typographical error somewhere along the line. It should be corrected.

19. Item. Committee's attitude, policy, or approach to: (a) pending legislation, e.g., a proposal by Senator Parmer; (b) proposing legislation; (c) opposing legislation.

20. Item. Should the Committee advise President-Elect Smith respecting a State Bar committee on criminal rules of evidence, or respecting enlargement of our Committee and adding responsibility for criminal rules of evidence? If so, what advice?

21. Item. Other business.

CANON 3C: DISQUALIFICATION

A judge should disqualify himself in a proceeding where:

(a) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(b) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

RECUSAL

A judge should recuse himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

* This suggestion resulted from discussions between Luke Soules and Justice Kilgarend.

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April 23, 1985

Mr. Tom B. Ramey, Jr.
P. O. Box 8012
Tyler, Texas 75711

RE: Adoption of F.R.A.P. 10
and F.R.A.P.11 in Texas

Dear Tom:

I have followed with interest the efforts to curb litigation costs and delay. Today I am responding to your invitation to submit suggestions that may aid in solving these problems.

The adoption of rules similar to F.R.A.P.10 and F.R.A.P.11 (copies enclosed) would save countless hours and dollars in those very common situations where court reporters fail to transcribe the statement of facts for timely filing in an appeal.

The federal system recognizes that courts-not lawyers-control court reporters. Clients there no longer pay for lawyer time expended in interviewing court reporters, preparing affidavits and filing motions for extension.

I have been forced to file as many as five motions for extension in one state case. I have had appellate courts invite writs of mandamus. The client could not understand the reason for the expense nor the delay, much less the uncertainty of an extension.

I am taking the liberty of sharing these thoughts not only with you as President of the State Bar of Texas, but as well with some members of the Committee on Proposed Uniform Rules of Appellate Procedure.

They are proposals that would seem appropriate for civil rules to be promulgated by the Supreme Court regardless of what the legislature may do with the criminal rules.

Cordially,

Frank

F. W. Baker

FWB:bv
6FWBaak

cc: Hon. Clarence A. Guittard
Hon. Sam Houston Clinton
Hon. James Wallace
Hon. Shirley Butts
Mr. Hubert Green
Mr. Luke Soules
Mr. Ed Coultas

which appellant was convicted; the date and terms of sentence.

Concise statement of the question or questions involved on the appeal, with a showing that such question or questions are not frivolous. Counsel shall set forth sufficient facts to give the essential background and the manner in which the question or questions arose in the trial court.

Certificate by counsel, or by appellant if acting pro se, that the appeal is not taken for delay.

Factual showing setting forth the following factors as to appellant with particularity:

nature and circumstances of offense charged,

weight of evidence,

family ties,

employment,

financial resources,

character and mental condition,

length of residence in the community,

record of conviction,

record of appearances or flight,

danger to any other person or the community,

such other matters as may be deemed pertinent.

A copy of the district court's order denying bail, containing the written reasons for denial, shall be appended to the application. If the movant questions the factual basis of the order, a transcript of the proceedings had on the motion for bail made in the district court shall be lodged with this Court. If the movant is unable to obtain a transcript of these proceedings, he shall state in an affidavit the reasons why he has not obtained a transcript.

If the transcript is not lodged with the motion, the movant shall also attach to this motion a certificate of the court reporter verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

The government shall file a written response to all motions for bail pending appeal within 7 days after service thereof.

Also, upon receipt of the application for bail, the Clerk shall request that the Clerk of the District Court obtain from the probation officer a copy of the presentence report, if one is available, and it shall be attached to the application for bail. The report shall not, however, be disclosed to the applicant. See Rule 32(c)(3) Fed.R.Crim.Proc.

THE RECORD ON APPEAL

FRAP 10.

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript Is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge an appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days

court of appeals such parts of the original record as any party shall designate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

Loc. R. 11

11.1. Duties of Court Reporters—Extensions of Time. *The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the Clerk of the Court:*

acknowledge receipt of the order for the transcript,

the date of receipt of the order for the transcript,

whether adequate financial arrangements under CJA or otherwise, have been made,

the number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

the estimated date on which the transcript is to be completed,

a certificate that he or she expects to file the trial transcript with the District Court Clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by FRAP 11(b) shall be filed with the Clerk and shall specify in detail (a) the amount of work that has been accomplished on the transcript, (b) a list of all outstanding transcripts due to this and other courts, including the due dates of filing, and (c) verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

[I.O.P.—The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982 the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the Court.]

11.2. Duty of the Clerk. *It is the responsibility of the Clerk of the District Court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this Court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the Clerk of the District Court shall advise the Clerk of this Court of the reasons for delay and request an enlarged date for the filing thereof.*

DOCKETING THE APPEAL; FILING OF THE RECORD

FRAP 12.

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.] [Abrogated]

(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

REVIEW OF DECISIONS OF THE TAX COURT

FRAP 13.

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the United