

January 1982

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### Recommended Citation

Harry Lee Anstead, *Selective Publication: An Alternative to the PCA?*, 34 Fla. L. Rev. 189 (1982).  
Available at: <https://scholarship.law.ufl.edu/flr/vol34/iss2/2>

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## 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<sup>1</sup>

### 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.<sup>2</sup> In 1979, a fifth appellate district was created,<sup>3</sup> 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.<sup>4</sup> Finally, and perhaps most significantly, a constitutional amendment passed in 1980 redefined the Florida Supreme Court's jurisdiction.<sup>5</sup> 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,<sup>6</sup> and these courts substantially revised their internal procedures for processing appeals.<sup>7</sup> 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.<sup>8</sup>

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

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1. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921) (referring to his service on the New York Court of Appeals). Cardozo subsequently increased this estimate to "nine tenths, perhaps more." B. CARDOZO, *THE GROWTH OF THE LAW* 60 (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. Cormio*, 338 So. 2d 1238 (Fla. 1979).

5. FLA. CONST. art. V, § 3b (1980). See generally England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (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 13, 1979) (on file with the Florida Supreme Court, Tallahassee, Florida) [hereinafter cited as *Report*].

portions.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Subsequently, the committee voted unanimously to report its opposition to implementation of any form of selective publication.<sup>12</sup>

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.<sup>13</sup> 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 Analeptic*, APPELLATE CT. AD. REV. 35, 35 (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 or 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

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Some jurisdictions also authorize an independent body, in one instance a special committee of court administrators and judges, to make the publication decision.<sup>19</sup> 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*, 48 U. CHI. L. REV. 573, 588-91 (1981).

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.<sup>20</sup>

### *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.<sup>21</sup>

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.<sup>22</sup> Even in England, however, where the common law was born, publication of appellate opinions has been the exception rather than the rule.<sup>23</sup> 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.<sup>24</sup> For example, the All England Law Reports, the largest collection of cases published in England, contains only about three volumes of cases each year.<sup>25</sup>

The reporting of appellate opinions in this country followed a pattern similar to the English practice through most of the nineteenth century.<sup>26</sup> 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 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 146. 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.

teenth century, federal and state appellate courts began officially reporting all of their opinions, and private publishers gradually lost control of the publication decision.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup>

As our country has grown, activity in our appellate courts has more than kept pace. Literally millions of appellate opinions have been published. Since 1895, West Publishing Company alone has published 2,331,781 opinions.<sup>30</sup> In 1981, West published 206 volumes of federal and regional reports containing 54,104 opinions.<sup>31</sup> 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.<sup>32</sup> Modern technology has also moved into the field with the development of computer assisted storage and retrieval systems.<sup>33</sup> 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: Unprecedented 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.<sup>34</sup>

Others, including members of the judiciary, echoed Pound's sentiments;<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.

...

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?"

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.<sup>38</sup> Also in 1964, the Judicial Conference of the United States recommended that federal courts publish only opinions with general precedential value.<sup>39</sup> Subsequently, all federal circuit courts of appeal have adopted the practice of selective publication.<sup>40</sup>

Perhaps the single greatest impetus to the selective publication movement was its 1973 endorsement by the Advisory Council on Appellate Justice.<sup>41</sup> The Council, composed of distinguished lawyers, law professors, and judges,<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> One study concluded opinion writing consumes thirty percent of an appellate judge's time.<sup>45</sup> 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 134-35.

38. B. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* 24 (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*, 32 *ARK. L. REV.* 26, 28 (1978).

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.<sup>46</sup>

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

### *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.<sup>52</sup> 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 REPORT, *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(b) (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 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> Particular unpublished opinions have been carefully dissected to demonstrate their substantial precedential value.<sup>56</sup> 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.<sup>57</sup> Defenders of selective publication concede that mistakes will occur but assert that judges will err no more often in determining precedential

M. ZANDER, *supra* note 22, at 151 (quoting Munday, *New Dimensions of Precedent*, 1978 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 CR. 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 631. See also Frank, *supra* note 43, at 25-26 (judges follow publication criteria in most cases with only occasional mistakes).

value than in ruling on the many other complex and important issues before them.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> Others complain of frustration after locating unpublished opinions of precedential value unavailable for citation<sup>61</sup> or point out conflicts within the same court that remain unresolved because one of the opinions is unpublished and therefore unavailable for citation.<sup>62</sup> These critics contend the legal system's credibility will be undermined if an actual case on point, although unpublished, cannot be cited.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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,

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.<sup>66</sup> Other jurisdictions, however, have tightened their procedures to prevent widespread distribution of unpublished opinions.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> Others, concerned about the no-citation rule's consequences, have completely withdrawn their support for the concept of selective publication.<sup>70</sup> These authorities still maintain routine cases should be identified and treated separately, but they propose alternative methods for doing so.<sup>71</sup>

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.<sup>72</sup> 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 noncitation 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 38-39.

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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> Moreover, since unpublished opinions have, by definition, no precedential value, they need not meet the quality standards applicable to opinions with substantial precedential consequences.<sup>79</sup>

#### 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.<sup>80</sup> In 1980, the district courts issued some 7,205 decisions. Including

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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 38, 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.<sup>81</sup> Florida's appellate filings are almost as great as those in California, a state with twice Florida's population and many more appellate judges.<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> Since these decisions have no accompanying written opinion, no reason exists to limit their publication.<sup>86</sup> 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

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

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

83. See *supra* note 46.

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

85. See *supra* note 81.

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

Court complaints that the court was overworked and spending too much time on routine error correction, as opposed to policy and law-making.<sup>87</sup> 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 case-loads. 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.<sup>88</sup>

Contrary to present practice, the Florida Supreme Court often used the PCA before the district courts were created.<sup>89</sup> The degree of reliance on the PCA, however, increased dramatically in the district courts. In 1958, the first full year district courts operated, 347 PCAs were issued; by 1981 this figure had grown to 4,133, an approximate increase of twelve hundred percent.<sup>90</sup> 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.<sup>91</sup>

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.<sup>92</sup> In contrast, the Third District issued only 339 PCAs.<sup>93</sup> 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 1,327 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 435 cases by opinion.<sup>94</sup> 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.<sup>95</sup> 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:<sup>96</sup>

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.<sup>97</sup>

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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. P. 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."<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> 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 state-wide policy and left the matter of individual appellate justice to the district courts of appeal.<sup>101</sup>

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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 pre-occupied 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*, 24 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: ne 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.<sup>102</sup> As the recent amendments have been construed, review of a district court decision which is not accompanied by an opinion is impossible.<sup>103</sup> The decision must "expressly and directly" conflict with the prior case and the conflict must appear on the face of the opinion.<sup>104</sup> Other aspects of the supreme court's present jurisdictional scheme also require express holdings by the district court.<sup>105</sup> An express conflict or other holding can hardly appear on the face of a PCA. This limited review<sup>106</sup> 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.

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[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.<sup>107</sup> The bottom line for litigants is that the existence of some opinion has now become essential for review in the supreme court.<sup>108</sup>

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,<sup>109</sup> 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.<sup>110</sup> Although many of those were opinions of precedential value, many others would not have been chosen for publication under selective

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 courtesies 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 201). His forthright decision to judicially advise litigants will perform a much needed service to the parties and the Bar. In our humble opinion it will also increase respect for the judiciary in the public eye. [Emphasis in original].

*Id.*

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

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

109. See *infra* app. A.

110. *Id.*

publication.<sup>111</sup> 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.<sup>112</sup>

*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,<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> In addition, although PCAs officially contain no precedential value as case

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

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

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

*Id.* slip op. at 1-2.

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

114. Cf. *Florida Hotel & Restaurant Comm'n. v. Dowler*, 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 152.

law,<sup>116</sup> 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.<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup> In the early history of many state appellate courts, cases were often decided without an opinion.<sup>120</sup> 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.<sup>121</sup> Florida has no such constitutional or statutory requirement.<sup>122</sup>

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

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

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

119. B. CARDOZO, *supra* note 1 and accompanying text, and Pound, *supra* note 34 and accompanying text, were two early voices that suggested opinions are unnecessary in every case.

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

121. *Id.*

122. Interestingly, written reasons are not required when cases are tried by a judge or jury, but are when a judge grants a new trial. FLA. R. CIV. P. 1,530(f).

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.<sup>123</sup> 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.<sup>124</sup>

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

123. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 161 (1915), reprinted in 24 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:

- (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
- (b) the evidence in support of a jury verdict is not insufficient;
- (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.<sup>127</sup>

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.<sup>128</sup> 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

*See* 11TH CIR. R. 25. *See also* D.C. CIR. R. 13; 1ST CIR. R. 14; 2D CIR. R. 8023; 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 864. Judge Godbold eloquently expounded this rationale by observing:

The principles underlying our legal system, with its mixed common law and statutory heritage, require us to recognize the validity of drawing reasoned distinctions between cases. The theory of lockstep uniformity—that every appellate case either requires or deserves a full record, oral argument, a written explanation for the decision, and a published opinion—is inconsistent with acceptance of the legal system as an institution capable of making valid distinctions and operating under them.

....

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 224. 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 14, 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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> 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*, 23 LOY. L. REV. 661, 676 (1977); Reynolds & Richman, *supra* note 63, at 1174. Of course, the absence of public criticism does not mean that critics do not exist. See *supra* note 106. 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 254. 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 38, 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.<sup>132</sup> In this way the legal community would be encouraged to avoid researching these opinions and permanent retention of such publications would be discouraged.<sup>133</sup>

Some suggest increased attention should be focused upon the increased application of computer technology and miniaturization to legal research.<sup>134</sup> 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,<sup>135</sup> 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.<sup>136</sup> 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

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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. 31, 31 (1977).

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

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.<sup>137</sup>

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;<sup>138</sup> 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

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137. 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.

138. 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.<sup>139</sup> 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.<sup>140</sup>

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,<sup>141</sup> 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

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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.

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

#### CONCLUSION

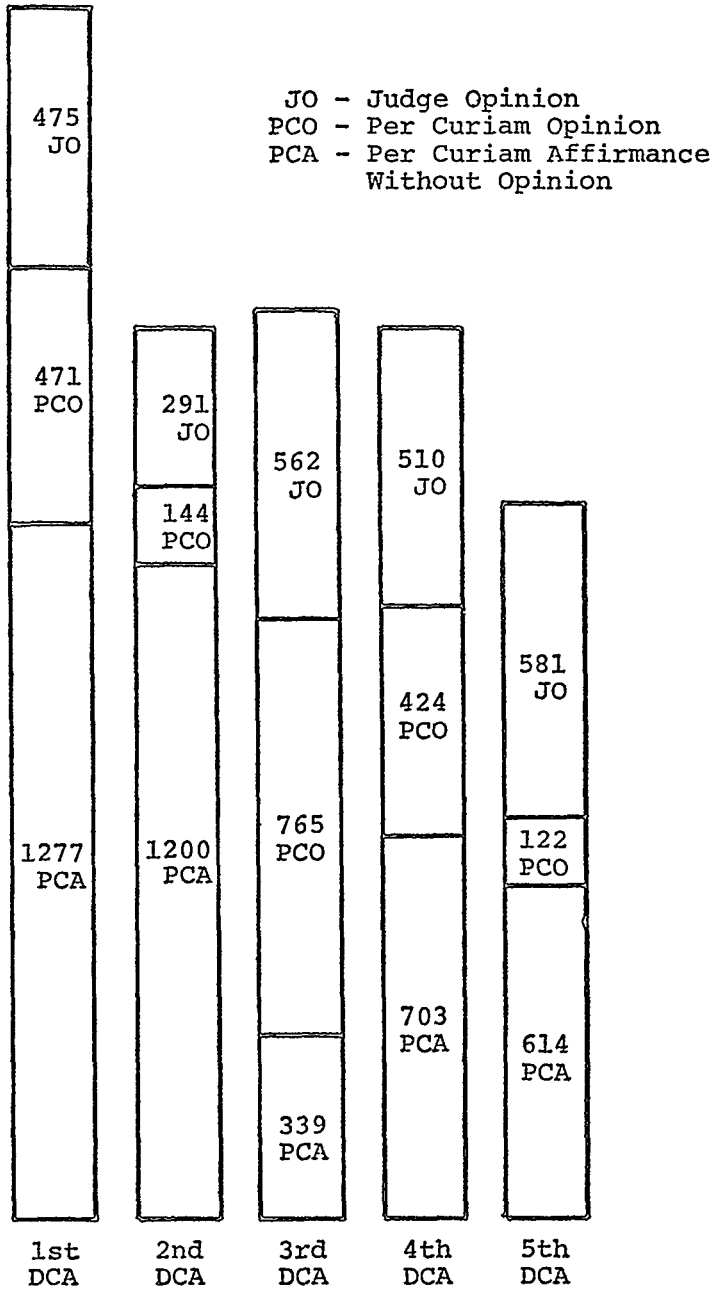
If judicial resources were unlimited, perhaps this debate over the relative merits of selective publication and Florida's PCA practice would be moot; with unlimited resources, alternatives could be found to satisfy almost everyone. An opinion could be written in every case of arguable merit, and an efficient 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.<sup>142</sup> The ultimate disposition of cases that present no issues of precedential value should be substantially the same regardless of whether an opinion is written or published.

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

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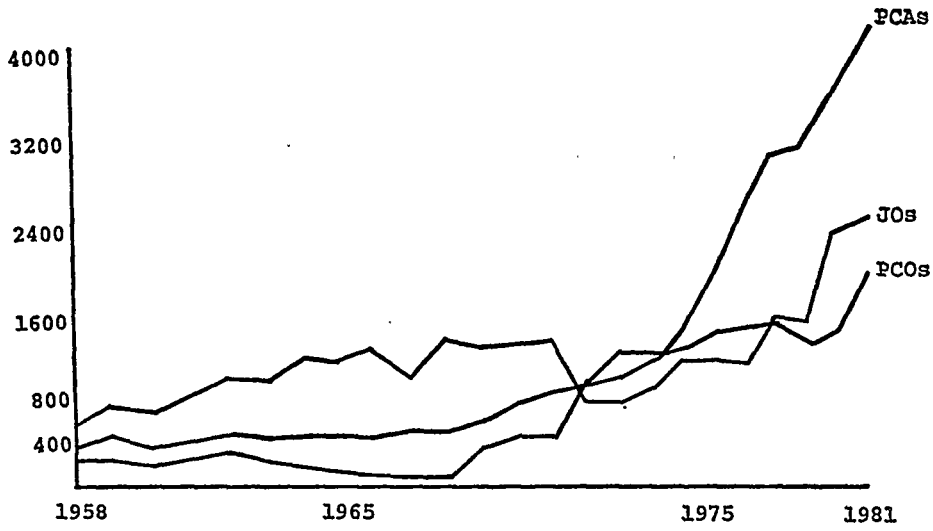
142. Moreover, the fear that such cases will be published in unofficial reporters should not prevent citation. The Fifth Circuit's experience has apparently proven the concern that unofficial collections of these cases will flourish to be unfounded. See Telephone Interview, *supra* note 127.

APPENDIX A  
 FIGURE 1<sup>143</sup>  
 DISTRICT COURT DECISIONS — 1981



143. See *supra* note 81.

FIGURE 2<sup>144</sup>  
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.