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**LAURANCE B. VANMETER,**  
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# WARNING!

## DANGER AHEAD WHEN CITING UNPUBLISHED OR NON-FINAL OPINIONS.

BY BETH BREETZ AND JAMIE NEAL

### UNPUBLISHED OPINIONS

From the early stages of Kentucky's current appellate court system, citation of unpublished opinions has been either forbidden or disfavored. In 1977, a year after the constitutional amendment replacing Kentucky's former single appellate court (then the Kentucky Court of Appeals) with a two-tier appellate court system, CR 76.28(4)(c) was adopted to forbid citation of unpublished opinions: "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state." That rule was in effect for three decades.

After unpublished opinions became more widely available through Lexis, Westlaw, and other websites and publications, in 2007, the Supreme Court stepped back from outright forbidding the citation of unpublished opinions. Effective January 1, 2007, the Supreme Court changed CR 76.28(4)(c) to direct that Kentucky appellate unpublished decisions rendered after January 1, 2003, could be "cited for consideration by the court, if there is no published opinion that would adequately address the issues before the court." At the same time, no unpublished opinions could be "cited or used as binding precedent in any other case in any court" in Kentucky. Thus, unpublished opinions from before 2003 were not allowed to be cited at all, while unpublished opinions meeting certain criteria could be cited for "consideration," but not as "binding precedent." Any such cited post-2003 opinions were required to be "set out as an unpublished

decision," with a copy of the opinion tendered with the document citing it to the court and all parties. This rule was in effect from January 1, 2007, until January 1, 2023, the effective date of the new Rules of Appellate Procedure (RAP).

Since 2007, the use of unpublished opinions has proliferated. While they can—sometimes—be helpful, in general, appellate courts much prefer published opinions, which have precedential value, to unpublished opinions, which are not "binding precedent." Because widespread access requires acknowledgement of the changed circumstances and guidance on the use of the information now available, RAP now has a rule, RAP 41, devoted to unpublished opinions.

RAP 41 continues to allow citation of unpublished Kentucky Supreme Court and Court of Appeals opinions rendered after January 1, 2003 if no published opinion "would adequately address the point of law argued by the party." RAP 41(A). To prevent unnecessary and overabundant citation of unpublished opinions, the rule now makes clear that they "are not binding precedent and citation of these opinions is disfavored." *Id.* In addition, the rule adds two requirements before an unpublished opinion may be cited: the opinion "is final under RAP 40(G)" and "the party clearly states that the opinion is not binding authority." RAP 41(A)(2) and (4).

When citing Kentucky unpublished opinions, parties are no longer required to attach the opinion to the document being filed and served. Instead, because unpublished opinions are available for free on the Kentucky Court of Justice website (<https://appellatepublic.kycourts.net>), the parties are now required to cite unpublished opinions in a manner that allows those opinions to be easily located on the Court of Justice website. “When citing a ‘Not To Be Published’ opinion of the Kentucky appellate courts, the party must provide the style, date, and case number of the opinion: e.g. *Doe v. Roe*, 2019-SC-1234 (Ky. Feb. 20, 2020), or *Smith v. Jones*, 2019-CA-1999 (Ky. App. Dec. 4, 2020).” RAP 41(C)(1). The parties may, but are not required, to provide a Lexis or Westlaw citation, but such citations must be in addition to, not instead of, the SC or CA case number. While unpublished Kentucky opinions are no longer required to be attached to the document being filed, they may be attached. If the party chooses to attach unpublished opinions to a brief, then they need to be listed in the index to the brief’s appendix. RAP 32(E)(1)(e).

RAP 41 also addresses use of unpublished opinions from jurisdictions other than Kentucky. As with Kentucky unpublished opinions, “[u]npublished opinions from other jurisdictions are not binding precedent and citation of these opinions is disfavored.” RAP 41(B). Parties citing to unpublished opinions from other jurisdictions must either (1) include with the document (for service and filing) a copy of the entire unpublished opinion or (2) include in the document citing that unpublished opinion “a URL or other identifier that will permit easy access to the opinion on a publicly available electronic database.” RAP 41(C)(2). Lexis and Westlaw are not “publicly available,” so a party citing an unpublished opinion from another jurisdiction must either attach that opinion to the document or include a citation to a publicly available (free) website.

Including the Kentucky appellate court case numbers in the citations for Kentucky unpublished opinions will not only help the court and parties locate the opinion on a free website, it will encourage use of the website to determine the status of the case. For example, was discretionary review sought and did the Supreme Court deny review and depublish? If an opinion was depublished, the Court of Appeals may consider it of lesser weight than other unpublished opinions. See, e.g., *Morgan v. Kentucky Dep’t Of Corr.*, 2001-CA-0323, 2003 WL 1227322 (Ky. App. Jan. 24, 2003) (stating that the court “will not consider [a depublished opinion] as precedent.”). But, because no reason is given for depublishation (just some of the possible reasons for depublishation are: right result for the wrong reason; excellent analysis of one issue,

but another issue misses the mark; some loose language that might have unintended consequences in future cases; the Supreme Court isn’t ready to take a definitive stance on a certain issue), the Court of Appeals sometimes is still “guided by” a depublished opinion if its “reasoning is sound.” *Stephen D. Prater Builder, Inc. v. Larmar Lodging Corp.*, 441 S.W.3d 133, 134, n. 1 (Ky. App. 2014). See also *Bardstown Cap. Corp. v. Seiller Waterman, LLC*, 2018-CA-1886, 2020 WL 3108238, at \*15 (Ky. App. June 12, 2020), (noting that, “although the Supreme Court opted to depublish” a particular opinion, “we nevertheless believe that this Court’s holding . . . is the correct statement of the law.”). Regardless of how the appellate courts choose to treat a depublished opinion, the fact that it was depublished should likely be considered and addressed.

Use of the Kentucky Court of Justice website will also show whether a case is final or not. For example, is a petition for rehearing or a motion for discretionary review pending? If so, the opinion is non-final. RAP 40(G).

## NON-FINAL OPINIONS

Whether non-final opinions could be cited was not previously addressed in the Civil Rules. Kentucky’s appellate courts, however, directed that non-final opinions were not to be cited. *State Farm Ins. Co. v. Edwards*, 339 S.W.3d 456, 458, n.2 (Ky. 2011) (noting that the “citation of [a] non-final” opinion “is improper. While

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CR 76.28(4)(c) now permits the citation of unpublished appellate opinions rendered after January 1, 2003, the rule does not extend to opinions that are not final, for clearly there can be no precedential value to a holding that is still being considered.”); *Alexander v. Commonwealth*, 220 S.W.3d 704, 710–11 (Ky. App. 2007) (denying motion for leave to cite an unpublished opinion “which was not final as of the date of oral argument,” because CR 76.28(4) relates “only to unpublished opinions which have become final.”). Note that if an opinion is published—meaning it has a S.W. cite—then the opinion is final. Opinions are not published until after finality (now governed by RAP 40(G)).

With the adoption of the new Rules of Appellate Procedure, which became effective January 1, 2023, the Supreme Court has made clear that non-final opinions or orders “may not be cited or used as binding or persuasive precedent in any court of this state and may not be cited without indicating the non-final status.” RAP 40(H). Thus, from District Court on up to the Supreme Court, non-final opinions may not be used as binding or persuasive authority. If non-final opinions are cited for another reason (such as to let the trial court know that the appellate courts may be deciding an issue soon or to let the Supreme Court know of a split at the Court of Appeals in how different panels have treated the same issue), then the non-final status “must be indicated.”

One of the areas where citation of non-final opinions has frequently occurred is citation of an unpublished Court of Appeals opinion where the Supreme Court has granted discretionary review. The Supreme Court may have rendered its own opinion that didn’t reach every issue addressed in the Court of Appeals, or the case may have been settled after review was granted and the case was dismissed, in which case the Supreme Court would have granted review and then issued no opinion. Under such circumstances, seasoned Kentucky appellate practitioners would understand that, once the Supreme Court granted review, the Court of Appeals opinion became permanently non-final and should not be cited (unless the Supreme Court expressly ordered the Court of Appeals opinion to be published).

Practitioners, particularly those from out of state or with limited appellate experience, may not intuitively understand the impact of discretionary review on the previous opinions in the chain. Accordingly, RAP 40(D)(2) and (G)(2) now explain the impact of a motion for discretionary review on finality, including that an opinion rendered after discretionary review is granted supersedes any previous opinions in the appeal chain. This also helps solve the issue of practitioners relying on a portion of a Court of Appeals opinion when the Supreme Court granted review and rendered its own opinion that is less fulsome on some issues than the Court of Appeals opinion. Regardless of whether the Supreme Court affirms or reverses the Court of Appeals, only the Supreme Court opinion has any precedential value.

## CITATIONS

To find cases on the Kentucky Court of Justice website, the numbers before and after SC or CA must be four digits. Thus, when citing to

unpublished opinions, the full year should be used and initial zeroes should be added or deleted to make the second number four digits: 2022-SC-0001 or 2023-CA-0429.

Also, remember that the Supreme Court—not the Bluebook, Lexis, or Westlaw—decides how Kentucky appellate cases are cited. Thus, citations to opinions from the current Court of Appeals end with (Ky. App. [year]), not (Ky. Ct. App. [year]). RAP 31(E)(1). Citations to cases from the Supreme Court or from the Court of Appeals when it was Kentucky’s highest court (before 1976), end with (Ky. [date]). *Id.*

In addition, RAP 31(E)(1) now directs that “[c]ase names should be italicized.” In other words, no more underlining of case names, which is more difficult to read.

## CONCLUSION

Any persons practicing an appeal should read the new Rules of Appellate Procedure in their entirety. More specifically, practitioners must be careful in determining the status of any unpublished opinions they cite (published opinions are, necessarily, final) and follow the rules regarding use of unpublished and non-final opinions. **BB**

### ABOUT THE AUTHOR

**BETH BREETZ** is the chair of the Kentucky Supreme Court’s Appellate Rues Committee. After clerking many years ago for Justices Charlie Leibson and Nick King, she joined Stites & Harbison, where she is the long-time co-chair of Stites & Harbison’s Appellate Advocacy group. In addition to providing appellate assistance and guidance throughout the life of a case, she has experience in complex business and commercial litigation, defamation, real estate litigation, trust and estate litigation, and personal injury, wrongful death, product liability, and professional malpractice defense. She has previously been the chair of both the Kentucky Bar Association’s and the Louisville Bar Association’s Appellate Sections.



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