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On Unpublished Opinions

BY EDWIN R. RENDER*

"[A]dherence to precedent must be the rule rather than the exception if litigants are to have faith in even-handed administration of justice in the courts."**

INTRODUCTION

Since the 1976 reorganization of the Kentucky judicial system,¹ the Kentucky Court of Appeals has effectively become the court of last resort for most appeals from the circuit courts of this state. This reorganization created the Kentucky Court of Appeals as an intermediate appellate court under the Kentucky Supreme Court.² In most cases the decision of the Court of Appeals is the final step in the judicial process.³ However, the vast majority of the decisions of the Kentucky Court of Appeals are not published,⁴ and under the rules of practice, such unpublished decisions may not be cited as authority in any court in

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** B. CARDOZO, NATURE OF THE JUDICIAL PROCESS 34 (1921).
² Until January 1, 1976, Kentucky's only appellate court (excepting district court appeals to the circuit courts) was the Court of Appeals. The 1976 reorganization renamed the high court the Supreme Court and created a new intermediate appellate court, the Court of Appeals. Since these name changes are often confusing, this Article will uniformly refer to Kentucky's high court, whether before or after 1976, as the Supreme Court and will uniformly refer to Kentucky's intermediate appellate court as the Court of Appeals.
³ In 1983, for example, there were 588 motions for discretionary review filed in the Kentucky Supreme Court, of which 76 were granted and 512 denied. KENTUCKY SUPREME COURT, STATISTICAL REPORT (1983). See also text accompanying note 44 infra.
⁴ During 1980, the Court of Appeals rendered 1,362 opinions; 181, or 13.2%, of these opinions were ordered published. STAFF ATTORNEYS' OFFICE, KENTUCKY COURT OF APPEALS, 1980 STATISTICS. During 1981, the court ordered 10.2% of its 1,358 opinions to be published. STAFF ATTORNEYS' OFFICE, KENTUCKY COURT OF APPEALS, 1981 STATISTICS. Nine percent of the 1,429 opinions rendered in 1982 were ordered published by the court. STAFF ATTORNEYS' OFFICE, KENTUCKY COURT OF APPEALS, 1982 STATISTICS. During 1983, the court rendered 1,240 opinions, of which 12.3% were ordered published. STAFF ATTORNEYS' OFFICE, KENTUCKY COURT OF APPEALS, 1983 STATISTICS.
This author contends that the Court of Appeals' extensive rendering of unpublished opinions, when coupled with the rule prohibiting the citation of unpublished opinions, produces undesirable results.

Even though unpublished opinions are not cited as authority, they do influence trial judges, attorneys and perhaps the Court of Appeals itself. Furthermore, there are instances of clear conflict between published and unpublished decisions. These conflicts create confusion within all branches of the legal profession. Moreover, they leave the Court of Appeals open to the charge that it is not doing thorough work, or worse, that it knowingly accomplishes through unpublished opinions that which it could not do in published opinions.

This Article first will trace the development of two sets of rules in Kentucky: the rules governing the publication of opinions and the rules prohibiting the citation of unpublished decisions. Further, this Article will summarize the Court of Appeals' case load and its practice in connection with the publication of opinions. This summary will be followed by an analysis of some of the problems created by unpublished Kentucky decisions. As a solution to such problems, this Article advocates abolition of Kentucky's "no-citation" rule.

I. DEVELOPMENT OF KENTUCKY'S RULES ON UNPUBLISHED OPINIONS

Before Kentucky's judicial system was reorganized in 1976, the publication of opinions was governed by the rules of the Supreme Court. Rule 1.310(b) stated:

If the issues presented in a case do not detail the facts and will dispose of the law or any question of public importance the Court may direct that the opinion not be reported officially or cited as authority, which direction will be stated in the opinion and shall be noted by the Clerk on the docket. The opinions in such cases will not detail the facts and will dispose of the issues in a summary manner.

See Ky. R. Civ. P. 76.28(4)(c) [hereinafter cited as CR].
See note 2 supra.
Rule 1.310(a) directed the court clerk to send copies of all opinions to the court reporter, who was to forward them immediately to the West Publishing Company. The rule further provided that opinions were not to be published until the mandate of the Supreme Court had been issued and until any motion, such as a motion for rehearing, had been resolved.

When the Supreme Court decided a case and the opinion was not to be published, the attorneys received a decision that might have read: "This case has been reviewed by a panel of three circuit judges and by this court. All are of the opinion that the judgment is correct and should be affirmed." Thus, an unpublished "decision" of the Supreme Court contained no statement of facts and did not summarize the parties' arguments or the Court's reasoning. Unpublished decisions reversing the trial court were equally terse. Under the applicable rules, such decisions could not be cited. Indeed, citation would have been fruitless because the decisions detailed neither the facts nor the Court's reasoning process. Under the pre-1976 practice of Kentucky's high court, one point was clear: the law as interpreted by the highest court of this Commonwealth was found in the official Kentucky reports. When attorneys wanted to research the law, they "went to the books," the Kentucky Reports or the Southwestern Reporter. Unfortunately, this is no longer the case.

II. Kentucky Practice Since 1976

Kentucky's current judicial system was established on January 1, 1976. The constitutional amendment providing for a three-tier court structure in this state necessitated the revision of the Supreme Court Rules and the adoption of rules by the new Court of Appeals, including those relating to publication of opinions and citation of unpublished decisions. The statutory basis for the current rule is Kentucky Revised Statutes § 21A.070(2), which states that the "Supreme Court shall determine which opinions of the Court of Appeals and lower courts shall be published." In 1976, Rule 1.310(b) was revised to read

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8 See RCA 1.310(a), KRS (1962).
9 See id.
11 See RCA 1.310(b), KRS (1962).
12 See note 2 supra.
13 KRS § 21A.070(2) (1980).
as follows: "Opinions of the Supreme Court shall be published unless the issues presented in a case do not involved [sic] any new or substantial point of law or any question of public importance." Rule 1.310(c) permitted the chief judge of the newly-created Court of Appeals to recommend to the Supreme Court the publication of a Court of Appeals decision. The revised rules also contained the admonition that "[u]npublished opinions shall not be cited or otherwise used in any other case in any court."

In 1978, the rules relating to publication of opinions by the Court of Appeals were modified. The Rules of Civil Procedure contain the current rules governing the publication of opinions and the citation of unpublished opinions. Rule 76.28(4)(a) provides:

When a motion for discretionary review under Rule 76.20 is granted by the Supreme Court, the opinion of the Court of Appeals in the case under review shall not be published unless so ordered by the Supreme Court. All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is 'To Be Published' or 'Not To Be Published.'

The present no-citation rule, found in Rule 76.28(4)(c) of the Rules of Civil Procedure, states: "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of the state." The rule further states that "[p]arties to an appeal may not [by] agreement dismiss an appeal and have an opinion withdrawn after it has been issued."

In many jurisdictions, court rules or statutes set forth standards for determining when publication is appropriate. Earlier rules of the Kentucky high court suggested some reasons for not

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14 Ky. R. App. P. 1.310(b), KRS (1976) [hereinafter cited as RAP].
15 See RAP 1.310(c), KRS (1976).
16 RAP 1.310(d), KRS (1976).
17 CR 76.28(4)(a).
18 CR 76.28(4)(c).
19 CR 76.28(5).
20 In most states the decision whether to publish a decision of an appellate court is made by the court deciding the case, in accordance with standards set out in court rules or statutes. Ohio, for example, employs a comprehensive set of criteria for publication. The Ohio rule states that a decision will be published if:
publishing opinions. For example, cases that did not involve "any question of public importance" were not to be published.21 Under the present Court of Appeals rules, an opinion is not to be published if the Supreme Court grants discretionary review.22 Otherwise, the rules are silent as to when publication by the Court of Appeals is appropriate.23 The Court of Appeals has, however, developed publication standards which are not contained in its rules. The court utilizes a form, the substance of which states:

[ ] Publication is not recommended.
Publication is recommended because the opinion:
[ ] Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;
[ ] Involves an issue of continuing public interest;

(1) It establishes a new rule of law, which term as used in this rule includes common law, statutory law, procedural rules and administrative rules;
(2) It alters, or modifies, or overrules an existing rule of law;
(3) It applies an established rule of law to facts significantly different from those in previously published applications;
(4) It explains, criticizes, or reviews the history of an existing rule of law;
(5) It creates or resolves a conflict of authority, or it reverses, overrules, or otherwise addresses a published opinion of a lower court or administrative agency;
(6) It concerns or discusses one or more factual or legal issues of significant public interest;
(7) It concerns a significant legal issue and is accompanied by a concurring or dissenting opinion;
(8) It concerns a significant legal issue upon the remand of a case from the United States Supreme Court or the Supreme Court of Ohio.


21 See RCA 1.310(b), KRS (1972).
22 See CR 72.28(4)(a).
23 CR 72.28(4)(a) provides:

When a motion for discretionary review under Rule 76.20 is granted by the Supreme Court, the opinion of the Court of Appeals in the case under review shall not be published unless so ordered by the Supreme Court. All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is 'To Be Published' or 'Not To Be Published'.
The appellate panel makes the initial determination whether to publish its decision. In most cases, the judge who writes the majority opinion decides whether to order publication.

It is not unfair to say that present practice discourages publication. If the judge who wrote an opinion does not want it published, for any reason, the judge simply checks the appropriate box. On the other hand, if the judge opts for publication, the decision should accomplish one of the five alternatives indicated on the form. Clearly, the course of least resistance is not to publish.

Notwithstanding promulgation of the no-citation rule in 1976, attorneys apparently continued to cite unpublished opinions. In Yocum v. Justice, the Court of Appeals noted that there had been cases in which attorneys had cited unpublished opinions to various courts in the state. The Justice court stated that in future cases, it would strike the offending brief without leave to refile if the circumstances so warranted. Subsequent to the Justice decision, attorneys evidently have complied with the rule, at least at the appellate level. However, the major difficulty with the rule prohibiting citation of unpublished opinions does not arise in the Court of Appeals or even in the Kentucky Supreme Court. The problem is a more serious matter in the state’s trial courts and in the daily practices of its attorneys.

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24 A copy of this form was provided by the Staff Attorneys’ Office of the Kentucky Court of Appeals.
25 See CR 72.28(4)(a).
26 See McDonald, Chance of Publishing?, 3 LOUISVILLE LAW. 26, 27 (Winter 1982).
27 RAP 1.310(d).
28 569 S.W.2d 678 (Ky. Ct. App. 1977).
29 See id. at 679.
30 See id.
31 The author has found no published case in which an attorney’s brief was stricken without leave to refile for violating the “no-citation” rule.
III. PRECEDENTIAL FORCE OF UNPUBLISHED DECISIONS IN KENTUCKY

It has been said that the precedential effect of the decisions of the present Court of Appeals of Kentucky depends on whether the opinion is published. Judge McDonald has stated that "[t]he easiest way to think of a nonpublished opinion is as a personal letter from the panel to the trial court judge and the parties informing them of the decision and the rationale behind it." This statement is consistent with the no-citation rule. The rule does not state that an unpublished opinion is of no precedential effect; it only prohibits citation of such opinions. As far as appellate practice is concerned, the clear implication of Judge McDonald’s statement is that unpublished opinions have no precedential value in this state. Judge McDonald may have underestimated the impact of unpublished opinions. It seems that attorneys who receive unpublished opinions in cases they have handled tend to regard these opinions as more than personal letters. It is reasonable to assume that attorneys would rely on such unpublished opinions in their practice as a basis for counseling clients in similar situations.

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32 See McDonald, supra note 26, at 26.
33 Id.
34 Cf. CR 76.28(4)(c).
35 See text accompanying note 18 supra.
36 Judge McDonald's conclusion is the same as that of the Texas Supreme Court, which recently held that an unpublished opinion "is of no precedential value and should not be cited." Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983).

There is little uniformity among other jurisdictions as to the propriety of citing unpublished opinions or the precedential value thereof. Some states do not have court rules or statutes on the subject. See, e.g., VA. CODE § 17-116.01 (1984) (list and brief summary of unpublished opinions kept by court clerk and available upon request). Other states flatly prohibit the citation of unpublished opinions. See, e.g., LA. CT. APP. R. 2-16.3. Colorado and Michigan have court rules which state that unpublished opinions are not binding precedent, but their rules do not prohibit citation. See COLO. APP. R. 35(f); MICH. CT. R. 7.215(C). A number of states have rules which permit reference to unpublished opinions only for certain purposes. See, e.g., CAL. CT. R. 977 (law of the case, res judicata, collateral estoppel, criminal action involving same defendant or disciplinary action involving same respondent); ILL. S. CT. R. 23 (double jeopardy, res judicata, collateral estoppel, law of the case or similar doctrines); IOWA S. CT. R. 10(f) (same as California rule); WIS. STAT. ANN. § 809.23(3) (res judicata, collateral estoppel or law of the case). Ohio and Tennessee permit citation of an unpublished opinion if a
IV. WHY COURTS DO NOT PUBLISH

Numerous reasons have been advanced as to why appellate courts do not publish all of their decisions. An appellate court's caseload may preclude wholesale publication. Recent caseload statistics indicate that this consideration is directly applicable to the Kentucky Court of Appeals.

Since 1980, between 1,500 and 2,000 cases per year have reached the Court of Appeals. During this same period, the Court of Appeals issued between 1,200 and 1,400 opinions annually. This figure represents nearly 100 opinions per judge per year. Nearly nine out of ten opinions of the Court of Appeals since 1980 have gone unpublished.

The volume of work produced at the Court of Appeals most likely affects its decision whether to publish opinions, and justifiably so. Given the number of opinions each judge writes, it would be unreasonable to expect every opinion to be refined so the copy of the opinion is attached to the brief and made available to the other parties in the litigation and to the court. See Ohio S. Cr. R. 2(G)(3); Tenn. S. Ct. R. 4(5).

Nor is the practice uniform in the federal system. The Tenth Circuit permits citation of unpublished opinions. 10th Cir. R. 17(c). In the Fifth Circuit, “[u]npublished opinions are precedent.” 5th Cir. R. 47.5.3 (unpublished opinion to be cited only when basis for res judicata, collateral estoppel or law of case). In the Seventh Circuit, unpublished orders can be cited “to support a claim of res judicata, collateral estoppel or law of the case.” 7th Cir. R. 35(b)(2)(iv) (emphasis in original). Citation of an unpublished opinion is disfavored in the Fourth and Sixth Circuits. See 4th Cir. R. 36.5 18(d)(ii) (exception for establishing res judicata, collateral estoppel, law of case); 6th Cir. R. 24(b). Citation is flatly prohibited in the First, Second and Ninth Circuits. See 1st Cir. R. 14; 2D Cir. R. § 0.23; 9th Cir. R. 21(c).


See Andreani, supra note 37, at 728; Kanner, supra note 37, at 388; Silverman, supra note 37, at 35, 38-39.

See note 4 supra.

See id.

See id.
that it is suitable for publication. Also, given its existing personnel and caseload, if the court were to adopt the practice of preparing all its opinions in a manner suitable for publication, the length of time cases remain in the Court of Appeals would increase dramatically. Indeed, the present court system was established to alleviate increasing delays at the appellate level.\footnote{See Reed, From the Desk of the Chief Justice: Workload Matters, 39 Ky. BENCH \& B. 25 (April 1975); Whitmer, One More Word—Your Support Needed, 39 Ky. BENCH \& B. 20 (July 1975).}

Notwithstanding its caseload, the decision of the Court of Appeals is, in most cases, the final step in the appellate process. Although the losing party can make a motion for discretionary review in the Supreme Court, such a motion realistically affords little hope of review since the Supreme Court rarely grants these motions. Indeed, the Court of Appeals makes the final decision in more than eighty-five percent of appealed cases.\footnote{See note 3 supra.} The fact that the Supreme Court does not review most cases greatly increases the importance of the Court of Appeals decisions. The Court of Appeals' status as a de facto court of last resort should not be ignored in determining whether and which of its decisions warrant publication.

It is often argued that cases lacking precedential importance should not be published.\footnote{See, e.g., Andreani, supra note 37, at 728; Kanner, supra note 37, at 388; Newbern \& Wilson, supra note 37, at 38.} According to this argument, if a case only involves the application of settled rules of law, publication adds nothing to the legal literature.\footnote{See, e.g., authorities cited in note 45 supra.} However, there is at least one problem with this reasoning. A case that does not seem particularly important today may become important in the future for reasons that are entirely unknown to the court at the time the decision is made. The "precedential importance" of an opinion thus cannot be predetermined by its author. Rather, the attorney wishing to rely on the opinion in a subsequent matter is in a better position to decide whether the opinion is worth citing.

Some have argued that publication of all appellate court opinions vastly increases printing expense.\footnote{See ABA APPELLATE COURT STANDARDS, Standard 3.37 commentary, quoted in Stern, supra note 37, at 1245.} Those advancing this
argument further contend that there is no commensurate benefit to offset the increased cost of publication.\textsuperscript{48} Most publication costs, however, are borne by the members of the bar, not the state.\textsuperscript{49} Moreover, several states publish opinions of intermediate courts in large numbers.\textsuperscript{50} One would suppose that if there were no market for these reports, the private publishing companies involved would soon find publication unprofitable and stop publishing the decisions.

Another argument in favor of selective publication of judicial decisions is that courts issue opinions at such a rate that, if all opinions were published, there would be an incredible mass of

\textsuperscript{48} See, e.g., id.

\textsuperscript{49} Since law firms and lawyers purchase the majority of volumes of reported opinions, the legal community and not the state pays most of the publication costs.

\textsuperscript{50} Many states utilize private firms to publish intermediate court decisions. For example, decisions of the California Court of Appeal are reported in the California Appellate Reports, the Pacific Reporter and West's California Reporter. The California Appellate Departments of the Superior Court report decisions in the California Appellate Reports Supplement, West's California Reporter and the Pacific Reporter. In Florida, District Court of Appeal decisions are reported in the Southern Reporter. The Circuit Court, County Court and other lower courts of record are published in the Florida Supplement. The Georgia Appeals Reports and the Southeastern Reporter contain the decisions of the Georgia Court of Appeals. The Illinois Appellate Court decisions are reported in the Illinois Appellate Court Reports and the Northeastern Reporter. The decisions of the Indiana Court of Appeals are published in the Indiana Court of Appeals Reports (prior to 1972, Indiana Appellate Court Reports) and the Northeastern Reporter. In Maryland, the decisions of the Court of Special Appeals are reported in the Maryland Appellate Reports and the Atlantic Reporter. In New Jersey, the decisions of the Superior Court are reported in the New Jersey Superior Court Reports and the Atlantic Reporter. The County courts and other lower courts also report decisions in these reporters. The New Mexico Reports and the Pacific Reporter contain the opinions of the New Mexico Court of Appeal. In New York, the Supreme Court, Appellate Division, decisions are reported in the Appellate Division Reports and West's New York Supplement. Other lower court decisions are published in the New York Miscellaneous Report, and West's New York Supplement. In North Carolina, decisions of the Court of Appeals are reported in the Southeastern Reporter.

The Ohio Court of Appeals reports its decisions in the Ohio Appellate Reports and the Northeastern Reporter. Decisions of the Oregon Court of Appeals are reported in the Oregon Reports, Court of Appeals, and West's Pacific Reports. In Pennsylvania, the Superior Court publishes decisions in the Pennsylvania Superior Court Reports and the Atlantic Reporter. The Atlantic Reporter also contains the Pennsylvania Commonwealth Court decisions. The Tennessee Court of Appeals, Court of Chancery Appeals, and Court of Criminal Appeals opinions are printed in the Southwestern Reporter. In Washington, the Court of Appeals decisions are found in the Washington Appellate Reports and the Pacific Reporter.
material to be reproduced. Law firms often have no place to store the volume of decisions that are presently published, let alone an additional thousand opinions of the Kentucky Court of Appeals every year. The response to this point is that if the decisions are significant, those who need them will devise ways of storing and retrieving them. Recent developments in the technology of storage and retrieval such as LEXIS, WESTLAW and JURIS necessitate a reconsideration of the “lack of space” argument.

V. PROBLEMS CREATED BY UNPUBLISHED OPINIONS AND THE NO-CITATION RULE

A fundamental cause of concern for attorneys and trial judges arises from differences between the law announced in published cases and the results reached in unpublished cases. The manner in which one recent unpublished case was resolved illustrates several problems created by unpublished opinions. Carter v. Gilmore & Tatge Manufacturing Co. concerned whether damages in a wrongful death action should be reduced where one of the beneficiaries of the wrongful death recovery was guilty of negligence which contributed to the decedent’s death. A brief summary of the substantive law prior to the Carter decision is necessary for an understanding of the difficulties generated by this case.

In an earlier wrongful death action, Bays v. Cox’ Administrator, the Supreme Court held that a negligent beneficiary could not share in the estate’s recovery. The Bays rule repre-

51 See, e.g., Silverman, supra note 37, at 35, 38.
52 See id. at 38. See also Newbern & Wilson, supra note 37, at 58-59.
54 28 KLS 10, at 5. See also notes 62-71 infra and accompanying text for a discussion of the facts which gave rise to this issue.
55 229 S.W.2d 737 (Ky. 1950).
56 In Bays, the Supreme Court found as a matter of fact that the death of Nola Cox was caused by the concurring negligence of her husband, Henry Cox, and Kenneth Bays, as drivers of two colliding automobiles. Id. at 739. The Court held that the trial court erred in awarding Mrs. Cox’ administrator $4,000 against Mr. Cox and $8,000 against Bays. Id. at 739-40. In so holding, the Court quoted § 241 of the Kentucky Constitution, which provides that “[u]ntil otherwise provided by law, the action to
presented a minority view and its rationale had been questioned in various quarters.\textsuperscript{57}

In 1974, the Supreme Court in \textit{Cox v. Cooper},\textsuperscript{58} faced precisely the same question that had been decided in \textit{Bays}, and it made the same ruling.\textsuperscript{59} However, the Court stated in \textit{dictum}:

As an original proposition, a good argument can be made to the effect that in such a case the recovery to the estate should not be diminished at all, because if it is, as in this very example, the wrongdoer gains back half of what he loses. A better policy would pass what would otherwise be his share of the recovery on to those who would take it if he were dead. . . . We might have given favorable consideration to adopting such a policy had the administratrix brought the question to us, but sadly she did not, so we must live for the time at least with the ruling in \textit{Bays v. Cox' Adm'r} . . . that the amount of the wrongdoer's beneficial interest is deducted from what he has to pay.\textsuperscript{60}

The foregoing statement by the Supreme Court helped create the problem in the unpublished opinion in \textit{Carter}. The plaintiff in \textit{Carter} was the personal representative of her deceased six-year-old child's estate.\textsuperscript{61} The decedent was killed when he fell into an uncovered conveyor which was being operated by his

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\textsuperscript{58} 510 S.W.2d 530 (Ky. 1974).
\textsuperscript{59} In \textit{Cox} a young pregnant woman involved in a two-car collision brought suit against both drivers, one of whom was her husband. \textit{Id.} at 532. The woman received injuries which resulted in the death of her unborn child and required her to undergo a hysterectomy. \textit{Id.} A jury awarded her more than $90,000 ($53,660.10 for her personal injuries and $40,196 for the infant's wrongful death) and apportioned the damages between the defendants. \textit{Id.} The trial court entered judgment accordingly, "except that from each award for the wrongful death the amount of $10,000, which otherwise would have been the father's beneficial interest in the recovery, was deducted." \textit{Id.} On appeal, the Supreme Court, citing \textit{Bays}, affirmed the judgment. See \textit{id.} at 538.
\textsuperscript{60} \textit{Id.} at 538.
\textsuperscript{61} 28 KLS 10, at 5.
father, a tenant farmer. The father was not joined as a defendant. Instead, the complaint alleged negligence of the manufacturer and the retailer of the equipment, and of the landowner for whom the deceased's father was working. The trial court sustained motions for summary judgment against the plaintiff on the theory that both parents were guilty of contributory negligence as a matter of law, thereby precluding recovery under Cox and Bays. On appeal, however, the Court of Appeals followed the above quoted dictum. The Court of Appeals stated that "should negligence in any manner be assigned against either parent or both parents, such finding will not preclude a recovery. . . . Rather, as suggested by Cox, the share(s) of the wrongdoer(s) in the recovery will pass to those who would take if the person(s) were dead." The Court of Appeals ordered the decision published, and the decision appeared in the August 12, 1981, Kentucky Law Summary.

The defendants in Carter successfully moved for discretionary review in the Kentucky Supreme Court. However, before the briefs were filed, all parties to the lawsuit made a joint motion not to publish the Court of Appeals' opinion. The Supreme Court dismissed the appeal as settled. Its order stated: 

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See notes 55-57 supra and accompanying text for a discussion of Bays. See notes 58-60 supra and accompanying text for a discussion of Cox. The Carter court did not mention whether the trial court had relied on these cases, only that the lower court had sustained summary judgment motions against the plaintiff. See 28 KLS 10, at 5.


The motion stated:
The undersigned, being all of the parties to this appeal, do hereby jointly move that this Court not publish the opinion heretofore rendered by the Court of Appeals on July 10, 1981, on the grounds that the parties have reached settlement of the case which cannot be consummated until this motion is ruled upon and that, since this court has granted discretionary review and that opinion has not been issued, it can under C.R. 76.28(4)(a) order the opinion not published if it deems such action appropriate.

Joint Motion Not To Publish and To Extend Time For Filing Brief, Carter v. Gilmore & Tatge Mfg. Co., No. 81-SC-734-DG.

See Order Dismissing Discretionary Review Proceeding, No. 81-SC-734-DG.
"Consistent with CR 76.28(4)(a) the opinion of the Court of Appeals shall not be published."\textsuperscript{72}

The \textit{Carter} result obviously is undesirable in that it produced a clear conflict between the published law and the decisions of the Court of Appeals. Such a conflict creates confusion. For example, any alert lawyer doing personal injury work would understand from reading the Kentucky Law Summary that the \textit{Carter} decision significantly modified rules relative to damages in wrongful death actions. Such an attorney should feel free to cite the case to a trial court or to the Court of Appeals since the case was published in the Kentucky Law Summary. However, the unpublished order of the Kentucky Supreme Court directing that the decision not be published makes any such citation improper.\textsuperscript{73}

Additionally, the circumventing of publication, as in \textit{Carter}, could create the impression of impropriety. Dissatisfied clients could easily jump to the conclusion that the court ordered non-publication of the appellate opinion to conceal an inadequate rationale for the decision.\textsuperscript{74} To the suspicious, unpublished will often suggest secret and corrupt. The Commonwealth's judicial system and bar do not need this kind of ill-favored speculation about their activities.

Finally, it is possible that part of the \textit{Carter} settlement was

\textsuperscript{72} \textit{Id.} See note 23 \textit{supra} for the text of CR 72.28(4)(a).

\textsuperscript{73} Furthermore, in dismissing \textit{Carter} on appeal, the Court apparently disregarded CR 76.28(5), which prohibits parties to an appeal from agreeing on its dismissal in order to circumvent publication of an opinion that has already been issued. \textit{See} CR 76.28(5) ("Parties to an appeal may not be [sic] agreement dismiss an appeal and have an opinion withdrawn after it has been issued."). Had the Supreme Court followed this rule, the confusion created by \textit{Carter} might have been avoided. Further, the \textit{Carter} court simply followed \textit{dictum} in an earlier case and made a reasoned change in the law. This alone would seem to justify publication of the decision under the Court of Appeals' guidelines. \textit{See} text accompanying note 24 \textit{supra}.

\textsuperscript{74} Clients are not the only group which might make such inferences: Judges are obviously caught in a squeeze between the need to give litigants the reasons for the disposition and the need to keep those reasons brief and informal, while preserving the reputation of the court for scholarship. An unpublished opinion accommodates both of these, but \textit{the very danger of this system lies in its fulfillment of the tribunal's desire to avoid critical review by non parties, legal commentators and even other courts, who are forbidden access by the no-publication rule}. \textit{See} text accompanying note 37 \textit{supra}.

\textsuperscript{Id.} See note 23 \textit{supra} for the text of CR 72.28(4)(a).
paid on the condition that the other party agree to a request for nonpublication. This is not a proper element of damages in a wrongful death case.\textsuperscript{75} The defense bar was undoubtedly unhappy with the decision of the Court of Appeals in \textit{Carter}; however, neither the defense bar nor the insurance industry should be allowed to silence an unfavorable change in the law by conditioning settlement on stipulated nonpublication.

Issuing unpublished opinions under the no-citation rule can make it difficult, if not impossible, to reconcile inconsistent cases. A series of recent worker's compensation cases illustrates this difficulty. These cases focused on the proper apportionment of death benefit damages between the Special Fund\textsuperscript{76} and employers where the deceased employee had suffered from a pre-existing disease.

Prior to 1983, the issue of proper apportionment of damages appeared to be settled. In 1978, the Kentucky Supreme Court held in \textit{Yocum v. Loy}\textsuperscript{77} that the employer was liable only "for the degree of disability which would have resulted from the subsequent injury had there been no pre-existing disability or . . . disease."\textsuperscript{78}

In a subsequent case, \textit{Wells v. Collins},\textsuperscript{79} the trial court applied the \textit{Loy} standard in holding the Special Fund wholly liable

\begin{quotation}
\textsuperscript{75} See KRS § 411.130 (1983) ("[D]amages may be recovered for the death . . . ") (emphasis added). \textit{See also} Louisville & N. Ry. Co. v. Simrall's Adm'r., 104 S.W. 1011, 1013 (Ky. 1907) (recovery is for death).

\textsuperscript{76} The Special Fund is a division of the Department of Labor which, in certain circumstances, supplements employee compensation. \textit{See} KRS § 342.120 (1983).

\textsuperscript{77} 573 S.W.2d 645, 650 (Ky. 1978).

\textsuperscript{78} \textit{Id.} at 650. The employee in \textit{Loy} had suffered a fatal heart attack and the Workmen's Compensation Board assessed 95% of the liability against the Special Fund as attributable to the employee's pre-existing heart condition. \textit{Id.} at 647. The standard applied in \textit{Loy} was taken from KRS § 342.120(3), which at the time of the Court's decision, read as follows:

\begin{quote}
If it is found that the employee [has a previous disability or a dormant non-disabling disease or condition brought into disabling reality by a later injury] . . . and the employee is entitled to receive compensation on the basis of the combined disabilities, the employer shall be liable only for the degree of disability which would have resulted from the latter injury or occupational disease had there been \textit{no pre-existing disability or dormant but aroused disease or condition}.
\end{quote}

\textit{See id.} at 650 n.3 (quoting KRS § 342.120(3) (1983)) (emphasis added).

\textsuperscript{79} No. 82-CA-1539-MR (Ky. Ct. App. Mar. 4, 1983).
for worker's compensation benefits payable because of the employee's death. The Court of Appeals, however, applied a different standard and reversed the trial court. The Court of Appeals held that "[i]f a work connection exists in an incident which brings about or contributes to the causation of a heart attack, then the employer is liable for a proportionate part of the award, even if the same exertion or stress would have caused no injury to a healthy individual." This test for measuring the employer's liability is quite different from the Loy standard, which holds employers liable only for "the disability which would have resulted from the [fatal] injury . . . had there been no pre-existing . . . disease." The Court of Appeals originally ordered its opinion not to be published, but it subsequently granted the Special Fund's motion for publication.

Three weeks after the decision in Collins, but prior to the Court of Appeals publication order, a different panel decided Wells v. Dal Camp, Inc. The Dal Camp panel, however, relied on Loy and held that "the employer is only liable for the degree of liability which would have resulted from the subsequent injury to [the employee] had his coronary vessels been normal." The Court of Appeals ordered this decision to be published.

Under the no-citation rule, it would have been improper for anyone to have cited the Collins case to the Court of Appeals in Dal Camp prior to the entry of the order to publish Collins. There is no reason why counsel should not tell one appellate

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80 The trial court in Collins relied on KRS § 342.120(3), which was the basis for the Supreme Court's holding in Loy. Compare Wells v. Collins, No. 82-CA-1539-MR, slip op. at 2-3 with Yocum v. Loy, 573 S.W.2d at 650.
81 See No. 82-CA-1539-MR, slip op. at 8, 9.
82 Id., slip op. at 8. The court relied to a significant extent upon Moore v. Square D Co., 518 S.W.2d 781 (Ky. 1974), for the proposition that "heart-attack cases fall into a special class of their own, to which, historically and necessarily, special rules have been applied." Wells v. Collins, No. 82-CA-1539-MR, slip op. at 5 (quoting Moore v. Square D Co., 518 S.W.2d at 784).
83 See 573 S.W.2d at 650.
84 See No. 82-CA-1539-MR, slip op. at 1.
85 See Order Granting Motion To Publish, No. 82-CA-1539-MR (May 6, 1983).
87 See id., slip op. at 3 (emphasis added).
88 See id., slip op. at 1.
89 See CR 76.28(4)(c), which is set out in full at text accompanying note 18 supra.
panel what another panel has done in a similar case. If attorneys could cite to the Court of Appeals its own theretofore unpublished opinions, inconsistent results produced by such cases as Collins and Dal Camp could be avoided. As the Fourth Circuit stated, "any decision is by definition a precedent and . . . we cannot deny litigants and the bar the right to urge upon us what we have previously done." 

Jericol Mining Co. v. Jones demonstrates how knowledge of an unpublished opinion could give an attorney potential advantages in counseling and planning, as well as in litigation. One of the issues in Jericol Mining was whether the company could be enjoined and fined for misconduct by a management representative during a labor dispute where the representative's actions were allegedly beyond the scope of his employment. Addressing this issue in an unpublished opinion, the Court of Appeals adopted the following standard for liability:

[U]nions may only be held responsible for the authorized or ratified actions of their officers and agents. The complaining parties must prove not only that irresponsible or violent acts by individual workers (or by agents provocateur) occurred but also that in some way the union acting through its officers or agents initiated or encouraged or aided and abetted or ratified the prohibited conduct.

Applying this standard, the Court of Appeals held that the company could not be held liable for the violent misconduct of its employees unless it "initiated, encouraged, aided, abetted or ratified" its employees' actions. The standard used by the Court of Appeals, insofar as the proof needed to establish

Interestingly, both Collins and Dal Camp were appealed from the Harlan Circuit Court, and the same attorneys represented the employer and the workers' interest in both cases. Compare Wells v. Collins, No. 82-CA-1539-MR, slip op. at 1, 10 with Wells v. Dal Camp, Inc., No. 82-CA-1602-MR, slip op. at 1, 3. Consequently, the attorneys in Dal Camp certainly knew about Collins.


See id., slip op. at 2, 6-7.

Id., slip op. at 7 (quoting United Mine Workers of America v. Eastover Mining Co., 551 S.W.2d 245, 246 (Ky. 1977)).

Id., slip op. at 7.
liability of the company is concerned, is not universally applied in labor matters. For example, labor practitioners who handle NLRB election cases would anticipate a finding of employer liability under the purported facts of Jericoli Mining.

Even though an unpublished decision such as Jericoli Mining may not be cited, attorneys may want to rely on such opinions in counseling clients. An attorney who uses unpublished decisions in advising a client may be securing an advantage for the client should the matter proceed to litigation. In labor disputes, for example, a company's good faith belief that it is acting lawfully can be important. Consequently, an employer with knowledge of the standard of liability announced in Jericoli Mining would be in a position to deal with its employees or a union more flexibly than would employers who were unaware of the court's holding. If such a dispute proceeded to litigation, an employer who had acted on the advice of counsel and patterned its conduct to meet the requirements of Jericoli Mining could argue that it relied in good faith on the court's statements. Thus, the employer could avoid an injunction or damages which might otherwise be appropriate.

There are cases in which it appears absolutely essential for a party to be able to cite an unpublished decision to protect its own interests. Consider, for example, an unpublished decision of the Court of Appeals which quiets title to land in A. If A subsequently sells the land, the buyer should be able to rely on the unpublished decision if sued for possession of the property he bought from A. Similarly, an attorney searching the title to a tract of land should be able to treat an unpublished decision, which quiets title in someone within the chain of title, as more than a letter to a pair of litigants. The attorney in this situation surely would include a reference to the unpublished decision in

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96 See, e.g., 1 The Developing Labor Law, supra note 95, at 330. See also Gabriel Co., 137 N.L.R.B. 1252, 1267 n.6, 50 L.R.R.M. (BNA) 1369 (1962) ("It is not material that the fear and disorder . . . cannot be attributed either to the employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible.").
a title opinion. Should the attorney's title opinion ever become the subject of litigation, the case could not be disposed of without reference to the unpublished opinion.

There are strong indications that the no-citation rule is difficult if not impossible to enforce. There are a number of ways, apart from formal citation in a brief or memorandum, that unpublished opinions are brought to a court's attention. First, a judge may know about an unpublished opinion which resolves an appeal from his court.97 A trial judge is very likely to remember how the appeals court ruled on an issue he decided. The judge is also very likely to decide a subsequent case in accordance with prior decisions of the appellate court. Indeed, the judge may feel duty bound to do so, whether the decision is published, cited or not. Trial judges can also learn about unpublished cases from fellow judges, especially in Kentucky's larger circuits. Whenever a judge has personal knowledge of and relies upon an unpublished appellate opinion, it makes no sense to require the judge to be silent, especially when there is an arguable conflict between the published and unpublished law.

Judges have related stories to this author about receiving unpublished decisions in the mail anonymously, or having them slipped under their office doors. Policing this kind of conduct is virtually impossible. A system in which unpublished decisions are cited, analyzed and argued is preferable to such subterfuge.

In some situations, the no-citation rule may create an ethical catch-22 for attorneys. An attorney who cites an unpublished opinion to a court may be subject to professional discipline if the violation is intentional98 or results in injury to the client.99 On the other hand, the attorney who knows about a line of unpublished cases, but advises clients to act in accordance with the published decisions, may not be giving these clients the best possible advice.100 Similarly, the attorney who fails to learn about

97 Cf. note 89 supra and accompanying text.
99 See Model Code DR 7-101(A)(3) which provides, in part, that a lawyer shall not intentionally "[p]rejudice or damage his client."
100 See Model Code DR 7-101(A)(1) which provides, in part, that a lawyer shall
unpublished cases is open to a charge of incompetence and also risks possible discipline.\textsuperscript{101} It would seem desirable to eliminate these gray areas by making the unpublished decisions of the Court of Appeals a body of binding precedent. This would allow attorneys to rely openly on such opinions in their dealings with each other and with courts.

**CONCLUSION**

The modification of the rules of practice so as to permit the citation of unpublished opinions is a starting point for the elimination of the problems extant in the present system. Abolition of the no-citation rule could help eliminate the idea that non-publication is a rug under which judges sweep whatever they wish never to see the light of day. If lawyers could cite and argue unpublished opinions, case law conflicts could be reconciled and bad decisions could be overruled. Attorneys would no longer have to devise questionable methods for bringing such opinions to the attention of the courts. Similarly, judges with personal knowledge of relevant unpublished opinions would no longer have to suppress the instinct to rely on such opinions in rendering decisions.

The abolition of the no-citation rule might create some difficulties. There would be more decisions to read. Furthermore, there would be pressure on law firms to purchase copies of all Court of Appeals decisions. On balance, however, the judicial system of the Commonwealth would benefit from the abolition of the no-citation rule.

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\textsuperscript{101} \textbf{Model Code DR 6-101(A)(1)} provides, in part, that a lawyer shall not “[h]andle a legal matter which he . . . should know that he is not competent to handle,” \textbf{Model Code DR 6-101(A)(2)} prohibits an attorney from handling a legal matter “without preparation adequate in the circumstances.” According to \textbf{Model Code EC 6-2}, “[a] lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal . . . developments . . . and by utilizing other available means.” As one commentator noted, “the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers . . . and to know how to advise to the best of his legal talents and abilities,” Levy & Sprague, \textit{Accounting and Law: Is Dual Practice in the Public Interest?}, 52 \textit{A.B.A.J.}, 1110, 1112 (1966).