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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

OCTOBER 20, 2000

(AFTERNOON SESSION)

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Taken before Gina S. Verduzco, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of October, A.D., 2000, between the hours of 1:00 o'clock p.m. and 5:00 o'clock p.m. at the Texas Law Center, 1414 Colorado, Austin, Texas.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Commitee during this session are reflected on the following pages:

P R O C E E D I N G S

CHAIRMAN BABCOCK: We're back on the record.

MR. SOULES: Mr. Chairman, we met as you instructed during the months that the State Bar provided us here today and came up with this for Section 11 that begins on page 6. Be no changes on page 6, but on page 7 starting with (b), the following lines will not be changed: Line 1, 2, 3, 4, and 5 will remain the same. 6, we put a period after "fees and costs." That would -- the only departure from the statute, as I understand it, would be the 31-day deadline for payment and then the italicized language after that.

CHAIRMAN BABCOCK: That would be in or out?

MR. SOULES: Out.

CHAIRMAN BABCOCK: Out. Period --

MR. SOULES: After the period -- period -- "fees and costs," period, and everything else comes out and then the new (c) that would say, "A sanctions order shall be subject to review on appeal from the final judgment," which parallels the language in 215.

CHAIRMAN BABCOCK: Okay.

MR. SOULES: And I move the adoption of those changes to the draft on the table.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: And why are we varying from the statute with regard to the obligation to pay within 31 days?

MR. SOULES: In order to work with the appellate subcommittee on a -- an approach to supersedeas so that we don't have to rely altogether on mandamus, for example, under the Transamerican rule or what's the other?

MR. ORSINGER: Brighton versus Downey.

MR. SOULES: Brighton versus Downey. I mean, there's some -- there's some constitutional implications to that requirement. If they are -- if the sanctions were burdensome --

MR. TIPPS: Right.

MR. SOULES: -- could be any size. A little case for disadvantaged people, it might be $100, or it could be any size. That has due process implications. You have to do it immediately, and we think that should be left to an ad hoc -- to a case-by-case basis. We shouldn't cross that same constitutional threshold that the legislature has chosen to cross. We think the Court shouldn't cross that in the adoption of our rule, and we hope that we'll be able to get Senator Harris to agree with that.

And then as far as the supersedeas is concerned, all of the 12 would come out and be referred to the appellate rules committee.

MR. TIPPS: But the basic concern is that we should not leave in the provision that requires payment within 31 days without having in place an appropriate supersedeas mechanism.

MR. SOULES: Yes. That would certainly be one due process if you can supersede.

CHAIRMAN BABCOCK: In the statute there is a supersedeas provision. It's just that it doesn't work.

MR. TIPPS: Right.

CHAIRMAN BABCOCK: Okay. Any second to Luke's --

MR. HAMILTON: The only problem I see with this approach is if this rule is going to go forward, we also have to have in place a sanctions provision somewhere maybe.

CHAIRMAN BABCOCK: Well, there is a sanctions provision. We decided to cut that out.

MR. SOULES: (a) stays the same but picks up 215(b)2 (sic), and (b) is an arbitrary sanction. It's a mandatory sanction. Now what do you do? You appeal. That's why we put (c) in there if you want to

appeal.

MR. HAMILTON: We added -- Luke, we added that 215.2(b) in there, and it wasn't in the statute.

MR. SOULES: Well, it's in (a) now on page 6. See, (a) is the discretionary sanction under 2 -- sanction under 215.2(b), and (b) is the mandatory sanction.

MR. HAMILTON: Oh, okay. Sorry.

MR. SOULES: Either of which by virtue of the new paragraph (c) would be appealable with a final order.

CHAIRMAN BABCOCK: Anyone second Luke's language?

HONORABLE SARAH B. DUNCAN: Second.

MR. CHAPMAN: What's the language of (c) again?

CHAIRMAN BABCOCK: Read it again, Luke.

MR. SOULES: "A sanction order shall be subject to review on appeal from the final judgment," which is the language really out of 215, the last part of 15 -- 215.2(b). "A sanction order shall be subject to review on appeal from the final judgment."

CHAIRMAN BABCOCK: Read it again, Luke, if you would. Carrie didn't catch it.

MR. SOULES: "A sanction order shall be

subject to review on appeal from the final judgment."

MS. GAGNON: "From the final judgment"?

MR. SOULES: "From the final judgment."

CHAIRMAN BABCOCK: Okay. Although it was somewhat soft, Justice Duncan -- soft voice, not in commitment to the second by Justice Duncan. Any more discussion about it? Okay. Everybody in favor of Luke's language, raise your hand. Anybody against? 25 to nothing it passes, and we are --

MR. SOULES: I move we delete paragraph 12.

CHAIRMAN BABCOCK: We've already done that.

MR. SOULES: That's gone?

CHAIRMAN BABCOCK: That's already gone.

MR. SOULES: And page 13 -- is number 13 now going to be 12, JP courts?

CHAIRMAN BABCOCK: That's correct.

MR. SOULES: I move that we -- subject to overnight review for inadvertent errors that we may have made, either in transition from the old rule to this or in language that may be in this rule, subject to that, I move that we recommend to the Supreme Court the now-proposed rule as redrafted on Disqualification and Recusal of Judges.

MR. HAMILTON: I have one other thing on the last paragraph. In the Court Rules Committee, we've been working on the rules for the JP court, small claims court. And I'm told by the subcommittee that the Supreme Court does have rule-making authority for small claims courts even though it has never exercised it.

CHAIRMAN BABCOCK: Well --

MR. HAMILTON: And I'm wondering if that last paragraph ought to include the small claims courts.

CHAIRMAN BABCOCK: I don't think so because Judge Lawrence is shaking his head, and we fully discussed this at the last meeting. I don't particularly want to discuss it again.

HONORABLE TOM LAWRENCE: I certainly stand to be corrected by Justice Hecht, but the small claims court provisions are in the Government Code, and I wasn't aware that the Supreme Court had any rule-making authority for it.

Now, the Government Code references certain sections in the Rules of Procedure, for example, for appeals and things of that type. But otherwise there's really no specific tie-in other than what's referenced between small claims and justice, and I don't think there's any supervisory control over the small claims except in the legislature.

CHAIRMAN BABCOCK: Well, in any event, we just -- we debated this proposal. It's not in deadlock, so I don't want to reopen the debate on that in light of all the stuff we have to do today yet.

And that brings me to a change in schedule. Paula has graciously ceded to Bill Dorsaneo for a couple reasons. Bill's got a commitment tomorrow in Dallas, so he can't be here, and Justice Hecht is very interested in one of the issues that's on Bill's docket, and I think we're going to take that up first.

MS. SWEENEY: That's not, of course, to say that he's not riveted by the voir dire discussion.

CHAIRMAN BABCOCK: That's right. Just a matter of when Bill can be here, and Paula can be here tomorrow if we don't get through the TRAP stuff today.

But that is the issue of unpublished opinions. As you know from the materials, there is an Eighth Circuit decision called Faye Anastasoff versus United States, which held that a rule similar to ours that says that unpublished opinions may not be cited as precedent was unconstitutional under the federal constitution.

So that is -- that is going to be the first item we're going to discuss because the Court would like to hear our views on this issue. Bill?

PROFESSOR DORSANEO: I don't know if all of you have the report of the Combined Committee.

MR. SOULES: Do you want to take a vote on recommending this to the Court?

CHAIRMAN BABCOCK: Yeah. It's going up.

MR. SOULES: Oh, it's already done?

CHAIRMAN BABCOCK: We voted that last meeting.

MR. SOULES: Okay. Excuse me. Sorry.

PROFESSOR DORSANEO: Carrie, have these been copied yet, the proposed revisions, Texas Rules of Appellate Procedure?

MS. GAGNON: Let me see what it is.

CHAIRMAN BABCOCK: Yeah.

MS. GAGNON: Yeah. Everyone has that. There's extra copies in the back there. I think the ones in your packet were maybe one-sided or just odd pages, so you might double-check.

PROFESSOR DORSANEO: Well, for the purpose of this precise issue, it may not be completely necessary for you to have the packet, but if you do, on the very last page there is a committee report on Rule 47.7, which now provides, "Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or

by a court."

During the process of soliciting and obtaining comments for the appellate rules which took effect in September 1997, this subject was raised, and as the report shows, the -- the particular issue involves a potential change to Rule 47.7 to say that they may be cited as persuasive authority by counsel or by a court rather than prohibiting the citation to unpublished opinions, opinions designated or not designated for publication as is provided in Rule 47 -- Appellate Rule 47.7 right now.

After the Combined Committee met or after the discussion of the Combined Committee, the -- the opinion from the Eighth Circuit in the Anastasoff opinion deals with the issue of the constitutionality in the -- in the federal system of a comparable Eighth Circuit rule. And that raised other concerns about unpublished opinions and particularly with respect to the Combined Committee proposal casts in question language in the recommendation that says, "Opinions not designated for publication by the court of appeals have no precedential value."

So with respect to this specific part of Appellate Rule 47, I think there are really two or maybe three issues. One, should we change the current rule?

Two, should we say in the revised rule that opinions not designated for publication may be cited as persuasive authority by counsel or by a court or some similar language? And, third, should we state at all that opinions not designated for publication by the court of appeals have no precedential value, or should we just let that be?

Now, there are other issues involved in this entire discussion that would be concerned with other parts of Rule 47, Appellate Rule 47 such as, you know, whether we want to change the standards for publication, you know, altogether. And, you know, we could talk about that before we talk about 47.7, or we could separate these out. Maybe by way of introduction, I ought to talk about those issues and then we see.

Right now in Appellate Rule 47, the rule basically provides that an opinion should be published only if it meets certain criteria. And those criteria don't really need to be enumerated here in our discussion, but -- but the idea is kind of -- I won't say a presumption against publication, but the general rule would be don't publish, you know, unless. Okay. An opinion should be published only if it does any of the -- any of the following.

The courts of appeals are met under

another part of Appellate Rule 47 to decide whether an opinion meets the criteria stated in 47.4 for publication. Justice Hecht informs me and the rest of us that the courts of appeals are not publishing roughly 80 percent of the opinions in cases decided by the courts of appeals. Some courts are publishing, you know, fewer opinions than others, but as I understand it, the nonpublication approach isn't restricted to criminal cases. It's about -- it's about 50/50, or it covers civil cases, too.

So we have kind of an interesting phenomenon that's occurred. The courts of appeals are deciding that 80 percent of their opinions, you know, don't meet the criteria, or else they're using some other criteria other than the ones listed in 47.4 in designating opinions not for publication.

So that's a larger issue that's in the background as to whether we want to perhaps change the attitude of the rule and say that, you know, opinions shouldn't be published unless, and the "unless" might be as broad as "unless someone requests them to be published" or something comparable to that.

But for our purposes, the way this came up, I think we could deal with -- we could deal with the 47.7 issues first and then deal with the larger

publication, the standard question second, although dealing with the publication standard question would make -- would or could make the other issue a nonissue altogether. Mr. Chairman, what's your pleasure?

CHAIRMAN BABCOCK: Well, I would like to get some direction from Justice Hecht on this. The Anastasoff, if that's how you pronounce it --

HONORABLE JAN P. PATTERSON: Anastasoff.

CHAIRMAN BABCOCK: What?

HONORABLE JAN P. PATTERSON: Anastasoff.

CHAIRMAN BABCOCK: Okay. The Eighth Circuit opinion in the United States of America case, I've made a clear distinction between those two issues, Bill. As I read it, they said, We're not talking about whether you publish or not; that's not the constitutional question. The constitutional question is whether or not, published or unpublished, these opinions are available to the public and they have precedential effect as a matter of federal constitutional law. And so that's one question.

And then as a matter of state law, which does not raise a constitutional issue, it's the Rule 47 problem of when do you publish, recognizing you're not going to publish everything? And so I guess my question to the Court is, which of those two questions, if either

of them do, have more interest to the Court or are more pressing in terms of what you want to know?

JUSTICE HECHT: Well, they're both of interest to the Court. 47.7 came up first because even before the Eighth Circuit case came out, the appellate section or the appellate subcommittee had already looked at changing Rule 47.7, and, of course, this committee has debated the rule several times in the past 20 years.

So that is of concern, but also the raising of the whole issue and two or three articles that have appeared in the appellate section newsletter -- it's kind of a brochure, magazine that comes out periodically -- raised the question whether we need to relook at unpublished opinions altogether.

The procedure -- part of our procedure allowing the intermediate courts not to publish opinions goes way back, and I'm not even sure myself of the history of it. But it -- it goes back a long time.

But the numbers of unpublished opinions are sort of startling. It's gone up since fiscal year '95 from 75 percent to almost 85 percent through July of this year are the latest numbers that I could get. And my sense -- the numbers that we were able to get don't go back before fiscal year '95 -- '94, and -- but my sense was back in the '80s that it was a good deal lower

than that, the number of unpublished opinions. So it seemed to us that we ought to look not only at the use of these opinions for citation purposes but the whole process of deciding whether to publish opinions.

The latter issue is more of a structural issue, I guess, of how the court system works. The Eighth Circuit opinion at least raises some legal issues about 47.7, and, of course, there's practical issues as well because some of the courts of appeals release their unpublished opinions to computer services like Westlaw so that you can get them on the computer services, and others of the courts of appeals don't. So it doesn't strike me that that's a very good system to have some courts putting them out, which they're free to do, but then some courts deciding not to, which leaves the law, it seems to me, in kind of a distorted way of developing.

So I think -- I hate to answer just both, Chip, but I think the Court would like to know about both of them.

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT McCOWN: Could I make a comment about that? It seems to me that those two questions can't be separated because once you say they can be used, to some extent the distinction between

published and unpublished becomes meaningless because there will be computer services that will have an economic interest to make the open records request or whatever it takes to get them and load them. I mean, technology is going to overtake this issue, and if they can be used, they will be publicly available whether they're officially published in the Official Reporter or not.

PROFESSOR DORSANEO: And actually beyond computer services, I read the courts of appeals opinions before the slip opinions, and a number of those are designated not for publication. So to say they're not published is really just inaccurate. They are published.

MR. GILSTRAP: That's a point that the Anastasoff court brought up. They weren't talking about whether the opinion is published; they were talking about whether it's precedential. And even though they're widely available and on the Internet, they still may not be precedent. This comes up all the time in the federal courts of appeals. They -- they look at and they say, "This is an unpublished opinion. We're not going to follow it." That's exactly what they did in Anastasoff. There's a distinction. They're not the same thing at all. They are going to be available, but

the question is are they going to be precedent?

PROFESSOR DORSANEO: Going back to the first thing, I mean, the Combined Committee believes that they ought to be something that can be cited, and if -- even if it's the case that they have no precedential value, which, is, you know, a large question, I guess there's so many of them, would we become more aware of them since they're easier to come by?

The Combined Committee's recommendation is at a minimum that 47.7 state that the opinions, you know, may be cited. That says "as persuasive authority." We might change the language, you know, to some slightly different language, but that is the SCAC subcommittee Combined Committee recommendation or at least part of it.

CHAIRMAN BABCOCK: Justice Hardberger.

HONORABLE PHIL HARDBERGER: Wouldn't it make sense to take up the larger structural question in line with Justice Hecht's memo to committee first? Because if you don't have unpublished opinions, then you don't have all the problems attendant to unpublished opinions. And I think there has been quite a movement, which will now be accelerated by the Anastasoff opinion, that maybe we should go back to published opinions.

CHAIRMAN BABCOCK: So -- yeah, Justice Duncan.

HONORABLE SARAH B. DUNCAN: It seems to me a prerequisite to that discussion is a definition of "publication." As originally promulgated, "publication" meant publication in Southwest or an Official Reporter. "Publication" now could continue that meaning, or it could mean not readily available either by computer database or published report.

CHAIRMAN BABCOCK: Well, if -- I think that's a key point because as a defamation lawyer, I will tell you that when the court of appeals publishes the opinions of the parties in the case, it is published in one sense. And what the Eighth Circuit decision says, I believe, is that once that occurs, it is precedent in that circuit or in that court, and that's a matter of constitutional law.

It seems to me that -- that that is -- that is the bigger issue whether or not we think as a group that the Eighth Circuit is right about that. And if they are right about that, then all the rest of this is just going to take care of itself because if every decision from the court of appeals is precedential, then -- and it is published to somebody, then it's going to get published.

PROFESSOR DORSANEO: Mr. Chairman, Frank Gilstrap did a fine memo on that. It might be good for him to explain what he thinks might be the pertinence of the Eighth Circuit opinion to us.

CHAIRMAN BABCOCK: That would be great.

MR. GILSTRAP: I think the Eighth Circuit -- we're not going to decide today if the Eighth Circuit rule is constitutional. We're not going to do that. The Supreme Court, either the Eighth Circuit en banc or the Supreme Court is going to decide that, and that will apply to federal courts. The next step is, does that apply to state courts? It might because the same language that they're interpreting in Article III is in the Texas Constitution in the judicial power clause.

But we're not going to decide that. Texas Supreme Court ultimately is going to have to make that call. We just have to recognize that if -- that regardless of what we decide today, there may be a decision that comes along soon that wipes it all away anyway and says that they are -- that all published opinions -- or all opinions are precedential, period.

CHAIRMAN BABCOCK: But lots of rules are constitutionally compelled, and our Supreme Court could decide by rule to do something that they could also do

by case law.

MR. GILSTRAP: It may make more sense for it to allow it to be decided by litigation first.

CHAIRMAN BABCOCK: Okay. Justice Duncan.

HONORABLE SARAH B. DUNCAN: As Justice Hecht says, we've debated this a lot over the last two decades, and this committee actually did send to the Supreme Court a recommended rule that gave unpublished opinions some -- some level of precedential weight.

And I don't -- as I see it, it does not need to be a constitutionalized issue. We can decide this completely without reference to the Texas or the United States Constitution just as a matter of how -- how we want our appellate courts to offer it.

CHAIRMAN BABCOCK: Well, so long as we don't shortchange the constitution because the constitution will set a minimum standard.

MR. GILSTRAP: If you decide that all published opinions -- that all opinions are going to be precedent as a matter of prudent -- pruden -- policy, it's just a prudential call you make, we decide today that all opinions are precedential, then it moots the constitutional issue. But if we decide anything less, then it's subject to a constitutional challenge at some

point.

CHAIRMAN BABCOCK: Right. Judge McCown.

HONORABLE F. SCOTT McCOWN: It seems to me that when we say "precedential," that that -- that we're not saying very much. I mean, different authority -- different authority has different weight. A Supreme Court decision 9-0 yesterday has more weight than a 100-year-old decision from a San Antonio court of appeals that was 2-1. And I have a question before me today, and I have to decide what weight to give the authority.

And it seems to me where I agree with the Eighth Circuit and where as a trial judge I've long been frustrated, it ought to be the rule that whatever any court has done in the past can be brought to the attention of the court that's struggling with the problem today. That ought to be the rule. And lawyers all the time cite unpublished opinions, and the other side all the time objects to it. But as the judge you still want to know what the court in the past did.

The question really becomes is whether a court in the past can say to a court in the future, "This opinion is tentative. Don't put much weight on it in the future," or "In the future look at this on a blank slate." Because when you publish or don't

publish, all you're really trying to do is stamp in advance, "This is tentative," "This isn't well thought out," or you're stamping, "This is our best work; it's really well thought out." And you're trying to determine in advance what weight to give the authority at a later date. It ought to all just be citable, and the court should decide when they wrestle with the problem at the later day how much weight to put on it.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: When Justice Duncan said that the Court had gotten a rule from this committee years ago -- I think it was in the '90 set of rules -- going the other way and doing basically either what Scott said or something along in that direction, the Court was of the view -- and not committed but generally of the view that there were a lot of cases in the courts of appeals that just did not warrant much explanation regarding the outcome and that the courts of appeals would probably evolve toward writing memorandum opinions in those cases, which would be virtually unintelligible to somebody who didn't know the background of the case.

The parties themselves and their counsel would understand because the opinion would say, The first point of error is overruled because of Smith versus Jones, and the second point of error is overruled

because of this case, whatever reason. And an outsider, a stranger to the case reading it wouldn't able to tell from the opinion -- face of the opinion what was going on, but it would give the parties an answer.

Well, the -- as I understand it, the courts of appeals have basically not evolved in that direction for a number of reasons, but one of the reasons is that a good many of the court of appeals judges tell me that they believe that the parties deserve a longer explanation than that and that the parties -- more importantly, that the parties and lawyers themselves believe they're entitled to more explanation than that, and they're not going to be satisfied when you lose, Thank you very much, Sincerely, The Court of Appeals.

And if that's the case, then it doesn't seem to me that there are a whole lot of practical reasons not to publish all of the opinions. But then I suppose I'm a little persuaded by Judge Posner, too, who -- there's a debate on this same issue in the circuits, and the Seventh Circuit takes the position that it doesn't take a long time to write an opinion in a case in the court of appeals that is -- in which the issues are not very significant and not very troubling. And it would be better for the institution to give

people a little more explanation, which might take an extra hour of a judge's time, an extra two hours, an extra hour of a staff attorney's time to get an explanation on paper which is three pages instead of half a page, and people go away from the system feeling like they got a reasonable response.

And the more of that argument that I hear, the more I'm persuaded by it. So I'm not sure that the Court now -- I don't know what my colleagues' views are, but I know that the position that the Court took when it last rejected the suggestion that there be more precedential value given to them is not necessarily the view that the Court takes today.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Frank, what are the reasons out there for not giving opinions precedential value regardless of whether they're published or unpublished? That's what I'm trying to come to grip with.

MR. GILSTRAP: As I understand the reason that the -- the old reason was is that, you know, they couldn't put them all in the law books. That's almost pretty much beside the boards now or is becoming beside the boards.

The prudential argument that remains is that -- are twofold. First of all, it's more work, a

lot more work to do a full published opinion than an unpublished opinion, and the courts are pressed to turn the opinions out. Judge Arnold in Anastasoff talks about that.

MR. WATSON: That's the two tiers of justice.

MR. GILSTRAP: The second one is there's just going to be so much law to read. I mean, Bill Dorsaneo tells me he spends about a day a week reading cases.

PROFESSOR DORSANEO: When I started doing what I do, it used to take about a half a day a week, and now it takes two, and I'm much faster.

MR. GILSTRAP: Yeah. And if this rule pass -- if we say all opinions have precedential value, it's going to take eight, as I understand the numbers.

CHAIRMAN BABCOCK: Mike Hatcher.

MR. HATCHER: We have a particular problem in Texas because some cases you can only get into the Supreme Court by reason of conflict by a prior opinion of the court of appeals. We've also expanded the number of interlocutory appeals which are subject to that rule, and many of those interlocutory appeals, particularly special appearance, often turn on constitutional issues such as general jurisdiction versus specific

jurisdiction.

And I'm aware of many cases that I can cite where they did have some precedential value that would aid my jurisdictional statement in the Supreme Court, but I'm hamstrung because I cannot use those cases and I cannot get the courts to publish them. In fact, if I could get them to publish them, they might not be considered to be a prior opinion anyway. So I'm very much in favor of giving some precedential value for this unique reason.

CHAIRMAN BABCOCK: Okay. Justice Schneider.

HONORABLE MICHAEL H. SCHNEIDER: I think it was actually covered there. You know, from our point of view -- I don't want to give too much of the history, get too bogged down in it. But, you know, since 1980 or so, '81, '82, we quit adding justices. We have 80 in the state, appellate justices. Caseloads since then doubled. And basically one of the reasons, it's frankly judicial economy, if you want to look at it from our -- from the standpoint of just what kind of resources we have to do a good job on the case. Now, when I say "a good job," what I'm saying, a full and complete job.

Let me add something else to what Justice Hecht said, and that is that actually it takes

almost as much time to write a memorandum opinion as it does to write an opinion that's going to be published.

The bottom line is is that if we are going to publish all of them, I know as far as this crowd here, you may be impressed by that, but the legislature is not impressed by us doing more work. And that's -- that's a real problem, what we would do and the amount of work I think it would add to our caseload.

But I'm ambivalent about it because I feel that, on the other hand, that when you decide a case, the people ought to know what the reason is, and there is some value to that. You know, we also have another problem. A number of lawyers who basically handle maybe 10, 15 appeals, they have a good bit of experience as appellate lawyers. We don't have any that are published, and that's almost unfair to them, too, as well.

But anyway, I would just point out to you that of the many factors, the many tricks we've used to try to get by with less funds and less resources, probably the primary one is basically unpublished opinions, is that we don't have to spend as much time on that. I'm not saying that that's necessarily right. I'm just saying that's what we have to do with what we've got.

CHAIRMAN BABCOCK: Justice Schneider, could I ask you a question? Why do you not have to spend as much time on it?

HONORABLE MICHAEL H. SCHNEIDER: Well, it's just a -- you can -- you can almost incorporate the facts. You can just basically take the briefs and put the facts together and say, Based on these facts, sufficient evidence or whatever. That's an example. Whereas, you would want to cut it down -- if you're going to be publishing it, you want to get down and just go to the relevant parts, and we quite often will just publish part of an opinion, for instance.

But that's -- that's the main reason is it's just -- you have to put more spit and polish on it if it's going public and if it's going to be used for precedential value.

CHAIRMAN BABCOCK: Sarah, then Steve.

HONORABLE SARAH B. DUNCAN: This gets back to the question, I think, of what does "published" mean? As far as I'm concerned, all of my opinions are published. Either they're in the West database, or they're in books, and I don't -- I don't distinguish between the amount of time it takes relative to the complexity of the problem on any given opinion. Unpublished opinions tend not to be difficult legal

issues or difficult factual issues.

So I think we need to resolve, first of all, what is "published" going to mean? Because if anyone is advocating publishing in SW 3d all of the opinions of the courts of appeals, I, for one, think it's a horrible idea. I, like a lot of individuals in law firms, pay for a set of SW 3d, and if we're only publishing 20 percent of the opinions now in SW 3d, imagine what it is going to do to the cost of what is now about a $75-a-month expense.

But if what we're talking about is publishing all opinions in one medium or another, I would be all in favor of it because these are opinions of a court. I don't understand -- I just -- I fundamentally don't get the concept that a court can issue an opinion and it only have importance or legal significance to the parties in the case.

CHAIRMAN BABCOCK: Steve and then --

MR. SUSMAN: Well, I agree. I mean, the issue is not whether it's published or not, but the issue is whether you can cite it for precedent. I mean, I guess you can have a category of opinions that say not precedent. Okay. Forget published or not, just not precedent. But you can also have the judges, I would assume, say -- I mean, I could arrange a little

introductory sentence that would have the same message. "This is not a significant case. It's very -- it's absolutely clear that the plaintiff should win, and the judgment should be affirmed." "It's clear even if the law isn't exactly like I think it is, and I haven't really researched it carefully. There's so much room for error here."

I mean, in other words, you could say something in it that, just as Scott said, sends the message, and we all can determine what the message means. Yeah, it's precedent, but it's certainly not as good as an opinion that has a bunch of footnotes and that clearly someone carefully thought about.

So I don't see why you need one label. It seems to me that the judges who are writing these short opinions ought to be able to say things in them like that that send a message to the reader as to whether this is something that they, you know, really spent a lot of time on, or it's just an effort to explain to the parties. And that, I think, to me is the issue, not this publication, which is ridiculous. I mean, it's just --

CHAIRMAN BABCOCK: Judge Patterson, did you have something?

HONORABLE JAN P. PATTERSON: Yes. I want

to speak in favor of the proposed rule because I think that this issue is one that is of great interest to all lawyers. I think more than any other issue that they raise with the judges, that they are most concerned about this.

And I think that the two levels, precedent and persuasive, speaks to all of the issues that are of concern because I think that there are those cases, and I don't look upon it so much as a matter of less work or more work; I look upon it more as a matter of, Are you writing for these specific parties, or are you writing for a larger legal interest?

And there are many cases that are either highly factual where you may not fully develop all of the facts or that they may not be relevant to this. On the other hand, you're dealing with a very narrow problem. I mean, there are cases that speak only generally to the parties, but that they should be available to everybody as well.

And so I guess I speak in favor -- and I think that the publication issue is relevant to this extent: I think all courts of appeal should release all opinions, and they should be available in some form. I agree with Judge Duncan. I do think that -- I worry about losing the books. I'm afraid I'm -- so I really

think that there is some value in still calling them "unpublished" even if they're available on computer.

And there are cases that are of lesser value, and I don't see any concern in just being able to send that signal. And Steve says an introductory sentence. Well, this is another way of sending that signal that there may be something peculiar about this case, and we all know those cases that are snake bitten and just are so peculiar that somehow they speak to smaller interests.

So I don't think it's a matter of -- of denigrating anybody's case. I think that there are ways that you can send those signals, and this is one. One of the other concerns of lawyers is that there have been judges -- supreme court judges who do tell lawyers that if it's not published, it's less likely to be reviewed. And that is of great concern to lawyers as well, so I'm -- I'm very much in favor of publication, but I also like the persuasive idea as well.

CHAIRMAN BABCOCK: Richard, then Frank and Bill.

MR. ORSINGER: I think that the publishing versus unpublishing issue is only theoretically relevant at this point. The State Bar is on the verge, if the plans go through, of making all Texas case law back to

1950 available for free to all Texas lawyers. You won't have to subscribe to LEXIS or Westlaw to get that.

And it really at that point becomes a citation question. Can you cite to an unpublished opinion by some kind of electronic citation method, or can you cite only to West Publishing, which is a monopoly they have that I'm not sure that they should continue to enjoy anymore. I think we either ought to publish all or not publish any, and then let's get West out of the business of controlling our information, and we'll go electronic.

Now, as far as opinions are concerned, I think there's three reasons to have opinions. One is for the parties, which has been commented on. They like to know why they won or lost when they went to this panel of three judges. Another thing, which I greatly support, is that when a justice or a group of justices are required to articulate their decision, it imposes a mental discipline on them, and it forces them to confront precedent. And it's, I think, a control mechanism to be sure that our appellate judges will follow the published precedent because if they don't, they have to explain why they're not, and I think it makes everyone more intellectually honest.

The third function of publishing is that

it puts the reasoning of the court in the public domain for criticism or support by other justices, by law professors who write Law Review articles, or in the section reports. And I don't think we should do anything that would encourage an appellate justice to treat a case as being less important because they can label it as less important. I think that the reasoning of the opinion will tell you whether the case is important or not. I don't think that we should have a stamp that says, This is not important.

And so to me, I think everything ought to be published, and I think that there ought to be an opinion that's available to everyone, and that we shouldn't perpetuate the idea that there is a publisher who has a body of paper that we give a monopoly to and that we're going to make any decisions based on whether they print and sell our government records or don't print and sell our government records.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I'm not hearing from the committee really any desire to hold off because there's some constitutional issue that's out there in the courts that may come along and deal with this. Apparently what I'm hearing is the desire to go forward with something. And we're really doing it based on the prudential

arguments, which there's huge literature on it. We've touched on some of them today.

But I can tell you that the decision to turn around now and say, okay, all of a sudden we're going to say, "All opinions in Texas are now precedent henceforth," is a huge decision. It raises a lot of other problems like, Well, what about an unpublished decision from 1910? You know, I mean, I guess -- it seems to me in light of all this that the committee proposal is a prudent step at this time. You know, we could go forward. We can say, Okay, we're now going to deal with unpublished opinions at least as persuasive authority and see how that works, and then maybe at some point we can deal with it and make another step. But the idea of saying we're going to say all opinions are precedent is a huge leap into the dark as far as I'm concerned.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Well, I agree with Richard that the publishers do recognize -- at least mine does -- that original source material, whether we're talking about statutes or cases, that that's all really in the public domain and will not be treated as somebody's, you know, private business, and they recognize that that's the way things are going to be.

They also don't think that books, per se, are going to be things that people use. You know, like at some point in the foreseeable future that electronic publishing will be how things are handled. So I think that problem does go away, and I'm glad that all the -- all the opinions are going to be, you know, made available to people for free if they could just figure -- figure enough expense money to be able to access them.

We could say with respect to this committee proposal, you know, something that reserves the question about precedential value, whatever that means. We could say that opinions not designated for publication, you know, may be cited as authority by counsel or by a court as persuasive authority and just kind of finesse the question about precedential value or whatever in the world we're talking about.

Frankly, you know, Frank, I don't know if anybody would know about a 1910 opinion that was not published or whether there were any such opinions not published.

MR. GILSTRAP: That gets back to the old issue, you know, the criminal lawyers had in the old days. Well, the DA has all the opinions. You know, people in a big case do go out and research old

opinions, and they do in the federal courts, and they do find them. And so, you know, at least the idea of maybe making it prospective seems to me to be prudent.

CHAIRMAN BABCOCK: Steve and Buddy and then Scott.

MR. YELENOSKY: There's one other interest that I don't think has been raised here of the litigants in getting an explanation. Sometimes in the public interest practice, your interest is in establishing a point of law that to many people, including appellate judges, may not appear that significant. And you have to continue to reestablish it if the appellate court doesn't recognize it as being significant, and it probably isn't significant out of a poverty practice. But I'll give you an example since the appellate judges are here, and I want to ingratiate myself to them.

I did a case years ago where the issue was whether or not a court reporter at the trial level had to do the transcript for free for an unemployment claimant who wanted to take it on appeal. She refused. We filed with the court of appeals, and the court of appeals published an opinion saying that court reporters have to do it for free for unemployment claimants when they want to appeal.

Well, I could just -- it could have been

the case that they would have decided, Well, that's not so important. We're not going to publish it, or in some other scheme, We're not going to label it as precedential in which case we wouldn't have been able to use that, and we'd have to reestablish that every time it came up again. So I'm just not ready to say that the appellate judges are always in the best position to decide what needs to be out there.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What bothers me about this is I can cite a Law Review article. That's no more -- that's just some third person who's disinterested giving his analysis. Okay.

CHAIRMAN BABCOCK: Or hers.

MR. LOW: Certainly an opinion that's unpublished is a disinterested person giving his analysis of that situation. I've got a case right now that the only case in point is an unpublished opinion out of a Dallas court. And I don't make it a practice citing that court a lot, but in this case I made --

CHAIRMAN BABCOCK: Dispute some of its distinguished awards.

MR. LOW: My only remedy is to petition the Supreme Court under the rules to ask them to publish it. Otherwise I can't cite it. I can tell the trial

judge, I can cite Law Review articles, but I can't open my mouth and tell the appellate court that somebody has analyzed this exactly the way that I say it should be and not let them have the advantage of that, and that's wrong, and I favor Bill's amendment.

MR. YELENOSKY: Or you could bootstrap it and have a professor write an article about --

HONORABLE F. SCOTT McCOWN: It seems to me that we have general agreement that everything should be available and that technology is going to make everything available. And it seems to me we have general agreement that everything should be citable, that we ought to be able to tell a court what some other court's done.

MR. SUSMAN: At least prospective.

HONORABLE F. SCOTT McCOWN: And where we have the disagreement is over whether a court that's doing something should be able to label its work in advance as less worthy or less reliable. And, you know, Richard made a point that we should never treat one case as less important than another, and I agree with that. But sometimes the answer that a judge gives is less definitive, and the judge knows it in advance. And I'll give you a very good example.

There may be a case where the parties'

briefing has been horrible or where the parties have framed the issue in a very poor way or where they have procedurally got the case postured in a very poor way, and you, the judge, have to give them an answer, and you answer their case, but that answer is less than definitive. And I think it makes sense to say everything's available, everything can be cited for authority, and just finesse the question of whether it's persuasive or precedent or for whatever it's worth, just say it can be cited for authority, but keep the ability of the appellate courts to stamp in advance by saying some things are getting published, that that has a little extra -- they've dressed it up and that has a little extra.

CHAIRMAN BABCOCK: Justice Hardberger.

HONORABLE PHIL HARDBERGER: I would like to speak in favor of publishing everything and making everything precedential. And, in fact, if that was my motion, I would stop right there. But I want to give some reasons.

First, I agree with Judge Schneider. It does take more time. But then justice is well served when it takes more time and you get a more rounded opinion. As far as what Scott's saying, well, some things are much better precedent than others. There's

no question that is true, but that's what lawyers and trial judges sort out. They can tell that, too.

I just think the public is better served, justice is better served if it's all right out on the table. And as far as the rumor about you escape or have a better chance of escaping appellate review or Supreme Court review, that's not a rumor; that's a fact. Statistics will bear that out. I'm sure Justice Hecht can tell exactly what it is. I don't know exactly what -- I've heard different statistics. But it certainly is the case and sometimes makes for perhaps an inferior product that the author of that opinion does not want the Supreme Court looking at it. I think the Supreme Court should have the same -- they should look at all of them the same, have the right to look at all the same.

I just think that while there are some disadvantages -- and maybe what Frank said is true. Maybe we want to make this prospective so that we don't get into troubles in the past. But with that qualification, I really do believe that everybody is much better served to put it out on the table.

CHAIRMAN BABCOCK: Skip and then Justice Schneider.

HONORABLE MICHAEL H. SCHNEIDER: I would

like to make it clear for the record that every case we decide is important, and it's not a matter of basically not taking the time for justice because I think regardless whether the decision -- the decision first, and then the opinion follows. The most significant thing that the courts do is make their decision as far as that goes. And if somehow or another it's been read here that I'm saying that perhaps we don't spend as much time on making our decisions or trying to get it right, that's -- that's incorrect, and I stated it poorly. And I also cannot --

HONORABLE PHIL HARDBERGER: Let me just say, Judge, I didn't mean to make any implications like that.

HONORABLE MICHAEL H. SCHNEIDER: No, no. I can --

HONORABLE PHIL HARDBERGER: If I did, I apologize.

HONORABLE MICHAEL H. SCHNEIDER: The point being, though, I think we have to look at the reason why the rule exists. It's not just for precedence. It is one of the case management techniques developed in the '50s and so forth, and all I say is factor that in. That it -- you know, I think -- I think we're prepared to publish every one of them.

CHAIRMAN BABCOCK: Skip, then Paula.

MR. WATSON: I am for all cases being precedent, and it's very difficult for me to see reasons why they shouldn't be except practical reasons, and it's those practical reasons that make me favor the committee proposal rather than going all the way at this time.

The reasons for making everything precedent to me are compelling, and there are basically three. The first is what we've said about the Supreme Court, getting Supreme Court review. That's just reality today. That if it's not published and if it doesn't appear to be important to the jurisprudence of the state, you're not going to get in the door. That leads to the second.

For most litigants in the state of Texas -- let's say 90 percent to use round numbers -- the court of appeals is the only constitutional right of appeal they are going to receive. If there is any need to use case management techniques on one set of cases as opposed to another set of cases, there is at least the implication that was dealt with head-on in Anastasoff that there are two tiers of justice, at least two tiers in which the amount of time, resources, et cetera, are dedicated to cases. I don't think we can have even the appearance of that.

Finally, and every appellate lawyer in this room has seen it, and I suspect every appellate judge has seen it. There are cases which for good reasons are designated as nonprecedential which are cutting-edge -- have cutting-edge legal issues in them. That was precisely the point in Anastasoff. The cost in delay to litigants and to the system itself when a case has to be tried to a jury verdict, when there is a dispositive case out there which is nonprecedential which would dispose of it with the dispositive motion in my opinion far outweighs the extra time that the courts of appeals have to put in to make every opinion well thought-out, fully thought-out, and equally considered.

But that's the ideal world. And I come back to the reality that if we go to full precedent for everything today, the courts of appeals are not going to have one more justice, they're not going to have one more law clerk, they're not going to have one more anything to keep them from having to go to the same case management techniques that they wish to avoid. And, indeed, the prediction of going to memorandum opinions like the Fifth Circuit where you literally get back from argument and waiting in your mailbox is the one-paragraph decision will come.

The only way I can see around that is to

do what Frank said at the get-go, and I think there was a lot of wisdom there that we hadn't thought through. And that is to let the move to full precedential use of every opinion not come from us, not even come from the Texas Supreme Court. Let it come from the U.S. Supreme Court of saying, This is what the rule of law requires.

If they adopt Anastasoff's reasoning that we are courts of law, that judicial function is precedent, it is the application of precedent for there to be equal justice under law, and if they say that's what the law is, that's what the judicial function of the courts of the United States are, I daresay that the Texas Supreme Court might follow suit. And if they do do that, then the legislature would have little room to give these people the resources they need to effectuate a full use of precedent. So that's a long way of saying I'm for the committee proposal but only as a stopgap.

CHAIRMAN BABCOCK: Paula, before I get to you, can I ask Skip a question? Do you think or does Frank think, number one, is this before the U.S. Supreme Court?

MR. GILSTRAP: No. It's just gone before the Eighth Circuit en banc.

MR. WATSON: It's en banc.

MR. GILSTRAP: And they haven't granted

the motion. The motion is pending.

CHAIRMAN BABCOCK: Even assuming -- Skip, even assuming that the Supreme Court took the case and affirmed, would that be binding on us? Because it seems to me --

MR. WATSON: No.

CHAIRMAN BABCOCK: -- this is an Article III case, not a --

MR. WATSON: You're absolutely right, Chip. This is Article III. Part of Frank's memo is Article V, Section 1?

MR. GILSTRAP: Five, Section 1, same language.

MR. WATSON: Which, you know, the framers of the Texas Constitution fortunately didn't reinvent the wheel. They just took the Article III language and plugged it in. That's what I'm saying. I don't want to predict what Justice Hecht is going to do, but it's not too great a stretch for me on this one.

CHAIRMAN BABCOCK: Yeah. But the point I make is the Court could take a different view. They wouldn't be compelled to follow it just because U.S. Supreme Court says --

MR. WATSON: Absolutely.

CHAIRMAN BABCOCK: Paula had her hand up a

long time ago and then Bill and then Richard.

MS. SWEENEY: I as a practitioner have been very frustrated for years when I had an unpublished opinion in my hand that is foursquare my case and is going to get me where I want to go and save a year of work, and I can't use it, can't talk about it, can't even, you know, hold it up discreetly and show it to people. So I'm in favor of that. I think we have some issue we have to deal with on prospective versus retrospective just to ensure that there's fairness of access to everybody of the old stuff that predates computerization so that no litigant is unable to have an equal playing field in that regard.

The one thing that -- you know, I'm not a judge, and I don't have to say every case is equally important. They're not. There are stupid cases, and y'all have to decide stupid issues on appeal all the time. And just because, you know, Edgewood may require an 80-page opinion does not mean that some idiotic billing file mandamus requires that. And if the discovery issue comes up and it's an idiotic issue, the opinion can still reflect in a paragraph or so.

So I don't think that by making all opinions published that by definition we therefore say every opinion has to be footnoted and equal to one that

is dispositive on the statewide constitutional issue. And if -- if the burden does indeed turn out to be prohibitive, then I think attention has to be given in the legislature to staffing up the courts. But I strongly favor making the opinions public, having them all be citable, usable, precedential, and available to all litigants.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I want to revisit the Combined Committee proposal. In response to a specific proposal to say that unpublished opinions can be cited as persuasive, although not binding, the Combined Committee recommended this language: "Opinions not designated for publication by the court of appeals have no precedential value but may be cited as persuasive authority by counsel or by a court." That was similar to what was recommended in the Supreme Court before.

In the current context in light of this discussion, it would be my own, you know, personal recommendation to say that, "Opinions not designated for publication by the court of appeals may be cited as authority by counsel or by a court," and to leave out this announcement that they have no precedential value.

Now, personally I would -- I would agree with Justice Hardberger that they ought to have, you

know, precedential authority, but that gets into these other -- other questions. But as far as the exact recommendation, you have the committee recommendation on the one hand, which really didn't focus on the language, "have no precedential value," and then, you know, another choice would be to just simply say, as I've said and as has been said by others, "Opinions not designated for publication by the court of appeals may be cited as authority by counsel or by a court," which avoids some problems but seems to address a lot of concerns that people have expressed here.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would like to propose that we uncouple the precedent versus nonprecedent from publication. The West Publishing Company, which is our official reporter, asserts a copyright as to the internal pagination cites on the cases that are in the Official Reporter. And so LEXIS, for example, has to pay a licensing fee to West in order to have the internal pagination.

PROFESSOR DORSANEO: Or it has chosen to do so. The question as to whether it has to or not has not been resolved.

MR. ORSINGER: Let me say that the federal district court in Minnesota has said they have to, and a

federal district court in New York said they don't have to, but they do.

CHAIRMAN BABCOCK: Where's Westlaw located? At any rate --

PROFESSOR DORSANEO: Where is LEXIS located? Well, Cincinnati but it used to --

MR. ORSINGER: I think it would be beneficial to everyone if we took the issue of whether it's precedent or not and severed it from the issue of whether it's officially published or not because that basically -- we're saying that we're giving the publisher of our official journal control over our documents that are precedential, but we don't give them the documents that are not precedential, and yet we all know they're all going to be available. I think everybody here is probably in favor of them being available.

And so what I would suggest is that let's -- there's no point in distinguishing between published and unpublished anymore because it's going to be available electronically. The Texas rules of form still require you to cite to West if it's in West. I think what we ought to do is just make it all electronic and then stamp either "precedential" or "not precedential" on the opinion rather than "published" or

"not published" on the opinion.

CHAIRMAN BABCOCK: Frank had something to say, then Sarah, then Steve.

MR. GILSTRAP: I think we're complicating our problem here. There is a well-recognized and well-understood distinction between a published and unpublished opinion. And the idea of saying that published opinions are precedent and unpublished opinions are not precedent is something that's well understood by -- in every state.

If we get in -- with Bill's proposal if we get in and just say they're authority, I don't know what that means. Are they precedent, or are they not? And if they are precedent, then we've changed the rule and gone to the kind of radical proposal that everything is precedent. I think we need to maintain the distinction between published and unpublished and precedent and unprecedent and decide -- and nonprecedent and decide, you know, whether we can cite some of them. That's all.

PROFESSOR DORSANEO: Let me answer that. I would be willing to take out "as authority" and just say, "Opinions not designated for publication by the court of appeals may be cited by counsel or by a court." And let's figure out what in the world that means, you know, later because I think that at least advances the

ball where we have agreement, right? I don't think "as authority" is trouble -- doesn't trouble me. Okay. But I'm telling the trial judge, You have to read this.

MR. GILSTRAP: But, Bill, you're saying let's decide it later. I say let's decide it now what that means.

PROFESSOR DORSANEO: We can't. Let's decide what we can decide first, and then let's decide later, maybe like an hour later.

CHAIRMAN BABCOCK: Justice Hecht has the floor.

JUSTICE HECHT: I personally agree with Phil, but I would hate for us to litigate from now on whether an opinion is precedential or authority or citable, or because it has a SW 2d cite, that means it's in one class of cases preferred; because it has a big long Westlaw number, that makes it not so good or -- it seems to me we need to go one way or the other. I agree.

CHAIRMAN BABCOCK: A lot of hands up. I think it goes Sarah and then Stephen and then, I think, Carl and then Luke. So we'll go that way.

HONORABLE SARAH B. DUNCAN: I would like to speak in favor of Professor Dorsaneo's suggestion. One of the things that keeps cropping up in my mind is

despite several people having written on the topic, including Professor Dorsaneo, we don't know what's binding on anybody in the state of Texas. Bill has written that opinions by a court of appeals are in no sense binding on any of the trial judges in that court of appeals district or outside of it. I don't think we're --

PROFESSOR DORSANEO: What?

HONORABLE SARAH B. DUNCAN: The IBM case. Anyway --

HONORABLE F. SCOTT McCOWN: That's always been my view.

(Laughter.)

CHAIRMAN BABCOCK: Let the record show the laughter.

HONORABLE SARAH B. DUNCAN: I've been sitting here wondering what -- what does "precedent" mean as opposed to "persuasive authority" as opposed to "authority"? I don't think this committee is really able to decide that.

CHAIRMAN BABCOCK: Oh, yeah? Says who? Steve.

MR. TIPPS: I think what we need to do is to say, with all due respect to the courts of appeals, that a three-judge panel on a court of appeals really

ought not to have the power and authority to decide for all time whether or not the decision that it's making in a particular case is going to be persuasive, of precedential value in some future case or not.

I -- I understand Judge Patterson when she says that some of the cases the courts of appeals decide are so specialized, are so fact specific, it's hard to imagine that they would ever be precedential. But maybe they would be. And, in fact, probably they won't be. But it just seems to me to be unwise for us to ask the court of appeals to make that kind of permanent sort of decision at that particular point in time.

I think that over time practitioners applying the common law are going to figure out which of the cases are real precedent and which of them are not much precedent at all, so I think we ought to have some kind of rule that makes it possible to cite anything that's been decided for whatever it's worth and for later courts to decide whether or not it's precedent.

CHAIRMAN BABCOCK: Steve Susman.

MR. SUSMAN: I just thought it might be appropriate if we could get a show of hands. I mean, it seems to me the issues are clear, and there are a lot of people sitting around here that say they ought to be the same as all other opinions, these unpublished ones.

They're all published.

CHAIRMAN BABCOCK: Right.

MR. SUSMAN: All opinions should be published somewhere, and they ought to have the same -- we should not distinguish between their effect. And I think there's a substantial number of people who favor that approach in which case -- I mean, I think we ought to get a show of hands on it pretty soon.

CHAIRMAN BABCOCK: I agree. I think we're getting there, but there are a lot of people that still want to say something. Carl, then Carlyle.

MR. HAMILTON: I just want to say that I sure agree with what Richard said a while ago, that everything is published anyway, so why doesn't the rule just say, "All opinions by the court of appeals may be cited"? Why distinguish between whether or not they're designated for publication now? Why not just have, "All opinions are available to be cited by counsel or by the court"?

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I'm persuaded after hearing the discussion that we really are making a mistake to concern ourselves with the problems of LEXIS, Westlaw, and the West Publishing Company. It seems to me that the -- that the wise thing to do is to say, as Carl just

suggested, that opinions -- court of appeals opinions may be cited as authority by counsel or a court and leave it at that.

We know what "precedential" means. It means once the court decides that it's persuasive and relies on it, it becomes precedential. That's what it means. And we ought to be able to cite those opinions as authority and let them rest on their merits and on the merits of the case as they apply. And that's what we ought to do I think.

CHAIRMAN BABCOCK: Luke.

MR. SOULES: I sympathize with the burden of the court of appeals, and I think it's real. They don't have discretionary review authority. Their caseload is absolutely determined by the litigants and how many people want to line up and try to get some of their hard work and sweat, thinking processes, and reasoning, and it's very well done. So we have a problem there, but maybe -- maybe the rules can sort of speak to that in another place.

I do agree that everything is already published. We may not want to call it published, but it is published. And I think the very simple fix for this is just to repeal 47.7, period. Don't say anything. That's all we got to do. And then I think we'd probably

see a shift maybe in the -- in the cultural processes in the courts of appeals, one of which may be which sort of decision-making process the justices go through.

My partner, Justice Wallace, considered his primary function while on the Supreme Court back in another day with different ideas probably on the court as a whole, his was to decide the case. He didn't feel like he had to write on every point in the case. If there were one or two or three dispositive points, that's what he wrote about, and he decided his cases, and when you read his decisions, they're pretty short on the whole. There are a few that are more important. Some of them are very important cases.

Whether or not -- well, in the workers' comp area he wrote some two and three-page cases that are still governing law today that are very, very important, but they were short. Other justices and another great friend of mine, Justice Pope, tended in some cases to write more lengthy opinions to try to really talk about the jurisprudence.

So there may be a shift one way or another in that, and it's sort of a decision on how we -- how the justices on the courts of appeal approach decision-making. And then we can turn to another part of Chap -- Chapter 47 rule after we repeal 47.7, and we

see that there -- there's two kinds of opinions. There's a written opinion, and there's a memorandum opinion in the succeeding sentences. The written opinion is to be as brief as possible, but it's to address every issue raised and so forth necessary to the final disposition of the appeal. Maybe we're talking about two many issues. Maybe some of them aren't necessary. If so, we don't have to talk about those when we write.

But then -- and I don't see this written on court of appeals decisions in the state; I see them written on federal circuit court opinions. "Where the issues are settled, the court should write a brief memorandum opinion, no longer than necessary, to advise the parties of the court's decision and basic reasons for it." So there may be a shift to using that second sentence of 47.1. I think we ought to just repeal 47.7 and let the case -- let it roll. And then everything else that we do with all the other opinions follows naturally from that repeal.

CHAIRMAN BABCOCK: Steve, then Frank.

MR. YELENOSKY: That may be the fix. Whatever we do, I'm very much against having appellate courts label an opinion in any fashion, and I don't think that they can. I think constitutionally that when

the court acts, whatever it does and whatever it says, parties should be able to bring that to the attention of someone else and argue that it has value and if -- and whatever value they think it has and not be precluded because it's been labeled one way or another.

And as Wendell said, I mean, we can figure out how much value it has. That's what lawyers do. We don't normally need a sign in a case that says this is dicta. We figure out this is dicta because it wasn't necessary to the decision. Now, if a judge wants to put a signpost in there, fine, but it's a signpost. It shouldn't be something that precludes a party from trying to give it more weight than that judge thought it should be given.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The rule of precedent is not that prior opinions of the court are authority. The rule of precedent is that prior opinions of court are binding upon that court, and the court cannot rule differently unless it has a good stated reason that it articulates. Indeed in the federal circuits, the panels can't change it even if they have a good reason. They have to go en banc.

Now, it's true in state court maybe the rule is not so rigorous. But I'm troubled. And you can

read the IBM case, and you can form your own opinion of that. But I am troubled by the notion of just kind of blurring the idea of a precedent. It seems to me -- it may be constitutionally required. And we can't leave this with some rule that simply says that, Well, they're all kind of precedent. They're either precedent or they're not. Maybe they're all precedent, but we can't get away from that notion.

CHAIRMAN BABCOCK: Well, it seems to me, Frank, picking up on what you're saying, that it may be our duty to tell the Court what our collective thinking is about whether or not the Anastasoff case is correct in saying that there's a constitutional compulsion to the precedent -- precedential weight of prior unpublished opinion.

MR. GILSTRAP: I don't see how we can tell the Court whether we think something is constitutional. I think the best we can do is to tell the court whether we think the practice of having some opinions as precedent and some not or all opinions as precedent is good -- good prudent policy. I think that's the best we can do here.

HONORABLE MICHAEL H. SCHNEIDER: Let me also say --

CHAIRMAN BABCOCK: Judge -- I'm sorry.

You get trumped by the Supreme Court judge.

JUSTICE HECHT: Just to complete Luke's proposal, it seems to me if you're going to repeal 47.7, you ought to repeal 47.4 and change 47.3 to read simply, "A court of appeals must make its opinions available for publication."

PROFESSOR DORSANEO: Also would do away with the 6 --

MR. ORSINGER: I second that.

HONORABLE SARAH B. DUNCAN: There is a practical aspect to this. I'm with Justice Patterson. I like my books. I like the premise, I like the computer, but I like my books. There's a very practical problem here that we've got to have something that says whether it gets printed in SW 3d or so long as SW 3d exists. So even if we repeal -- and I think it's a grand idea -- repeal 47.7, there's still going to have to be some decision-making process in the court about whether that opinion gets sent to whatever company it is to get printed in the official paper reports of the State.

MR. ORSINGER: Why?

MR. SOULES: Can't you just leave that to whoever orders it?

MR. YELENOSKY: Can't you put it on-line

and pick it up --

MR. SOULES: Just whoever sends the court -- the clerk a check for a copy gets it.

HONORABLE SARAH B. DUNCAN: What I'm saying is if we repeal 47.7 --

MR. SOULES: Okay.

HONORABLE SARAH B. DUNCAN: -- and then repeal 47.3 that says -- with the decision-making process on unpublished opinions, are we just not going to have a SW 3d anymore?

MR. SOULES: If West orders the opinions from the court and wants to publish them, they got them.

PROFESSOR ALBRIGHT: You will have SW 3d, but it's going to -- there's going to be a big ol' fat book every week.

MR. ORSINGER: What's going to happen is people will discontinue their subscriptions to SW 3d, and we're going to move past paper.

PROFESSOR DORSANEO: That will happen anyway.

MR. ORSINGER: It's just a question of when.

CHAIRMAN BABCOCK: Bill -- Mike.

HONORABLE MICHAEL H. SCHNEIDER: One thing about these number of cases that don't get published,

most of those are criminal cases. In fact, I would say -- I would say almost 80 percent of those that don't get published are criminal cases, and they're -- they can be 30 pages long. And it's basically because the criminal law is -- you just don't have a big pool of laws to reach to to handle the case. And so -- and many times you have indigent -- or pardon me -- pro se defendants who are raising things that have not only been -- maybe not waived, but it's just like the other 40 cases we had that week.

I don't think you really want -- I mean, I don't want to be presumptuous, but I think if you saw the number of cases, if you read our unpublished cases at least on the 1st Court of Appeals, I don't think that it would contribute any to the jurisprudence, and I think it's impractical to do this. I'll just say that. I understand where you're coming from, it sounds good, but I don't think it's good government. And, I mean, good government means looking out for the individual, of your particular client's interest.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: You forget that back in the late '50s and early '60s, the draft of Rule 47 was pushed by -- at a time when the median lawyer income was about $14,000 a year. The number of cases was

multiplying at a rapid rate, and we were getting maybe one or two Southwest Reporters a month, and we couldn't afford it.

So the Bar started jumping on Westlaw and everybody else to cut down on the number of published opinions because it was just getting too darn expensive. That's where it all started. I can tell you because I was there. And then we -- but we didn't -- we hadn't even invented a Xerox machine in those days. No Thermofax -- you couldn't get the book through the Thermofax machine.

MR. WATSON: You tried.

MR. EDWARDS: But now we've got the electronic stuff available, and as long as the stuff is electronically available, there's no reason for not having it all available and precedential if it will be, not decided by somebody else. I think there's going to have to be, as long as there's an official printed reporter, some method of thinning out the number of cases that get reported, or we're going to price the thing clean out of any reasonable reason for having it at all, which may be okay, but there needs to be some way of getting things that people think are really important in print as long as it's going to be printed.

CHAIRMAN BABCOCK: But, Bill, don't you

think the market is going to take care of that?

MR. EDWARDS: Well, not as long as we have a requirement that we've got an official written book --

MR. ORSINGER: Why don't we have an official electronic book?

MR. EDWARDS: I'm not saying we shouldn't have that.

PROFESSOR ALBRIGHT: Richard, I think you assume that everybody is as electronically astute as you are, and that's just simply not true yet. And I think, you know, one real problem is having too much information. Then it all becomes inaccessible. And if everybody has to pay for a big fat SW 3d that comes out every day, then it becomes completely inaccessible because you can't afford it. There still are a bunch of lawyers that don't make a whole lot of money.

MR. ORSINGER: If unpublished opinions have precedent, they had better learn how to get ahold of unpublished opinions.

PROFESSOR ALBRIGHT: Well, they may be able to get ahold of them, but I don't think -- you know, in most cases the ones that are designated unpublished just aren't that important and for your standard lawyer that's running down to the courthouse every day.

CHAIRMAN BABCOCK: Wallace.

MR. JEFFERSON: One -- one problem that I discovered early on in the practice is when the courts don't -- didn't have to publish their opinions, I don't think they all agreed that a prior opinion bound them absent en banc -- an en banc opinion. And so you would get on one rule of law Opinion A and Opinion B out of the same court with different panels. And -- and when they wouldn't provide them to Westlaw, there was no way to point out the hypocrisy or contradiction or whatever in that court.

And so the one thing I would favor is you ought to be able to cite them, and they ought to be going to Westlaw or some publication. I don't think they ought to all be in the books because many unpublished opinions are useless to any practitioner or to any other judge, but I think they ought to all go to some sort of electronic service just to discipline the courts and to allow the parties to say, "There's something going on here. You need to resolve this," to ask for -- seek en banc review when there's a conflict within one district on the court of appeals. So I would be in favor of some sort of rule that forces at least electronic publication or access.

CHAIRMAN BABCOCK: We got Bill, then Jan

and then Stephen.

PROFESSOR DORSANEO: Well, whatever is going to happen on the publication or not publication is going to happen. We could make it plain what it means here. When it says something is designated "not for publication," it means it's designated not for publication in the official print publication, you know, assuming that that is an official publication, come up with some sort of language that spells that -- you know, spells that out. I think that's -- I think actually ultimately West would probably decide not to publish these things if they're going to be given away for free because nobody will buy them.

But, you know, that -- that could be spelled out, and then -- then the committee proposal, original form or as modified, would work fine. I in some ways think that talking about these books and the expense of these books and all of this, I agree with Carlyle. We're getting off into worrying about something that we really shouldn't be driven by, what's going on in the publishing business.

CHAIRMAN BABCOCK: I think Jan --

MR. SOULES: Is there a web site that the courts of appeals' opinions go on?

HONORABLE SARAH B. DUNCAN: Each court has

their own web site.

MR. ORSINGER: But within the next three months or so, the State Bar is going to open up a web portal with a service provider that's going to provide free for all Texas lawyers Texas cases back to 1950. So the contract is not signed yet, but it's close. And so I think we can count on that. And if it isn't offered for free, it's going to be next to free before long just because of the market.

MR. WATSON: Which Texas cases, published or unpublished?

MR. ORSINGER: Whatever's in the database.

HONORABLE SARAH B. DUNCAN: How do you think you're going to get unpublished -- unpublished cases before they were even available on the computer? I mean, one of the reasons we put our opinions on West -- our unpublished opinions on Westlaw is because we couldn't find out what they said.

HONORABLE MICHAEL H. SCHNEIDER: That's true.

CHAIRMAN BABCOCK: Jan and then Steve Tipps.

HONORABLE JAN P. PATTERSON: I want to reiterate the importance of availability because there are courts of appeals that don't release their

nonpublished opinions, and those should absolutely be released. But I also am concerned -- it's not because of factual complication; it's not because of the amount of work. But I think that there is a quality of justice aspect to this, whether it be in information overload, which may not ultimately serve all lawyers, or -- keep in mind that briefing is limited.

The issues in many cases are vast and many, and the quality of briefing varies from case to case. And that shouldn't affect availability, but it does affect the quality of justice in this regard. I mean, there are many cases in which there are a couple of main issues and the lawyers also raise other issues. And they are just not -- simply not well briefed, but they must be addressed because they're necessary to the disposition of the case.

I do worry about -- whether it's courts of appeals or lawyers, the quality of citation, it seems to me, has deteriorated in proportion to the amount of material made available, and there is a blur as to what is precedent and what is binding and what is persuasive, and we do need to return -- and this discussion is very healthy because it might return us to those days where it was more meaningful.

But it's not so much the nature of our

opinions as it is the nature of the briefing and the numbers of issues and the number of decisions and the information overload. Just because the information is made available, it doesn't mean that the quality is going to be better. And so some of these brief discussions are going to be distorted, and even now you see -- the opinions may be briefer in dealing with more issues, I get the sense. And you'll see courts of appeals citing as overwhelming precedent a decision of another court of appeal that just deals with it in a sentence. And so I worry really about the quality here.

And I think that the proposals are good, and we need to respect the swift transition here. The other thing I will say is I really thought that I would be on the front edge of releasing these decisions and because I thought it was going to be much more controversial than this, so I'm glad that my cohorts are supportive of that. But I suspect that we are in the vast minority and that there would be a ground swell not for bad reasons but for good reasons. But I think that that needs -- that there are good reasons for that concern by appellate judges, and it doesn't just relate to amount of work; it relates to quality of our work and lawyers' work.

CHAIRMAN BABCOCK: Tipps, Buddy, and

Justice Schneider. Justice Schneider looked like he was -- maybe wanted to --

HONORABLE JAN P. PATTERSON: Can I finish one final thought?

CHAIRMAN BABCOCK: Oh, sure. I'm sorry.

HONORABLE JAN P. PATTERSON: And I'm going on a little bit here, but one other aspect is that -- of precedent is that you treat all cases that are alike alike. There is a fundamental fairness aspect here, and so our job as lawyers is to figure out what cases are analogous and what cases are alike. And so to the extent that there is final analysis and an ability to be able to garner the truth and the wisdom out of a case, I think that our system of justice is best served with that system, and I think that that system is better served by one of the hybrid recommendations here. Thanks.

CHAIRMAN BABCOCK: Do you mind if Justice Schneider --

MR. TIPPS: I'm always happy to defer to Justice Schneider.

HONORABLE MICHAEL H. SCHNEIDER: It won't take but a half second. I know that some states -- if the real concern here is that maybe the court -- courts of appeals aren't doing a very good job of weeding

through and determining what is precedent, some states, they -- the intermediate courts of appeals don't even decide whether or not it should be published. It goes to an independent body that does it.

In addition to that, there could be -- I could see a system where if the court -- court makes it -- court would -- the appellate court would say basically this case should be published or it should not be published, that that very issue itself could be appealed to some type of group, whether or not it's a bar group or whatever, that would point out what the precedent -- what they thought should be published.

But I agree with what Justice Patterson is saying. It does really get down to a quality issue, and I don't know that you're doing yourself a favor by having all this dumped over into the system.

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: I think there ought to be three things. The first is legal; the second two are administrative. As far as legality goes, I think that every opinion that the court of appeals writes should be available to subsequent litigants -- litigants to be cited and argued as persuasive or precedential if indeed it is. And, frankly, I think the best way to do that is to repeal 47.7.

The two administrative things are simply to make sure that all of the opinions that courts of appeals hand down are available in some way, on the Internet or whatever, and maybe the State Bar is going to take care of that. And the third thing with regard to West, I have no problem with the court of appeals making some kind of judgment that this is the kind of thing that probably belongs in a book so long as that doesn't affect the weight of the case.

HONORABLE JAN P. PATTERSON: We are delighted that there is obviously a clamoring out there that is occurring.

CHAIRMAN BABCOCK: I think it went Buddy, Carlyle, and Scott.

MR. LOW: I guess I've never been one accused of just wanting to make change, and so --

CHAIRMAN BABCOCK: You're the biggest change agent on this committee.

MR. LOW: With that background, let me make this statement about the quality of the work. Right now it is so extremely difficult to keep up with the published opinions, and so the lawyers aren't using that really very well. So let's give them a whole bunch more so they can use that not very well. I'm not against --

PROFESSOR DORSANEO: The only solution there is Supreme Court opinions. That's the only solution to that problem.

MR. LOW: I'm not against these things being available, but designated -- and courts can give them what weight as they want to, but I don't think just giving them more is going to give more quality; it's going to give more confusion. And we are not in the publishing business, but I can tell you right now -- I mean, I know of one case involving several billion dollars, and the lawyers did not -- I mean, they had lawyers hired in Washington and every place. They didn't find a case that was directly in point out of Iowa's published federal circuit case. That was found by a clerk. So they're not using what they got.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: It would seem that if we were to recommend the repeal of 47.7 but keep the standards that are set forth in 47.4, that we may be able to advance the ball here in terms of determining what should go into the, quote, official reporter and what should just be available. And so we eliminate by a repeal on 47.7 this distinction between what can be relied upon and what can be cited and what may be persuasive but keep a standard with regard to what would

be in the official reporter for the state. And that may be a way to accomplish both of the concerns that have been set forth here.

CHAIRMAN BABCOCK: Scott --

MR. CHAPMAN: Excuse me, Chairman.

CHAIRMAN BABCOCK: I'm sorry.

MR. CHAPMAN: We have some fairly clear and concrete requirements for -- for that standard set forth in 47.4.

HONORABLE F. SCOTT McCOWN: I would just like to make one point. I'm going to have to run. I hope to be able to come back. But I agree with Carlyle's suggestion. It ought to all be available. You ought to be able to cite all of it. It all ought to have whatever value as precedent it's worth as a matter of logic, but -- but we still need standards for publication, and some of it should be cited -- I mean, should be published, and some of it shouldn't. And I'm going to give you a reason that hadn't been suggested so far.

Everyone seems to assume that if it's all published, it all comes up to the top level. In fact, if it's all published, it all sinks down to the bottom level. There is -- there is a -- there's a vanity, if you will, or a culture, if you will, that if you put it

in the book, if you put it in the official reporter, it has to represent your best work, your good work. And I just think that we're not ready to change that culture, and if we print books that have it all that are long and nobody uses them, that we're actually going to deteriorate the quality of our good work instead of make it better.

PROFESSOR DORSANEO: Mr. Chairman.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Let me ask y'all this question. You get this book, this hard-bound book, and it has -- somebody wanted to sell you a book that had a fifth of the cases in it. All right. That's what you're going to buy because you can pay X amount of money for that. Are you going to buy that, or do you want all of the cases?

HONORABLE F. SCOTT McCOWN: You're going to buy it. If it's the official book and it's --

PROFESSOR DORSANEO: It's an official book that has one-fifth of the cases.

MR. GILSTRAP: You're going to buy it if it has all the cases that are precedent. That's what you're going to buy.

PROFESSOR DORSANEO: All right. Well, then we're going to have these other cases that are kind

of --

MR. ORSINGER: After we take a vote --

PROFESSOR DORSANEO: West is not even going to publish without --

MR. ORSINGER: After we take a vote, it's going to be precedent, and West isn't going to publish this anymore because they'll lose money.

PROFESSOR DORSANEO: To try to go back to the days that we need -- we need fewer cases because it's too much to read, that's just silly. I mean, if the cases have precedential value, they're going to be published, and you're going to want all of them. You're not going to want just some --

HONORABLE F. SCOTT McCOWN: Let me give you an example since you asked the question. People buy collected works of Yeats that don't have everything he ever wrote, that has the best of what he did.

HONORABLE JAN P. PATTERSON: That's a great analogy.

HONORABLE F. SCOTT McCOWN: And people are going to take books that the court of appeals judges have said, This is worth publishing because it meets these standards and it leaves out the junk. It is a book with junk edited out, and people will buy that, and judges will do better work if they have the option of

putting it in the book.

MR. ORSINGER: Scott, is it an answer to a malpractice claim if you didn't cite the controlling case in your favor because I just have the SW 3d and I don't have an electronic subscription?

HONORABLE F. SCOTT McCOWN: You may still have an electronic subscription. You may still search the electronic database. But if there is an official book that represents what the justices say is their best work, it's going to have value, and it's going to have value to the judges. It's going to have value to the lawyers. I don't think our culture is ready to change yet.

And it seems to me that it's fair to do this a step at a time. Why have a big revolution? Why not just say, Everything is available, everything is cited, this is what we're going to publish. And ten years from now if you're right and I'm wrong, we can change then.

CHAIRMAN BABCOCK: The greatest hits of the 1st Court of Appeals.

HONORABLE F. SCOTT McCOWN: Exactly.

CHAIRMAN BABCOCK: Elaine had her hand up a minute ago.

HONORABLE F. SCOTT McCOWN: I got to go.

PROFESSOR CARLSON: I think the committee is really suffering under a misconception if you think that all lawyers are computer proficient or can afford to be on-line all the time. Bill, you and I get it free as academics, but I can tell you a lot of our students from my law school go out and practice as smaller practitioners or medium practitioners, and they really don't have the resources to do that.

We make our law library at South Texas available to the public and seven days a week, and I can tell you that it is not -- the audience in that library, the users of that library are not just students. We have citizens coming in, a lot of citizens. We have a lot of small practitioners coming in. That's their main source of authority. They don't have the ability to buy SW 2d four times a month. And I think we would really do a disservice at this point if we took the leapfrog and said, Well, let's publish everything in Southwest so we drive West out of business. I think that's not responsible business. I really don't.

I agree with Luke. I think 47.7 being removed is a good idea. I really do. But I don't think -- and I think the Supreme Court has the authority to issue an order to the courts of appeals directing them to make their opinions available to electronic

submission. And those cases in which someone is worried about finding every authority, they're going to spend the money then to do the electronic research, but they don't necessarily have the resources, Richard.

MR. ORSINGER: By the time the Supreme Court votes on this question, we will know whether or not case law is free to everyone in Texas.

PROFESSOR CARLSON: And, you know, Richard, that idea has been around for a little while, and that would be great if it comes together. But even if it's made available, you know there's glitches, you know there's a learning curve. And it may or may not be completely free, and you have to have the computer access.

CHAIRMAN BABCOCK: We're going to take a break here in about ten --

MR. SOULES: Can a court -- excuse me. Can a court of appeals bury an unpublished opinion and not permit the public to see it?

MR. ORSINGER: No.

MR. JEFFERSON: They've done it.

MR. SOULES: What?

MR. JEFFERSON: They've done it.

HONORABLE SARAH B. DUNCAN: No, but they cannot submit it to West --

MR. ORSINGER: It's a public record, but you have to know about it to request it. If they don't submit it to a database, you have to know about the opinion in order to request it.

HONORABLE SARAH B. DUNCAN: For instance, Luke, the 2nd Court of Appeals in Fort Worth does not send its unpublished opinions to the electronic database. It doesn't go to West and LEXIS.

MR. SOULES: Even if they ask for it.

HONORABLE SARAH B. DUNCAN: I'm sorry?

MR. SOULES: Even if the database has asked the 2nd Court.

HONORABLE SARAH B. DUNCAN: None of them go. The Houston courts started it. If it --

HONORABLE MICHAEL H. SCHNEIDER: The Houston courts did what?

HONORABLE SARAH B. DUNCAN: They didn't want to differentiate when they were transmitting to West and LEXIS between published and unpublished, so they just started sending them all. And that was years -- a decade, 15 years ago. And then other courts by choice have decided to send their unpublished opinions to the computer databases. And now some do and some don't.

CHAIRMAN BABCOCK: I'm going to make a

proposal, and then we're going to take a break, and we can think about it. The proposal is to delete 47.4, 47.6, and 47.7 and to amend 47.3 to say, "All opinions of the court of appeals must be made available to the public including public reporting services, print or electronic," period.

MR. GILSTRAP: Can I ask for a clarification? By that we're saying that all opinions are precedent. I mean, that's the effect of that rule -- of that amendment, isn't it?

CHAIRMAN BABCOCK: It may or may not be.

MR. GILSTRAP: Well, it seems to me like that's what it is.

HONORABLE SARAH B. DUNCAN: Could you --

CHAIRMAN BABCOCK: Yeah. 47.3 would say, "All opinions of the court of appeals must be made available to the public including public reporting services," comma, "print or electronic," period.

HONORABLE JAN P. PATTERSON: Upon request.

CHAIRMAN BABCOCK: Guys don't want to take a break, huh?

HONORABLE MICHAEL H. SCHNEIDER: May I make an alternative suggestion? Start with 47.7 and then go down of what you said.

CHAIRMAN BABCOCK: I'm sorry. I said

delete 47.7 --

HONORABLE MICHAEL H. SCHNEIDER: No, no, no. I'm saying let's vote. Let's sever it.

MR. ORSINGER: He wants to do it one at a time. He doesn't want to vote on the whole package.

HONORABLE MICHAEL H. SCHNEIDER: I'm moving for a severance.

CHAIRMAN BABCOCK: Okay. You want to sever. Well, this is just something to talk about --

HONORABLE MICHAEL H. SCHNEIDER: Okay.

CHAIRMAN BABCOCK: -- since we haven't been able to talk for a while. 15 minutes.

(Whereupon a recess was taken.)

CHAIRMAN BABCOCK: I'm getting conflicting messages from our group. Dorsaneo and Susman say, Let's vote at all costs. McNamara joins that. And --

MS. SWEENEY: They said what at all costs?

CHAIRMAN BABCOCK: Vote. But others say that this is too important an issue to race through, so -- Judge Peeples is with that camp. But I'll throw something on the table to talk about, and it is a proposal that 47.4, 6, and 7 be deleted and we amend 47.3 to say, "All opinions of the courts of appeals must be made available to the public including public reporting services," comma, "print or electronic."

One thing we should keep in mind, and that is contrary to what may be the assumption of some is that the West -- the SW 3d is not the official reports of the state of Texas. And Justice Hecht confirms that there is no contract with West Publishing Company that says, for example, You will be our official reports, and in exchange for that you will agree that we can tell you what to publish or not to publish.

In the absence of that contract, West Publishing Company is fully free to publish all the unreported decisions that they can lay their hands on. So that is not really much of an issue for us to consider. If West wants to, they can put out, you know, the best and the worst of the 1st Court of Appeals. Yes, Justice Hardberger?

HONORABLE PHIL HARDBERGER: Mr. Chairman, was that a motion you made?

CHAIRMAN BABCOCK: Well, I can turn it into a motion, sure. Yeah.

HONORABLE PHIL HARDBERGER: If it's a motion, I second it.

CHAIRMAN BABCOCK: Okay. Judge Peeples, you want to talk about it?

HONORABLE DAVID PEEPLES: I just want to be sure what you're proposing to do. You said eliminate

47.7.

CHAIRMAN BABCOCK: Four, six, and seven.

MR. EDWARDS: You've got to look -- if you're going to do that, you've got to look at 47.3. And if you're going to --

CHAIRMAN BABCOCK: I'm amending 47.3.

MR. EDWARDS: And you're also going to have to look -- if you're going to do away with 47.7, I think you have to look at Rule 48, and that is where the courts of appeals are required to send their opinions. We're talking about making them available, and if we're going to do that, then we need to provide that those opinions be sent somewhere where we have a reasonable chance of having them available.

CHAIRMAN BABCOCK: No, I disagree with that, Bill, because my proposal on 47.3 is that the courts make them available. That doesn't necessarily dictate that the courts have to do any particular thing.

MR. EDWARDS: Well, how are they available -- if I'm sitting in Nacogdoches and the El Paso court of appeals hands down a group of decisions and lays them on their table out there, they're available, I guess, but how are they available for me in Nacogdoches? I don't even know about them.

CHAIRMAN BABCOCK: Well, the way it works

now, I think, generally is that you call up the court and you say, I would like to obtain copies of the X, Y, and Z opinions.

MR. EDWARDS: Well, how do I know I want them?

CHAIRMAN BABCOCK: Well, I guess -- I don't know.

MR. EDWARDS: How do I research them? How do I know -- they are really in my mind not available to me because I can't use them.

JUSTICE HECHT: As a practical matter the publishing services are going to pick them up.

PROFESSOR DORSANEO: And that's how they're available to you now, not because anybody tells them they have to do that.

JUSTICE HECHT: We don't make the 1st Court of Appeals -- nobody makes the 1st Court of Appeals publish their unpublished opinions, and nobody makes West pick them up, but West just does. If the court of appeals wants to do it, then there's going to be a market for it, and Chip's change would require the courts of appeals to make them available.

CHAIRMAN BABCOCK: That's all.

MR. HAMILTON: I think it's good to repeal 47.7, but I think we need to have a comment that says

that from now on you can cite all opinions because there's a lot of body of law out there saying you can't. Courts are used to that rule, and I think we ought to tell people in the comment that from now on you can cite all opinions.

MR. GILSTRAP: Including past ones? Including ones from 1910?

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Chip, it seems to me that we've got consensus on two of the three issues we've been talking about. I haven't heard anybody dissent from the notion that everything written by a court of appeals ought to be available electronically to whoever can get it, and I haven't heard anybody disagree with the notion that once you get one of these opinions, you can cite it to a court.

But I think what you propose would go further than that because the issue that I think we have -- need to discuss some more is is there going to be a distinction? Can courts designate something for a higher status, which right now a publication is, and I don't think we've got consensus on that. We've had a lot of, I think, excellent discussion, but we have not resolved that one in my opinion. And I think to eliminate 47.4 would touch upon that issue, which is

different from, Can you cite it, and is it electronically available to everybody?

CHAIRMAN BABCOCK: And I think that's -- that's a good point, except for the fact that we're confusing publication -- I mean, you're taking publication in the narrow sense that a court has some control over it, and I'm saying that the reality today is they don't have any control over it because it is published, no matter what you say.

Now, you can say on the opinion, This is not a cool opinion, so don't -- don't look at it as carefully as you might or some signal, some flag. But I think it's confusing in this day and age to say, Don't publish, because it is published, and we all know it's published.

HONORABLE JAN P. PATTERSON: Well, the label says "not designated for publication," so it does say not cool.

MR. GILSTRAP: It says -- 47.3(b) says you've got to put on the opinion "publish" or "not publish." That's how you decide.

CHAIRMAN BABCOCK: Right. And I propose a change on that.

MR. YELENOSKY: And West follows that designation by not putting it in the book if it says

"not designated for publication." And they just choose to do that or --

CHAIRMAN BABCOCK: But they're not obligated to do that.

MR. YELENOSKY: So --

CHAIRMAN BABCOCK: They just do it.

MR. ORSINGER: But if they do do that, they own the pagination.

MR. CHAPMAN: Well, they do that because it's not precedential value. We say it can't be cited in 47.7. That's why they don't publish it.

CHAIRMAN BABCOCK: So why would they spend the money in the paper costs to put it in if it's a nullity basis?

MS. SWEENEY: And why would anyone buy it?

CHAIRMAN BABCOCK: And why would anybody buy it? Right.

MR. EDWARDS: Why are some of the unpublished opinions on the electronic basis and not others?

MR. ORSINGER: Because the courts choose to make them available, and since they're available, the electronic services make them available to the lawyers, and then the lawyers use them.

MR. EDWARDS: Now we're back to where I

started from. They are not avail -- not all the court of appeals opinions are, quote, available, unquote.

MR. ORSINGER: But they will be after Chip's rule is voted in because they're required to make them available to the electronic services.

MR. EDWARDS: Where is it going to say that?

MR. ORSINGER: His motion.

CHAIRMAN BABCOCK: That's what my --

MR. EDWARDS: Is that part of it? Okay.

CHAIRMAN BABCOCK: 47.3 would say, "All opinions of the courts of appeal must be made available to the public," which I think is constitutionally compelled, "including public reporting services, print or electronic," period. Frank.

MR. GILSTRAP: Chip, your proposal I think pretty clearly, you know, demolishes the whole edifice for -- for distinguishing between public precedential opinions an nonprecedential opinions in Texas. And if this passes, then they're all precedent, I think.

CHAIRMAN BABCOCK: Maybe so. I don't know -- certainly if this Anastasoff case is the law, they are anyway regardless of what we say.

MR. GILSTRAP: Leaving that aside. Leaving that aside. We can't decide whether Anastasoff

is the law, but we -- I don't see any -- anything that keeps all opinions from being binding precedent if we pass this rule.

CHAIRMAN BABCOCK: There's nothing that says they are and nothing says they aren't, but the argument would be -- I mean, the rule would be silent on that fact. But we certainly would take the impediment away that they could be because right now there's a rule which may or may not be constitutional that says they can't be. So we're removing that.

So, yeah, tomorrow if I've got a -- if I've got an appeal and there is an unpublished -- a previously unpublished opinion I'm aware of that's on all fours and it's tightly reasoned and it's well written and it's -- and it seems to answer the question that I'm presenting to the court of appeals, yes, I could cite that, and the court of appeals can do with it what it will.

MR. GILSTRAP: I think it would binding precedent to the extent -- whatever it is in Texas.

CHAIRMAN BABCOCK: If you're my opponent, you wouldn't take that position.

MR. GILSTRAP: Whatever it is in Texas.

CHAIRMAN BABCOCK: But, yeah, that's what I said say. Yes.

MR. JEFFERSON: If I could just make one comment, I regularly don't follow 47.7 anyway. I mean, it says you can't cite it as authority. I'll cite it, and I'll say, you know, This isn't precedent, but it's persuasive to me anyway, and, Court, here's an opinion that came down.

And for trial courts, I'll tell you, they -- they usually follow those opinions if they are helpful to the case, and I've never been -- you know, I've been criticized by the opposing counsel but never sanctioned or anything because I make it very clear. I'm not saying this is authority, and you don't have to follow it, but it sure -- it sure is persuasive on this issue.

CHAIRMAN BABCOCK: Well, you know, it -- the rule as it stands now, it says, "Must not be cited as authority by counsel."

MR. JEFFERSON: As authority.

CHAIRMAN BABCOCK: So what are you citing it for.

MR. JEFFERSON: Like the Law Review articles.

MR. SUSMAN: You were circumventing the rule.

MR. JEFFERSON: Very clearly, but I think

I'm authorized to do that.

MR. GILSTRAP: Under the rule proposal you could do that, and you wouldn't be violating anything.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH B. DUNCAN: My only question about your proposal is the repeal of 47.3 and 4 to the extent that they provide a guide -- I mean, I think West is in a situation where it's pretty much an either/or thing. Either they're going to publish them all, or they're going to publish the ones that the court deems significant enough to be put in a permanent law book.

What is -- by repealing 47.4, what do you think -- what are you trying to move them towards, publishing them all or that West is going to make the decision of what they want to publish?

CHAIRMAN BABCOCK: I think government should not be telling publishers what to publish. That's their decision. I'm not trying to move them any particular way. I'm not trying to move West in a book form versus West on a compact disk or any other electronic service. That's their business. That's not our business. And if they publish and price their books so that none of us can afford it, then we're not going to buy it.

MR. MEADOWS: Chip, should the courts be signaling in some way then what they think is their best work? This whole concept that was talked about earlier by Elaine and Scott is very appealing to me, which is that most lawyers in most cases really just need the core stuff, the really good stuff. And it's in the more substantial or more complex cases where lawyers are going to look for the nugget. And I'm strongly of the view that they ought to be able to use the nugget. We ought to have everything available, and you ought to be able to cite it.

But I like the idea of somehow having something signal about what is the best. And if we're not -- if it's not going to be published versus unpublished, it needs to be something else.

CHAIRMAN BABCOCK: But why do we need -- just to be the devil's advocate, Bobby, why do we need to tell the courts what that is? Why can't --

MR. MEADOWS: We're not telling the court -- I'm interested in how the publishing companies know. I mean, the courts -- how are the courts going to signal that if we don't have the published versus unpublished distinction. You're saying we're -- you know, you're going to say this is cool and that's not, but that's still the court --

CHAIRMAN BABCOCK: Yeah. If the --

PROFESSOR ALBRIGHT: Isn't it true that West is our official reporter?

MR. MEADOWS: No.

CHAIRMAN BABCOCK: You came in late.

PROFESSOR ALBRIGHT: It's not?

CHAIRMAN BABCOCK: No.

MR. ORSINGER: How does F.Supp. make a decision what federal district court opinions are published?

JUSTICE HECHT: They just publish what their district judges say. If the district judge wants it's in the books, F.Supp. publishes it. And if he doesn't want it in the books, then they don't publish it.

HONORABLE JAN P. PATTERSON: That's a chamber-by-chamber decision.

MR. MEADOWS: I mean, that's the thing that's just not clear in my mind, and that's what Judge Peeples was talking about just a moment ago, and that is that if you're going to -- we all agree on these first two points. I see that, also. But if there's going to be something that is going to be, you know, user-friendly, used by the most most of the time, how does that get identified?

CHAIRMAN BABCOCK: Well, Bobby, I just don't -- I don't see how either this committee or the court can really address that situation. I mean, we do have -- we do see devices that are used by different courts to do that. I mean, the Fifth Circuit has a summary calendar. We have in our jurisprudence the difference between a memorandum opinion and a full opinion. So, I mean, there are ways to do it in a shorthanded -- shorthanded way, but -- but I think you're right. We have reached consensus that this business of saying that an opinion of a court can't be cited as authority is just not appropriate.

And then there are other issues, as Frank points out, as to whether or not what precedential effect these opinions, both past and future, will have, and that's just going to have to be worked out, and I don't know that we can do that by rule. But maybe we should do it by rule, but I don't think we should. Yes, Paula.

MS. SWEENEY: I'm just thinking that there's a parallel to per curiam opinions that in some instances are used to cut down workload, cut down on the length of opinions, and, you know, the parties still know what happened to them. There's still a result in the case, but they're out there. You know what they

are. But I just wonder the extent to which there's an analogy between that and the memorandum-type opinions that doesn't mean it's sloppy work, bad work, or anything else other than this is all we need to do on this; it doesn't require massive briefing. And I don't know that if that kind of a, you know, stamp --

MR. WATSON: That's a logical adaption that they'll make. They'll probably use both memorandums and --

CHAIRMAN BABCOCK: But, again, I think that's for the court of appeals to work out. Justice Hecht.

JUSTICE HECHT: Well, a true memorandum opinion like the circuit uses you could hardly ever cite for anything because you can't tell on its face what it says other than it approves some U.S. Supreme Court case. And if the courts of appeal wrote opinions like that, then the problem would sort of solve itself because unless you went back behind it, it would be hard to cite it.

But in ten years since the memorandum opinion rule has been in the books, at least ten years, the courts of appeals are not disposed to use it and for reasons that seem good to them and seem good to me, so -- but I think that's up to them.

HONORABLE MICHAEL H. SCHNEIDER: Well, I think civil cases don't lend themselves as much to memorandum opinions. You can do it with criminal cases a lot easier. It's much more difficult because there's no cookie cutter for all the civil cases.

Anyway, I think you're right about the per curiam. I think that's what happened. Whether or not we intend the consequence or not, two things will happen. More memorandum opinions or more per curiam opinions. And per curiam, the way we always look at it is no one wants to put their name on the bottom line. That's not our test for publishing, though. We really do try to go down 47.4. We try pretty much to do that.

I've heard that said several times here today, that you perhaps don't publish because you're either ashamed of it -- it's really -- as I say, I think the 1st Court, not to sound self-righteous, but I really think that we take that very seriously and try to do it only if it contributes to the jurisprudence of the state.

CHAIRMAN BABCOCK: Any other discussion? Do we want to vote on this? Judge Patterson.

HONORABLE JAN P. PATTERSON: I want to comment on the memorandum opinion because I really -- I think it would put forth a move in that direction, and I

think that is not going to be a satisfying step for the litigants. I mean, to the extent -- a number of the courts are cutting down oral argument. I believe very strongly in oral arguments.

To the extent that this shifts the work to the staff attorney or -- which I suspect that it may, I lament -- I think it is a quality-of-justice issue, and so I think that it has to be said that I don't think a memorandum opinion is the answer. I would not like to give a fully argued or briefed case a memorandum opinion.

CHAIRMAN BABCOCK: Judge Peeples, anything else?

HONORABLE DAVID PEEPLES: I want to be clear what we're voting on.

CHAIRMAN BABCOCK: Yeah. I'll state that in a second. Is there any other discussion you wanted to add?

HONORABLE JAN P. PATTERSON: Are we not voting on the committee's proposal because you made your motion first? Is that what happened?

CHAIRMAN BABCOCK: Yeah. The discussion overtook the committee. The discussion in the Anastasoff case overtook the committee proposal.

MR. HAMILTON: I think there was a motion

to sever that, wasn't there, to end three different --

CHAIRMAN BABCOCK: No.

HONORABLE DAVID PEEPLES: Chip, if we take out three different --

HONORABLE MICHAEL H. SCHNEIDER: Yeah, there was, but --

HONORABLE DAVID PEEPLES: If we take out 47.4, does that commit us on the issue of making distinctions among cases --

HONORABLE SARAH B. DUNCAN: That's right.

HONORABLE DAVID PEEPLES: -- and the use of SW 3d and so forth?

CHAIRMAN BABCOCK: Say that again.

HONORABLE DAVID PEEPLES: Okay. If we go along and vote on all of this, including 47.4, does that commit us to our ultimate decision as to whether to make distinctions among case -- whether the judges on the courts of appeals can have a pecking order, so to speak?

CHAIRMAN BABCOCK: No, I don't think so at all.

MR. GILSTRAP: You're going to have to create something.

HONORABLE DAVID PEEPLES: If not, aren't we going to have to talk about standards for what's a good case or not so good case later on? Why do you need

to get rid of the standards for making distinctions if all you're interested in is what I've said we've got consensus on, which is you can cite and everything goes to the electronic publishers?

CHAIRMAN BABCOCK: Because publication I thought we -- well, the reason behind my proposal was because you-all publish today, whether you say do not publish or not. I mean, it is published to the parties, but it's also more widely available generally, although some courts of appeals don't make their opinions widely available, but most do, like the court -- like the San Antonio court does.

So I think to get bogged down into published versus nonpublished has been overtaken by events of the electronic age. And coupled -- coupled with the fact that we don't have an official reporter where we have -- we have agreed by contract that they can't publish something. And that being the case, a government cannot tell a publisher what to publish or not publish.

HONORABLE DAVID PEEPLES: And you're using the word "publication" to mean make electronically available, not recommend for hard copy.

CHAIRMAN BABCOCK: You can recommend all you want, and I'm not suggesting that we not do that.

And on the severance, I don't want to be too formal about this, but I think that since it's my motion, I can bundle these things, which is always -- always --

MR. ORSINGER: To say nothing about you being chair.

CHAIRMAN BABCOCK: Yeah, that, too, the raw power of the chair.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: So the motion has been seconded. I think we're done discussing it. And here's the motion: That we delete 47.4, 6, and 7 and then replace 47.3 with the following language: "All opinions of the court of appeals must be made available to the public including public reporting services," comma, "print or electronic," period. All in favor of that raise your hand. All against?

CHAIRMAN BABCOCK: It passes 21 to 7. Bill, what's your next issue?

HONORABLE DAVID PEEPLES: Okay. Before we move, I would like to know why the people who voted against that did so because maybe I didn't understand exactly what was at stake. I mean, some people thought that was a bad --

CHAIRMAN BABCOCK: There were seven people who voted against it. Judge Peeples wants to know why.

HONORABLE MICHAEL H. SCHNEIDER: I want to know why you voted for it.

HONORABLE DAVID PEEPLES: I'll tell you why. Because as clarified -- as clarified by Chip, all that does is say everything's electronically available, and you can cite it to a court.

MR. GILSTRAP: It says it's all precedent. That's why I voted against it. It's all precedent.

HONORABLE SARAH B. DUNCAN: I voted against it because --

HONORABLE MICHAEL H. SCHNEIDER: Because you eliminated .4.

MR. SOULES: Justice Duncan, why did you vote against it?

HONORABLE SARAH B. DUNCAN: Because I think the end result -- West is not able to distinguish what is important to the jurisprudence of the state and what's not. And what we've done is exactly what Richard wanted. We have made SW 3d absolutely unaffordable, even for the largest law firms in the state. And I think that's a disservice to individual lawyers, individuals who are not lawyers in the state, and I think it's irresponsible.

HONORABLE DAVID PEEPLES: If we've done that, then I want to revote because I -- the whole room

did not know that's what we're voting on, and I don't think we did vote on that. I specifically asked you if that was part of it, and you said, no, that this action would not commit us one way or the other on the SW 3d, West Publishing, you know, distinctions among cases.

CHAIRMAN BABCOCK: I believe that.

HONORABLE DAVID PEEPLES: Huh?

CHAIRMAN BABCOCK: I believe that.

HONORABLE DAVID PEEPLES: So you disagree with what Sarah said; we're still going to discuss that issue.

CHAIRMAN BABCOCK: Somebody was talking to me when Sarah was talking. Say it again.

HONORABLE DAVID PEEPLES: She thinks that we just voted to make no distinction to say that appellate justices cannot say this ought to be put into West, this is for general use, or whatever; that everything is the same. And I don't think we just did that, did we? Did you-all think we did?

CHAIRMAN BABCOCK: Well, the language in this rule that I proposed certainly did not do that, and if -- if the San Antonio court, to take one example, wants to say, We recommend to West or the electronic publishing service or to anybody that you not publish this, I think they're free to do that. If they want to

say that this is an opinion that isn't -- you know, that is less than some other opinion, they're free to do that, I guess.

HONORABLE SARAH B. DUNCAN: My point is that in practical effect when you tell the courts of appeals you don't have to make this decision anymore, it's not going to get made, and the only way West can make that decision, the default is going to be to put it in SW 3d.

MR. ORSINGER: But, Sarah, if you write an opinion, how come you can't just type "not published" or whatever, "not precedent" on the end of your opinion?

HONORABLE SARAH B. DUNCAN: Well, it's all --

MR. ORSINGER: It's your opinion, isn't it? What keeps you from designating it somehow that you want it published or you don't want it published?

HONORABLE SARAH B. DUNCAN: Nothing keeps me from doing that, and I might well continue to do that. But what you've done is relieved every judge on every court of appeals from the obligation to make that decision, to look at the standards in 47.4, and it's -- I think in practical effect the courts of appeals aren't going to make that distinction, which means it's going to have to be made by West, which is not capable of

making it, so everything is going to get published.

CHAIRMAN BABCOCK: But, Sarah, whether you say "DNP" on it or not, the reason why West is probably going to publish everything is not 47.4; it's 47.7. Because, sure -- because if you take that out of it -- so, if, in other words, opinions can be cited as authoritative, regardless of what effect the courts have, the market will probably pick up those opinions.

HONORABLE SARAH B. DUNCAN: It was economic -- I mean, maybe Jackson and Walker will be able to afford SW 3d with every -- with 80 percent more opinions, but the Bexar County law library isn't going to be able to.

HONORABLE F. SCOTT McCOWN: Can I make a comment here? I mean, this is a good example of how this room with no empirical study and with only a pyra -- the top of the pyramid knowledge makes decisions. You should go read -- and I know some of you do, but I get these unpublished opinions from the court of appeals. They're junk.

HONORABLE SARAH B. DUNCAN: For the most part.

HONORABLE F. SCOTT McCOWN: For the most part they're junk.

MS. SWEENEY: Which court?

(Laughter.)

HONORABLE MICHAEL H. SCHNEIDER: Austin.

MR. ORSINGER: He only reads Waco's court of appeals opinions.

HONORABLE F. SCOTT McCOWN: It seems to me y'all are being disingenuous. Y'all are saying the market will go there anyway, but why force it? If you're right, the market is going to go there anyway, you don't need to shove this rule on to us. If you're wrong that the market wouldn't go there anyway, then we're right.

HONORABLE SARAH B. DUNCAN: Exactly. The proof is in the pudding. The market is going just the opposite way. The reason I think that this rule is viable with a standard for publication and a decision for publication in the books is that a young lawyer going out in practice today, they're not going to buy paper books. They're going to buy disks, or they're going to use the Internet. But what you're doing is making the books -- you're forcing the books to become obsolete. I don't think that's our place.

CHAIRMAN BABCOCK: Well, let me ask you this. Let me just ask Sarah one question. Suppose the San Antonio court adopted internally for itself 47.4 and applied that to your opinions henceforth so that based

on the same standards that we have in the statewide rule now, you came out with a system whereby you advise the public and the electronic media and West that this opinion does not meet our standards for publication and therefore do not -- do not publish, and you say "do not publish." What do you think is going to happen?

HONORABLE SARAH B. DUNCAN: We have 14 different standards. Professor Carlson just said --

CHAIRMAN BABCOCK: What do you think is going to happen with your opinion? What's West going to do with it, and what are the electronic publishers going to do with it?

HONORABLE SARAH B. DUNCAN: I don't understand the question.

CHAIRMAN BABCOCK: Well, I mean, you say you want this rule. So you got the rule --

HONORABLE SARAH B. DUNCAN: I want the courts of appeals to have to decide -- make the initial recommendation as to whether something goes into paper books, and I want them to have a standard that is the same standard throughout the 14 courts of appeals for doing that. Whether they follow it or not is a matter that's beyond our ability to control.

CHAIRMAN BABCOCK: So what do you think is going to happen if that -- if there's that standard?

What do you think is going to happen to your opinions if there's that standard?

HONORABLE F. SCOTT McCOWN: I think the reason she can't answer you is because your premise is that that could happen, and she can't get her mind around that. The courts of appeals are not going to adopt internal rules to make publication decisions in the absence of an official rule from the Supreme Court in the books that's uniform.

CHAIRMAN BABCOCK: All right. Let's say that we keep 47.4, but we do away with the others, and we amend 47.3 in the way that we just voted overwhelmingly to do? What do you think is going to happen in terms of West and publication and big law firms being able to afford stuff?

HONORABLE SARAH B. DUNCAN: I think what we're going to see is a more honest evaluation of whether something should be published in a paper book because there will no longer be any incentive for a court to designate something as a "do not publish" that, in fact, ought to be in the best of Yeats.

MR. SOULES: Chip, could I ask a question?

CHAIRMAN BABCOCK: Luke.

MR. SOULES: I'm confused because over several discussions about published or unpublished

opinions, I thought Justice Duncan felt that unpublished opinions should be something that could be used and reached and cited to the courts --

HONORABLE SARAH B. DUNCAN: I absolutely do.

MR. SOULES: -- for some purpose.

HONORABLE SARAH B. DUNCAN: I've thought that for 15 years.

MR. SOULES: And I guess to me the corollary to that needs to be that they are readily available in the research world to find so that they can be used in that way. And my confusion is, how do we allow them to be precedent -- or how do we allow them to be cited, without getting to what that may mean, and somehow at the same time not make them as available as anything else that could be cited? That's -- I'm having a hard time with that connection.

CHAIRMAN BABCOCK: A lot of hands up. Do you want to answer that real quick or not?

HONORABLE SARAH B. DUNCAN: It's like was said earlier. 95 percent of the unpublished opinions are junk. They're not going to be helpful. They're not going to be useful. And I can't see cutting down trees and increasing the costs substantially for those things to be in books in libraries and law firms and people's

offices.

So to me the big issue is to make them available electronically, make them citable. Once you do that, you take away the incentive to fudge on whether or not it should be in a book, but you're still keeping the books small enough that they're available to people in the South Texas Law Library or the St. Mary's Law Library or the Bexar County Library.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Earlier I was asked why we voted for this. I voted for this because I think the Eighth Circuit was right. And with all due respect to Frank Gilstrap, I think there have been a number of occasions when we've been asked to make a decision as to what -- or a recommendation to the Supreme Court as to what comports with the constitutional law. I think the decision is right, and on page 12 I also think it's right that the practicalities have to follow your judgment as the constitutionality. The court there said this may be less convenient, it may increase the case -- the caseload or the workload, but so be it. That cannot overcome the constitutional issue.

Secondarily, if you believe that, the practicalities have to just be worked out as they will. And I don't think any of us can say, as Judge McCown

said, exactly how this will pan out. But if we want to try to imagine that, if it's really true that there are all these opinions that are junk, 80 percent are criminal, and those are memorandums of law, then the market, I believe in this instance, will figure out -- somebody will figure out how to call those out because they'll be getting in the way of finding other things.

But if we're going to worry about what should be designated as printing, when we look at the practicality really, legal research is really going the way of computer. Nonprofits -- all nonprofits now have that. You can't afford not to have it. And small practices, there are various search tools becoming increasingly available to them.

But, you know, having the best of Yeats is sort of a luxury, and I think that's going to become a luxury with print. But I just put forward it's a constitutional issue, and I think we ought to make a recommendation to the court.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I was persuaded that in the grand scheme of things when the courts of appeals take a look at the concept that all things are available to be published, that by the use of either per curiam opinions or memorandum opinions, those things that fall into the

junk pile would be handled that way, and that -- that those opinions that would be written would be opinions that would -- that would be worthy of this list without the list being stated. And you apparently disagree, but that's why I was persuaded.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: Well, I appreciate your comment that we shouldn't be worried about the commercial aspects of what West does, but as a practical matter, we're sort of in bed with them here. I mean, we've got -- everybody depends on it, lawyers and laymen, everybody else. Everybody cites it. And we're making a decision that in concept I agree that everything ought to be out there and available and be precedent and be cited.

I'm not sure that we've given enough thought to how this is going to affect -- how this is going to be implemented. If the Supreme Court were to adopt what we did today, what's going to be the effect of all the lawyers with all the publishing? Are they going to -- how are they going to cite these things? Is there going to be a difference in how they view something in hardback and something else?

And, you know, Sarah is saying, well, it means that West is going to automatically print

everything. Well, I'm not sure. Nobody knows what West is going to do. They may well do that. That would probably be the most logical thing, but they may also pick and choose by some arbitrary standard that we're not going to have a voice in.

If we're what we're telling the Supreme Court is, yes, we think that everything ought to be available, then I agree with that. But the next step is, how is this all going to work out? I'm not sure we've given that enough thought though.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I'm not changing my vote, but what does bother me is that I see the people who are the judges on the court of appeals, a number of them are unhappy with this and which leads me to believe that we might ought to get a further view because I see that we're taking away a category of opinion, their right now unpublished opinion, and that is not exactly what some of them want. So I think we might ought to have a closer relationship with all the courts of appeals myself.

CHAIRMAN BABCOCK: Bill and then Carl.

PROFESSOR DORSANEO: It is hard to get a handle on this, but if you publish -- if you tell -- you know, West is either going to publish nothing -- or

whatever publisher that would be in the business of doing -- printing books, or they're going to publish, you know, everything. They're going to do whatever they're going to do, and I think it's more or less inevitable that those things will happen anyway.

The idea of having a separate set of published materials that's the really good, high quality stuff, you know, the vintage material and that somehow or another lawyers are going to make use of that as if they were going to go read it and use it like it was -- you know, like it was a treatise, okay, I mean, that's just not so. I mean, that's not how people do work, and it's not how they've done it for a long time.

They're going to go read something else, some award book or something like that to get a start, and then they're going to go to case authority after that. And the case authority is going to be selected by whatever mechanism that the organizer of that material used.

If you do have just a separate set of material that is, you know, identified as being, you know, a higher quality precedent than the other material, I think that's essentially an unworkable -- an unworkable system, if that's maybe so, maybe not so. You're either fooling the people you're selling things

to. Maybe some trial judges would say that, Well, if it's not in this book, I'm not counting it even though it's a court of appeals decision that's -- that's -- you know, that's relevant. I'm just not going to pay attention to that. What kind of a system would that be?

I don't -- I don't see the value of having a separate -- a smaller set unless it's Supreme Court opinions or, you know, something that's -- that's susceptible of being differentiated on some principle basis.

CHAIRMAN BABCOCK: Before we get too troubled by all this, think about what's going on in the Eighth Circuit now. The cite -- the cite to the opinion that the court felt bound to follow is Christie vs. United States, No. 91-2375MN, (8th Circuit, March 20, 1992) (per curiam) (unpublished).

Now, the Eighth Circuit just held that not only is their rule that said you can't cite this opinion as precedent unconstitutional, but they relied on and felt bound by that -- that decision and presumably are going to follow that -- the holding of the panel in the future. So what's going to happen to unpublished opinions in the Eighth Circuit henceforward?

MR. GILSTRAP: I can tell you what's happened. Another panel of the Eighth Circuit has now

said that it is going to follow an unpublished opinion because it's bound by the precedent of Anastasoff.

CHAIRMAN BABCOCK: Yeah, but I'm talking about in terms of making law books fatter, which was -- which was what Sarah was concerned about.

MR. GILSTRAP: Judge Arnold is not concerned about that.

CHAIRMAN BABCOCK: Well, I know. That's what he said. Yeah, Carl.

MR. HAMILTON: I agree with Sarah that there are a lot of lawyers who don't have access to the electronics. I'm one who doesn't use electronics, and I like the books. But what I'm confused about -- and maybe the appellate judges can answer this -- it seems to me that we're saying that there's three kinds of opinions. There's a regular opinion; there's an un -- there's a junk opinion, which is unpublished and usually unpublished because it's junk; and then there's a memorandum opinion. I guess I don't see the value of the junk unpublished opinion.

Why don't we just have a system where we have some guidelines for publishing opinions, those get published, and the rest are going to be memorandum opinions, which you can't cite anyway because, as Judge Hecht points out, unless you know what the

background is, they're no good for anything. So why have the unpublished opinions anyway? I don't understand why we have that.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I don't think, Carl, that they're all unpublished because the unpublished opinions are all junk. There are a whole lot of considerations that go into it. I know, for instance, opinions involving sensitive issues in the legal community sometimes are unpublished. There are a variety of reasons where something might not be published other than that it's not an interesting case or that it might not have precedential value if it were published. And that's just been an observation over the years from reading a lot of unpublished opinions.

The other is this -- this notion that the little guy is the one that doesn't have the computer is standing reality totally on its head. I'm on a lot of list serves with a lot of sole practitioner plaintiffs lawyers, and they're the ones that are on the computer. They don't have a secretary, they don't have a library, they don't have a floor dedicated to books, but they, by golly, have a computer, and it is the great equalizer for them. It's what makes their practice affordable. So, you know, we --

HONORABLE SARAH B. DUNCAN: I think it's a lot age driven, though.

MS. SWEENEY: Absolutely. There may be a class of lawyers who are disadvantaged in the use of computers. It is not the young ones coming out of school.

MR. ORSINGER: It's people like Carl.

CHAIRMAN BABCOCK: Not to name names or anything. Whoa. You don't get to dis our co-chair. Frank.

MR. GILSTRAP: To answer Carl's question, the value of the unpublished -- the unpublished junk opinion is very valuable to the litigants, and they're very valuable if you're trying to get Supreme Court review. To me one of the most dismaying things about this whole process is a suggestion that we're going to get more memorandum opinions.

We all have had experiences where we have unpublished opinions, and -- and they didn't cite the law. They didn't follow it. There's another case that they didn't cite or they didn't follow, and we can't get a review by the Supreme Court, and that's very distressing. It's going to be a whole lot more distressing when you have a memorandum opinion in your hand.

CHAIRMAN BABCOCK: Okay. Richard and then Justice Hardberger.

MR. ORSINGER: If any of you will go talk to your West book salesman, you will find out that they don't sell hard books anymore. They make a living off of their Westlaw subscriptions and the people who subscribe to their CD ROM sets. Libraries, big law firms, and mature practitioners like Carl, they're going to continue to keep renewing those subscriptions, but the publishing industry is moving on, and we really ought to uncouple the idea of precedent versus nonprecedent or important versus memorable or nonmemorable from publishing versus nonpublishing.

Everybody is publishing the electronic stuff that they can get their hands on. And so the real question here is, should we only have the unpublished opinions from the 1st and the 14th and the 5th and the 4th Court of Appeals, or should we have the unpublished opinions from all of the courts and everybody has equal access to the law?

HONORABLE SARAH B. DUNCAN: Wallace and I are agreeing that that's not the basis upon which we voted.

CHAIRMAN BABCOCK: Justice Hardberger.

HONORABLE PHIL HARDBERGER: I think equal

access is really important. Rich makes a good point. I just wanted to register for the record as one appellate judge here, the -- my dislike for the word "junk opinions." Whether they are published or unpublished, I would say that around my court people work awful hard on the unpublished opinions as well as they do published. My own particular belief is the only junk opinions are those that I don't agree with.

CHAIRMAN BABCOCK: Okay. Let me make a suggestion. I just leaned over and asked Justice Hecht if he was comfortable with where we are, and I think he is, but there is -- there is a minority of our committee that feels strongly about this and as I did with the summary judgment rule when I was outvoted consistently 22 to 4 or 5, I wrote a minority report on this issue.

So before our -- we won't send this up to the court until our next meeting. So if anybody feels so strongly they feel like they ought to write a minority report about this, I encourage them to do so. Because as Judge Peeples said, it's an important thing. We -- I don't want to cut off debate because --

HONORABLE JAN P. PATTERSON: I would ask that we have the proposal in writing. I think one of the concerns and one of the problems with our vote today is that people are not clear what they're voting on.

And when you talk about delete this or add this or delete this, I think the proposal is not in front of us, and I think that's the source of a great deal of confusion today.

CHAIRMAN BABCOCK: Well, is any of the 21 people that voted for it confused about it?

HONORABLE JAN P. PATTERSON: Judge Peeples was.

HONORABLE DAVID PEEPLES: Yes, absolutely. Is there any sympathy for breaking this into three separate votes? Two of them would be very easy. The first one would be, should all opinions be electronically available? Should we make the courts that are not doing that do it? Okay. The second would be, Can you cite it? I think we're all for that. The third issue, which I think would be more -- would be closer than 21 to 7 would be, should there be some way that judges can categorize opinions? Now, I don't mean -- you can talk about publish or hard copy or whatever, and the terminology is not important to me, but I think that's an issue that we're going to be divided on, and I think we need to discuss it more because we're talking about changing the way we practice law really. I would like to break it into those three. Is there any --

MS. SWEENEY: I agree with that.

CHAIRMAN BABCOCK: Anybody on majority can move for --

HONORABLE DAVID PEEPLES: And I so move.

HONORABLE SARAH B. DUNCAN: And I second.

CHAIRMAN BABCOCK: Well, you guys are in minority --

HONORABLE DAVID PEEPLES: I voted with the 21.

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT McCOWN: Mistakenly, but he did.

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: You know, one of the things that -- I'm for the vote as I gave, but we think that this vote is going to change what West Publishing does, but one of the reasons they don't publish is because we say "shall not be cited." If we change that, what is going to tell us that they're not going to say, "Well, wait a minute. Now you can cite it," and they're going to publish it, and we can't keep them from doing it.

CHAIRMAN BABCOCK: That's the whole crux, I think.

MR. LOW: So everybody here wants those opinions to be able to be cited. All right. We can't

have our cake and eat it, too, because once that happens, West is going to say, "Okay, that's the change. We're going to publish them," and we can't keep them from doing it.

CHAIRMAN BABCOCK: David, you want to have a separate vote on -- let's have one vote on deleting 47.7 --

HONORABLE DAVID PEEPLES: Well, I don't want to talk about -- I just want the general principle, and then maybe somebody needs to draft it. But the general principle I want voted on first is, should all opinions be electronically available, and should we make the courts of appeals that are not doing that start doing that?

PROFESSOR DORSANEO: That would be a change in 47.3 basically, like your change.

CHAIRMAN BABCOCK: Like the change we just voted on. Okay.

HONORABLE MICHAEL H. SCHNEIDER: It's called a severance that you didn't want to vote on.

CHAIRMAN BABCOCK: I didn't accept that amendment to my motion.

MR. ORSINGER: The minority hasn't accepted defeat, so now we have to break it down.

MS. SWEENEY: Let's vote on that. Let's

do it in steps and see what --

CHAIRMAN BABCOCK: So what do you want to vote for?

HONORABLE DAVID PEEPLES: Should all opinions be electronically available? Should we change the rules so that the courts of appeals that are not doing it start doing it?

CHAIRMAN BABCOCK: The vote would be to change 47.3 to say, "All opinions of the courts of appeals must be made available to the public including public reporting services, print or electronic."

HONORABLE DAVID PEEPLES: That's good enough.

CHAIRMAN BABCOCK: So everybody that's in favor of that? All against? So that's -- there are 26 to zero in favor of changing 47.3 to have that language. Okay. Now what, David?

HONORABLE DAVID PEEPLES: I guess the second one is you should be able to cite all these electronically available opinions to the courts. Now, there's an issue on precedent and citing. I don't want to get into that, but you ought to be able to cite them.

PROFESSOR DORSANEO: That's deleting 47.7.

CHAIRMAN BABCOCK: Okay. Who wants to delete 47.7? And who is opposed to that? So that's 25

to nothing to delete 47.7.

HONORABLE DAVID PEEPLES: And the third issue I want to bring up is should we -- I guess you can put it two different ways. Should we totally do away with the present system whereby judges can designate some opinions as more cite-worthy than others? And I don't want to get hung up on "publish" or "nonpublish" or categories or whatever, but should we say that shouldn't be done, or to put it differently, should we say judges should do that?

MR. GILSTRAP: Should we have a two-tier system?

MR. CHAPMAN: Judge Peeples, would you accept the proposition to seek to embody the standards set forth in 47.4 into 47.1, which says that there should be a written opinion, and it also says where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties so that as you require that there be a written opinion, you give some standards for that opinion?

HONORABLE DAVID PEEPLES: Carl, I'm not sure I want to get -- there are going to be some people who their vote will be determined on whether they want the details of what you're saying. I think a

fundamental question here is, do we want to go whole hog and say every opinion comes out looking the same and we're not going to give West any guidance on what goes into the books and so forth? That's a big decision.

And I think really what will happen with votes 1 and 2 is that -- and if we allow appellate judges to make some kind of categorization, West will publish the ones that used to be designated "publish," and then the mass of them, junk or not, they won't publish, but there will be some nuggets in there that they recognize as should have been published. In other words, they meet the criteria of 47.4, and they'll probably start putting those in the books even though the judge who wrote it didn't say so.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I think that's probably what's going to happen here. But I just don't think there's a 21 to 7 vote on that issue right there. Maybe there is.

CHAIRMAN BABCOCK: There may not be, so let's --

PROFESSOR ALBRIGHT: Can I ask a question? Would this be -- I pull up -- I -- I Shepherd-ize "Transamerica," and 600 cases come up, and 500 of those cases say "designated not for publication." So I can

say I'm going to look at those last, and I'll look at the first 100 first. Is -- this keeps that parenthetical on the citation.

HONORABLE DAVID PEEPLES: Well put.

HONORABLE SARAH B. DUNCAN: Elaine had a -- I've got a good suggestion. Instead of "do not publish" or "publish," "for electronic publication only."

CHAIRMAN BABCOCK: You can't say that, Sarah.

MR. ORSINGER: Of course, we have the say-so over that. You just hope they'll follow you.

HONORABLE SARAH B. DUNCAN: I don't feel like I am making a -- "recommended for electronic publication."

PROFESSOR ALBRIGHT: It's a designation or a recommendation. There is no question -- apparently we have no control -- we can't say to publish in SW 3d or not. They put whatever they want to in SW 3d. So -- but if there's some designation so I can get the 400 cases out of my search if I want to.

HONORABLE F. SCOTT McCOWN: Could I suggest a term? I mean, it seems to me we got hung up on West, and we really have to go further back in history. I mean, there was a time when a court had an

official reporter, and not every order of the court went into the official report. The court designated what went in and what didn't.

And what we're talking about is the establishment of a canon, or we are saying that the judges who write the opinion make an editorial or a judicial decision that this will be in the official reporter. Everything will be available, everything will be cited, but I'm saying as the judge I'm doing some editing in advance, I'm helping you call through my work, which is voluminous, and saying, This is in the canon.

And I think -- maybe it's just tradition, maybe it's misguided, but I think that is something we need to keep.

MR. YELENOSKY: So "canonize" is the word?

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: You know, Alex's example just really -- I'm sitting here being all in favor of let's have every bit of it out there, and then I'm sitting there on the airplane on the way to a hearing on the phone with Westlaw, and I pull up 600 cases, and I no longer get to tell my E and O carrier, I blew off the last 500 because they were "do not publish." I have to tell them why I didn't read them all. And I can't do

it, and neither can anyone else in this room.

So we're -- yeah. I mean, we are now creating a crushing workload for every lawyer in the state. And, you know -- no. The appellate justices are now like, "Yeah, yeah, vote our way and let's talk about yours."

HONORABLE MICHAEL H. SCHNEIDER: Go, go, go.

MS. SWEENEY: There's no longer a way to cull responsibly. You have to read them all.

PROFESSOR ALBRIGHT: And it may be that there's a nugget in those unpublished opinions possibly, but -- you know, so if you don't find what you're looking for in these first 100, then you can start getting --

MS. SWEENEY: No. My opponent who's got 19 little weenie law clerks will have found a nugget.

MR. MEADOWS: You don't need the nugget in every case. And I want to make sure that I -- this sounds like it's headed the direction I thought it should, but what David is saying is right now the word "publication" stands for the standards in 47.4. And all we're going to be doing is finding another way to say that. You know, "This opinion stands for this," or, you know, "This is intended to be precedent," whatever --

however we say that the standard -- the court has applied the standards of 47.4. Right now that's "publication."

CHAIRMAN BABCOCK: I think the word "publication" is getting us -- getting me confused anyway because --

MS. SWEENEY: No, it's not the same because the word now is protection. It means I don't have to go look, no one can criticize me, no one can beat me with it. I can't lose because I didn't look at this case.

CHAIRMAN BABCOCK: You just voted against -- voted away your protection.

MS. SWEENEY: I realize that, but then Alex scared the -- scared me.

CHAIRMAN BABCOCK: Judge Lawrence.

MS. SWEENEY: And I -- we --

PROFESSOR DORSANEO: Suppose there are ten cases.

MS. SWEENEY: Huh?

PROFESSOR DORSANEO: Suppose there are ten cases.

PROFESSOR ALBRIGHT: There's not ten on anything anymore.

MS. SWEENEY: There's going to be 100 on

everything. And the thing is right now "do not publish" means if I want to go read it for the intellectual exercise or because maybe there will be a trail I want to follow, swell. But if I'm in a hurry and I just want to make sure that I have not -- I'm not going to step off a cliff, I'm okay. I'm not advocating we stay with "do not publish," but I think we have to realize what we're taking away and what we're creating. And if there's going to be something substituted for it, you know, I want to know what it is.

CHAIRMAN BABCOCK: Paula, there are certain benefits to practicing in Texas. You could go to Rhode Island, and you wouldn't have to read that. Judge Lawrence.

HONORABLE TOM LAWRENCE: Today if it's unpublished, then it has no precedence, so it's not something you need to worry about, so --

CHAIRMAN BABCOCK: Can't even be cited.

HONORABLE TOM LAWRENCE: That's correct. So now tomorrow everything is going to be published, so we're going to distinguish in some way, canonize it, call it "published" or call it something. Is there going to be a different weight given to whatever we designate as being published so that that becomes the valuable case and the other case, even though it's out

there, is not going to be of any value or any use? What's going to be the relative weight of these two designations?

CHAIRMAN BABCOCK: Well, it's going to be up to the -- for the court deciding the case to decide. I mean, just because somebody says -- you know, somebody says this is not a very good opinion or not a cool opinion or not something that's up to our standards does not mean that some court couldn't cite it as precedent.

HONORABLE TOM LAWRENCE: So I've got a case that I've got two lawyers, and one lawyer is going to have the case that is in the hardback volume that has been designated as being in that, and the other case is going to be on the Internet, but still -- so what's -- and they're diametrically opposed.

MR. MEADOWS: The distinction is how the court that wrote it treated it. I mean, that's what it all comes down to. And either they correctly applied the standards --

MR. ORSINGER: And the argument could be made that you should read both cases and decide which one you think is right rather than letting some judge say that I don't think that mine measures up to some other one that might have been written.

HONORABLE SARAH B. DUNCAN: I agree.

MR. MEADOWS: That's what I vote -- that's what the first vote was about, that we should be able to do that and use it.

HONORABLE TOM LAWRENCE: I know, and I voted for the first two, and now we're getting to designating cases in some manner. I'm trying to understand --

CHAIRMAN BABCOCK: Let's see if we can sharpen what Judge Peeples is asking us to vote on. It seems to me 47.4 and 6 go hand in hand. 6 is just that -- that the -- there's a mechanism to challenge the opinion of the panel, so those are kind of together. So what are we -- what are you asking us to look at on that?

HONORABLE DAVID PEEPLES: Well, number one, I don't want us to get sidetracked on terminology. I'm interested in the principle here, the concept, which is, should we allow or encourage the appellate judges to recommend that some opinions are more cite-worthy or more hard-copy-worthy than others? Now, that's --

HONORABLE SARAH B. DUNCAN: It's not cite-worthy.

MR. ORSINGER: Don't they do that by putting their signature on the opinion?

HONORABLE SARAH B. DUNCAN: No.

MR. ORSINGER: Sure they do.

HONORABLE SARAH B. DUNCAN: No, they do not because the way the statistical setup is is, you know, people had -- somebody asked me in the editorial board the other day, Well, a per curiam is worth less than an original opinion on the merits, and I shouldn't even count concurring or dissenting opinions. So as long as you've got the statistical games going on, we've got a very important opinion on our court that's a per curiam. So we get to decide if they're per curiam or not.

MR. ORSINGER: That's why those labels -- you shouldn't be making decisions in people's lives based on those labels. You ought to read the opinion, and if it's a good opinion, then use it to decide your case. And if it's not then --

HONORABLE SARAH B. DUNCAN: I completely agree.

HONORABLE DAVID PEEPLES: Richard, is there anything in my motion that would defeat what you're saying? We've already voted that you can cite and you can get everything.

MR. SOULES: This is a recommendation.

HONORABLE DAVID PEEPLES: Yeah.

MR. SOULES: The panel recommends don't

waste your paper or vice versa.

MR. ORSINGER: But it's more than to the publisher. I mean, we're past the publisher now. We're telling the consuming public that this opinion is not as good a law as another category of opinion.

HONORABLE DAVID PEEPLES: We may be saying this case -- listen, this case does nothing but apply settled law to the facts, and there are dozens of cases on the books already. You don't need to read this one because the cases are already there.

MR. SOULES: What's wrong with that?

HONORABLE DAVID PEEPLES: Nothing is wrong with that. That's what we ought to do.

HONORABLE MICHAEL H. SCHNEIDER: I yield to my friend here.

MR. WATSON: I was going to ask Justice Hecht -- now, I'm serious about this -- what are the initials that the law clerks put on the motions for rehearing? Is it "CNN," "contains nothing new" or something like that?

JUSTICE HECHT: No. I mean, they -- a memo is prepared. On our motions for rehearing?

MR. WATSON: Yeah.

JUSTICE HECHT: They go around for a vote, and if somebody wants a study, then they do a memo.

MR. WATSON: Law clerks tell a different story. CNN.

JUSTICE HECHT: They may put -- they may put initials on theirs. I don't know.

MR. WATSON: I mean, is that what you're saying, that just something down there that contains nothing new or -- and, again, I'm not being facetious -- a better term of art than that, that this is, you know, reciting established law or doing --

HONORABLE SARAH B. DUNCAN: It's like when you first started reading advance sheets as a first-year lawyer. You didn't know what was interesting and new. It was all interesting and new.

MR. ORSINGER: Or all boring and new.

HONORABLE SARAH B. DUNCAN: All I'm suggesting is that when you've done 100 ineffective assistance cases in the space of a year, you kind of get a drift about what's interesting and new. If y'all -- if y'all want to give that decision to an independent committee or to Skip, all I'm suggesting is --

MR. WATSON: I don't want it.

HONORABLE SARAH B. DUNCAN: -- somebody needs to make a recommendation as to whether this is worth a treat.

MR. YELENOSKY: That's substantively

different from what was being proposed before, and I can accept that. But what you were saying before was a lot broader. It was that you can create two tiers of law based on other factors other than whether it's new. If you're just signaling there's nothing new here and if Paula didn't read it, she can rely on the fact that if it's labeled as nothing new for her malpractice claim, that's one thing, and I can go with that.

MS. SWEENEY: Thank you.

MR. YELENOSKY: But if you're saying that the judge can say, "Well," as we were talking about at the break, "I'm not going to publish this because I'm not real clear on the law and" -- you know, I doubt I would agree with it.

HONORABLE SARAH B. DUNCAN: I never intended to suggest that.

HONORABLE DAVID PEEPLES: The opinion that would have something new but the judge is unsure of it is still going to be available, and people can find it and cite it. The question here is whether judges can try to help the consuming public distinguish between the core good cases and the ones that maybe just have 20 pages of evidence and say the evidence is sufficient.

MR. YELENOSKY: Once you've said everything can be cited, I think that we as lawyers are

going to have to look for everything except something the judge says there's nothing new here. You're going to have to search it. And as far as there being 600 cases turned up if you put "Transamerica" in, well, then you narrow your search. You don't just put in "Transamerica." You look for other words that pertain to what you're looking for. We do that all the time.

CHAIRMAN BABCOCK: David, are you -- I don't think you're -- why don't we see if we can narrow the issue this way. Are you suggesting that we retain 47.4 and 47.6 as worded? I mean, do you want to vote on that?

HONORABLE SARAH B. DUNCAN: No.

CHAIRMAN BABCOCK: Sarah doesn't want to vote on that. Peeples is the ramrod on this thing, so --

MR. MEADOWS: Can I just say in response to that --

HONORABLE DAVID PEEPLES: I don't know.

MR. MEADOWS: -- I think -- I think it --

CHAIRMAN BABCOCK: Let David -- it's his --

MR. MEADOWS: Most people don't have it.

HONORABLE DAVID PEEPLES: I think certainly if you eliminate those, you take us down the

road toward what, I guess, Richard wants, that all cases are out there, and there's not a single stamp on it that says a judge should decide.

CHAIRMAN BABCOCK: No, no, no. What I'm getting at is there's a two-step process. Do you want -- is the vote to keep this as worded? Because I'd vote one way on that. And if we're not going to keep it as worded, do you want to replace 47.4 principally with different language, with a different standard, with a different concept, with a different something, or do you just want to keep the standards for publication language as it is?

HONORABLE DAVID PEEPLES: I guess what I want, Chip, is a world where the judges can still say, This is what we think is important enough to be what used to be in the books. That's all -- that's all I want.

PROFESSOR ALBRIGHT: It's not publication. It's 47.4, but you use a word other than "publication."

HONORABLE DAVID PEEPLES: The word "publication" needs to be --

MR. CHAPMAN: I had suggested before -- and I realize that you thought I was clouding the discussion with unnecessary detail, but if we take the concept that is -- concepts that are embodied in 47.4

and try to define -- one of the discussions went along the lines of what's well settled? We already have in 47.1, "Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary."

I would suggest that the concept is -- not necessarily the wording, but the concept is where the issues are settled or where the case does not present, and then A through B -- A through D of 47.4 is what we're trying to get at. We're trying to make a distinction between those things that, as Paula says, I need to concern myself with, that's new law, that's something significant, and those things that are settled and don't raise anything new.

CHAIRMAN BABCOCK: Joan.

MS. JENKINS: It seems to me that if you're going to go with the proposal that Judge Peeples or Judge Duncan has been talking about, you have to come up with the term that you're going to use, and if it's not going to be "publication," then, seriously, what term would we use because that's really sort of the bottom line. What would you propose stamping on the opinion that would be a signal to West, the practitioner, or anyone that this is a case that is worthy of review and the others can be left to be

reviewed, you know, if you've got the time?

MR. CHAPMAN: And I'm suggesting "memorandum opinion" is the stamp.

HONORABLE DAVID PEEPLES: I don't think -- I don't think that we -- I think it would be a mistake to vote on that -- on terminology and so forth instead of the concept because if people don't agree with the concept --

MS. JENKINS: Well, I'm not asking for a vote, but I'm just saying before I can vote, I need to understand conceptually what --

MR. CHAPMAN: You could exclude memorandum opinions from the search. You have the standard which gives you what the written opinion is, and it falls right within the standard of 47.4 that we've been talking about and comfortable with, and the memorandum opinions would not be something that you would have to deal with.

MR. ORSINGER: The problem with that proposal, though, is that it appears that for whatever reason the courts of appeals like to write longer opinions more often than 47.4 would require.

MR. CHAPMAN: I know. I --

MR. ORSINGER: But if they want to do that, I would like to let them do that. In other words,

I would hate to force everyone on the 1st Court to start writing memorandum opinions on 80 percent of their opinions if they don't want to.

MR. CHAPMAN: I'm just suggesting that that would be a reasonable line of demarcation between the two concepts that --

MS. SWEENEY: Carlyle is right. We don't have to call it a memorandum opinion. We need a Latin phrase, and we need to find some --

(Laughter.)

CHAIRMAN BABCOCK: Judge Lawrence --

MR. CHAPMAN: I'm trying to dovetail into Judge Peeples' concept discussion. I'm not concerned about what we label it.

PROFESSOR ALBRIGHT: We could have stamp that says "47.4 opinion," and, you know, then you could just say, you know, I don't want to read 47.4 opinions.

MR. YELENOSKY: Not to be relied on in malpractice suit for not having read.

CHAIRMAN BABCOCK: Judge Lawrence.

HONORABLE TOM LAWRENCE: I think adopting this 47.4 standard for what goes in the hardbound book versus what doesn't would cause the least upheaval and less confusion and would be more similar to what we're currently doing and I think would be the better idea,

whatever we end up calling it.

CHAIRMAN BABCOCK: The thing is we can't -- we can't dictate -- no court can dictate what goes in the hardbound book.

HONORABLE DAVID PEEPLES: We're not trying to do that.

HONORABLE SARAH B. DUNCAN: In 47.4 in some -- at least one sense in my view is not workable. I mean, I don't follow it to the extent that if there is not an opinion on point coming out of the 4th Court of Appeals on this particular issue, I'm going to publish even if there are 14 cases out of Corpus, 100 cases out of Houston because the truth is that people listen here differently if they know that it's a case -- an opinion that's emanated from that court that it's going to be appealed to. So I'm not advocating the particular language of 47.4.

And I guess in response to what Joan asked, in my view it would be a tag line that says, "In my opinion this case might be useful to somebody."

HONORABLE MICHAEL H. SCHNEIDER: How about "jurisprudential"?

MS. JENKINS: I didn't mean that to be flip at all. I see it coming back to that issue eventually because I really thought you were trying to

adhere to the 47.4 standards. If you're going to come away from those, then I'm confused as to -- I mean, you just want to stamp "significant" --

HONORABLE SARAH B. DUNCAN: "Useful."

MS. JENKINS: "Useful"?

MR. ORSINGER: I don't have a problem with that.

CHAIRMAN BABCOCK: What's the other stamp?

MR. GILSTRAP: "Precedent."

CHAIRMAN BABCOCK: No. This opinion is useful --

HONORABLE SARAH B. DUNCAN: Y'all don't see or read -- y'all don't see or read --

MR. GILSTRAP: Unimportant.

HONORABLE SARAH B. DUNCAN: -- most of the opinions that are offered by the courts of appeals and you don't want to because they're not going to help you in your case.

MR. ORSINGER: What you're proposing is that the courts of appeals justices would do the first-line editing on whether this case is important enough for people like Paula to research or not, and you're performing that function instead of the West Publishing Company editor performing that function or instead of an automatic rule that all of them are worthy

of being searched.

She's still going to get sued for malpractice if she loses a summary judgment because she didn't find a case that was not marked as important but that would have meant that she would win. She will still get sued. It will still go to a jury. But you are performing an editorial function, but that's all you're performing is an editorial function in my view.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE HECHT: If you're going to do this, it does seem to me that you should use a value-neutral term like Carlyle suggested like "memorandum opinion" which then does go into Shepherd's -- I think -- it's been a while since I looked at Shepherd's, but I think it goes in after the cite as "MEM." But, now, it could go -- it could be some other designation. Because "cite worthy" or "useful" or "nonuseful" are all value-laden concepts it seems to me. If you come in and say, "Well, Your Honor, we're arguing this as precedent. It does say 'not useful' down here at the bottom, but" --

(Laughter.)

HONORABLE SARAH B. DUNCAN: And I don't really care what the term is. I mean, if you want a

value-neutral term, that's fine.

CHAIRMAN BABCOCK: Joan.

MS. JENKINS: The other thing that bothers me is if you're going to go with the term that you're going to eliminate in 47.4, then there's no standard for the term, or there's going to be a different standard in each court. And then -- then what do I say to my malpractice carrier? Well, now I have to research the qualifications of the judges to decide whether or not they're capable of setting a standard so that the term they stamp on it, "significant," really means significant, whereas before I had a rule that I could follow that told me what it was that I was relying on?

HONORABLE SARAH B. DUNCAN: I think there ought to continue to be a statewide standard. I'm just not advocating the standard that's in 47.4 necessarily.

HONORABLE DAVID PEEPLES: Chip, I think what I want to do is crystallize my motion with help from Carlyle and Justice Hecht, subject to revision and so forth. But judges on the court of appeals can label their opinions "memorandum opinions" when they deal with settled law and do not deal with the standards of 47.4. And if we can later on add something to 47.4, do it. I think it's a great suggestion that it shouldn't be a value-laden term, and that's one reason I tried to stay

away from terminology.

But what the judges can do is label it "memorandum opinion" when they think this is not a big one. And the ones that aren't labeled that way could be labeled otherwise, and if West wants to pick it up, fine, and if West doesn't want to pick it up, that's fine, too. But it's out there electronically.

MR. ORSINGER: And what's the benefit of that, David?

HONORABLE DAVID PEEPLES: Where have you been the last two hours?

(Laughter.)

MR. ORSINGER: I mean, is it because it make it easier for people to research?

HONORABLE DAVID PEEPLES: Yeah.

MR. ORSINGER: It's not self-evident to me that putting "MEM" after a cause number is adding any value.

PROFESSOR CARLSON: Richard, if you're researching and you pull up, say, a Supreme Court case and a court of appeals, and you put "not for publication" in your search line as Alex suggested, aren't you just going to go to the top cases and you're not even going to reach those not for publication? Are you --

MR. ORSINGER: I think it's very dangerous for you to brief a point of law and to categorically exclude everything that has "MEM" after it if it's precedential.

HONORABLE F. SCOTT McCOWN: Let me make a suggestion. Wouldn't this problem be solved if we -- if we took 47.3 and just deleted it altogether and then we simply reworded 47.4 to say, "An opinion shall be labeled a memorandum opinion unless it does one of the following," and keep the standards so that -- so that an opinion would either be an opinion or it would be a memorandum opinion? It would be a memorandum opinion if it did -- if it didn't do at least A, B, C, or D.

MR. YELENOSKY: That's what Carlyle's been saying.

MR. CHAPMAN: I just couldn't say it with that draw, "Let's do this."

HONORABLE F. SCOTT McCOWN: And then West could make a decision -- I think West's decision would be -- and be very easy to make -- we'll publish everything that says "opinion." We'll put everything that says "memorandum opinion" on the Internet.

PROFESSOR DORSANEO: That won't be their decision to make. They'll publish all of it.

HONORABLE F. SCOTT McCOWN: No, they won't

because when they look at it --

HONORABLE DAVID PEEPLES: If they want to publish everything, let them have at it.

MR. CHAPMAN: Yeah, that's fine. At least we'll be able to make some distinction about what it is.

CHAIRMAN BABCOCK: All right. But you can't -- you can't knock out 47.3 because we already knocked it out and put in new language, so --

HONORABLE F. SCOTT McCOWN: Well, but I'm talking A, B, C, and D.

CHAIRMAN BABCOCK: It ought to go in 47.4, and what you're saying is, "An opinion that" -- could you come up with language, Scott?

HONORABLE F. SCOTT McCOWN: Yeah. It should -- instead of saying "standards for publication" --

CHAIRMAN BABCOCK: Right.

HONORABLE F. SCOTT McCOWN: -- just say --

MR. CHAPMAN: "Memorandum opinion."

HONORABLE F. SCOTT McCOWN: -- "An opinion shall be labeled a memorandum opinion unless it does one of the following," and then keep your A, B, C, and D.

CHAIRMAN BABCOCK: And the title would be, just as Carlyle said, "Memorandum opinions."

MR. CHAPMAN: "Memorandum opinions."

MR. ORSINGER: I sure hate the shell on that. What you're doing is you're taking away the discretion from the court, for example, to say there's no -- there's no San Antonio court of appeals case that holds this, but because it's not a new rule of law, I cannot treat it as a full opinion.

CHAIRMAN BABCOCK: "Shall" or "may"?

HONORABLE DAVID PEEPLES: The existing rule says "should" in 47.1 dealing with settled issues and 47.4. Do you want to say "should," Scott?

MR. ORSINGER: Why can't you say "may" and let the judges decide whether they're required to or not?

HONORABLE DAVID PEEPLES: That's fine.

CHAIRMAN BABCOCK: "May"? It may be labeled a memorandum --

HONORABLE F. SCOTT McCOWN: Well, I don't think you should say "may."

HONORABLE DAVID PEEPLES: How about "should," which is what the rule says right now?

MR. ORSINGER: If you start forcing that, we're going to have to start arguing about those standards because --

HONORABLE F. SCOTT McCOWN: Then let's just say -- that's an old lawyer's trick to the judge to

say, "If we're going to go that way, we're going to be here for hours," so the judge doesn't want to go that way. So if you threaten you'll be here for hours, then I'll just go with "should."

(Laughter.)

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: What about the -- what about the first -- maybe I missed something. What about the language in 47.1 that sets other standards for memorandum opinions as to be brief? Are we going to move that down? If you're going to label it a memorandum opinion, it better be short.

HONORABLE F. SCOTT McCOWN: I don't -- it should be no longer than necessary. That doesn't mean short. That just means succinct on each point. There may be an awful lot of points, and some of these criminal cases there are, but --

CHAIRMAN BABCOCK: Okay. Let me just see if we've got the language down. 47.4 would be redesignated as "memorandum opinion," and the language would be, "An opinion" should, may, shall --

HONORABLE F. SCOTT McCOWN: "An opinion should be labeled a memorandum opinion unless it does one of the following."

PROFESSOR DORSANEO: You better put that

first sentence from 1 in there as the first thing.

MR. CHAPMAN: Yeah, that where it says "the issues are settled." That needs to be in there.

PROFESSOR DORSANEO: And I would say, "If the issues are settled" --

CHAIRMAN BABCOCK: Wait a minute. So you're going to put that -- from 1 you're going to put --

HONORABLE F. SCOTT McCOWN: You're going to take the last sentence of 47.1.

CHAIRMAN BABCOCK: Right.

HONORABLE F. SCOTT McCOWN: "If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it."

CHAIRMAN BABCOCK: Okay.

HONORABLE F. SCOTT McCOWN: "An opinion should be labeled a memorandum opinion unless it does one of the following."

CHAIRMAN BABCOCK: Should it be "any of the following" since that's the language in the rule book?

HONORABLE F. SCOTT McCOWN: Okay. "Any of the following."

CHAIRMAN BABCOCK: "Any of the following."

Then A, B, C, and D.

HONORABLE F. SCOTT McCOWN: And leave them exactly the way they are.

CHAIRMAN BABCOCK: Okay. A, B, C, and D. And would we -- what would we do with 4.6 (sic) here? Do you want to leave 4 point -- 47.6 in here?

HONORABLE F. SCOTT McCOWN: No. Take it out.

CHAIRMAN BABCOCK: Okay. Here's the proposal --

HONORABLE SARAH B. DUNCAN: It's covered by motion for reconsideration en banc.

CHAIRMAN BABCOCK: Okay. Here's the proposal --

MR. ORSINGER: Wait a minute. That's a different decision. The decision to publish -- an appellate court en banc could decide to publish even without deciding to --

CHAIRMAN BABCOCK: No, no, no. We're not publishing anything.

HONORABLE F. SCOTT McCOWN: We're not publishing anything.

MR. ORSINGER: Well, I know, but override the memorandum designation.

HONORABLE F. SCOTT McCOWN: Why would we

bother to go en banc to override a memorandum designation? They can all be cited. I mean, that would be the biggest question --

CHAIRMAN BABCOCK: That doesn't have that big an impact anymore since they all could be cited. I mean, if somebody really gets jazzed about that --

HONORABLE SARAH B. DUNCAN: And if that really bothers you, you can just include it in your motion for reconsideration en banc, and the court could conceivably grant only that point.

CHAIRMAN BABCOCK: And by the way, the ignorant panel made it a memorandum decision.

HONORABLE SARAH B. DUNCAN: Right.

CHAIRMAN BABCOCK: Not only did they get it wrong, they labeled it wrong.

(Laughter.)

CHAIRMAN BABCOCK: All right. Here's -- here's what our new 47.4 as proposed. "Memorandum opinion" -- did we say "if" or "where"?

MR. CHAPMAN: "If."

CHAIRMAN BABCOCK: "If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion should be labeled a memorandum opinion unless

it does any of the following," colon, subparagraph "(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases," semicolon, "(b) involves a legal issue of continuing public interest," semicolon, "(c) "criticizes existing law," semicolon, "or (d) resolves an apparent conflict of authority." In addition, we are going to delete 47.6. All in favor of that raise your hand.

MR. ORSINGER: Can we still make revisions to the standard later, or can we do that now?

CHAIRMAN BABCOCK: We're voting on what we're voting on. All opposed? It passes by a vote of 18 to 7. Okay. Richard, do you want to further complicate things now?

MR. ORSINGER: Yeah. On the -- since we're putting "should" in there instead of "may" -- and I would be really happy if it just said "may" -- I'm concerned about the fact that there's a dispute among our court of appeals justices as to whether the law in a particular court of appeals district is precedent only in that district and not others. And I think that we ought -- if we're going to tell them they shouldn't publish it, we ought to say "establishes a new rule of law in the district" or somehow encourage the courts to

take a position --

CHAIRMAN BABCOCK: Richard, there's just so much we can do, you know?

HONORABLE SARAH B. DUNCAN: Can I make a friendly amendment, Richard, to something that wasn't a motion? I think we need a catch-all for any other reasons the court deems it advisable.

MR. CHAPMAN: That's probably a good idea given Paula's comment about sensitive things that sometimes the court won't --

HONORABLE SARAH B. DUNCAN: Well, but the exception is going to be "should be a memorandum opinion unless it does one of the following."

MR. CHAPMAN: That's it.

HONORABLE SARAH B. DUNCAN: So the catch-all would be if it creates -- if it's the first case on the issue in that district or it -- it actually -- it doesn't resolve a conflict, but it exposes a preexisting conflict within that court of appeals that's never been recognized because it's a nonpublished opinion before September 1st, 1995. There might be a lot of reasons to publish it that are not in this list.

JUSTICE HECHT: One way to solve that would be to go back and say "should not be labeled a

memorandum opinion if," and then you don't have to worry about catch-all reasons.

HONORABLE DAVID PEEPLES: Yeah.

JUSTICE HECHT: If you just say, if it's this, it can't be, and what can be we don't say.

MR. ORSINGER: I like that a lot better.

MS. JENKINS: That's a good idea.

CHAIRMAN BABCOCK: Okay. So we just insert the word "not."

JUSTICE HECHT: Then you have to change each one of the issues the other way.

CHAIRMAN BABCOCK: Well, so the first sentence should still be okay, right? "If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it. An opinion should not be labeled a memorandum opinion" --

HONORABLE F. SCOTT McCOWN: "If it does any of the following."

MR. ORSINGER: If it does, and then you don't need to reverse them.

CHAIRMAN BABCOCK: -- "if it does any of the following." Okay?

MR. CHAPMAN: Yeah.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: One other thing that I want to make sure we have a footnote on. The cases that were "do not publish" ten years ago, are we now saying that those now can be cited, or are we going to have a footnote that if you couldn't cite them before the new rule goes into effect, you still can't cite them.

CHAIRMAN BABCOCK: Let's get this done first.

MS. SWEENEY: I just want to be sure we have that because there's a huge tiger cage there.

CHAIRMAN BABCOCK: Let's get this done first. That's another issue. Carl.

MR. HAMILTON: So now we no longer have the category you mentioned earlier, Paula, about some sensitive case or something that wasn't going to be published before. Now everything is published, so we don't have that category. So now it's either a regular opinion or it's a memorandum opinion, one or the other.

CHAIRMAN BABCOCK: Pretty much. Does anybody dissent from the flipping it and making it "should not be labeled"? Does anybody have a problem with that other than the seven people who were against the whole thing to begin with? Okay. Nobody's raised their hand, so that's -- that sentence will then be

modified to read, "An opinion should not" -- adding the word "not" -- "be labeled a memorandum opinion if it does any of the following," A, B, C, and D taken from 47.4. Okay. We're all set on that? Okay.

Now, Paula raises an issue about what are we going to say about old unpublished opinions, if anything?

MS. SWEENEY: Do they now become citable? I mean, they're going to get picked up and published as they're found presumably, but are they still not citable? Are they still not authority? Are they now authority?

CHAIRMAN BABCOCK: I'll tell you my opinion about it. I believe that the Eighth Circuit got it right, so I think that old unpublished opinions are fair game, and I would -- and if people -- there's now no prohibition against citing them because we've taken out 47.7, and so I would say my answer to that is, yes, they can be cited.

MS. SWEENEY: Well, I guess the question I have about that then is, right now those are not equally accessible to everybody. In fact, they are accessible in some instances only to people who used to be on the court of appeals and happen to have one at their house. And I don't -- there's got to be some sort of safeguard

that we build in for that so that a litigant who didn't happen to be on the court of appeals and doesn't have that particular opinion -- they're not in the marketplace. They're not publicly accessible to everybody in all instances, and so we're creating now a situation where there could be "gotcha's" for which there's no remedy.

CHAIRMAN BABCOCK: You're not going to have a gotcha that you don't know about, do you think?

MS. SWEENEY: Sure, until -- you know, I'm in a hearing, and all of a sudden here comes an unpublished opinion from, you know, 1959 from Justice Guittard that I've never heard of.

MR. YELENOSKY: Well, you could require, consistent with the Eighth Circuit opinion, that a lawyer using a previously unpublished opinion make it available in advance.

MS. SWEENEY: I don't know. I mean, yeah, you could --

MR. ORSINGER: What you need to do is get the name of the old staff attorneys and then --

MS. SWEENEY: And call them all?

MR. ORSINGER: Yeah --

MR. YELENOSKY: But don't you put a burden, consistent with the Eighth Circuit opinion, on

the use -- on -- to making available previously unpublished opinions to the other side?

CHAIRMAN BABCOCK: Well, you could, but aren't we just really complicating things?

MS. SWEENEY: No.

CHAIRMAN BABCOCK: You could write -- we could write a lot of rules about -- I mean, I get handed cases at a hearing all the time that I am constructively unaware of.

MS. SWEENEY: Well, that's between your you and your carrier, Chip.

CHAIRMAN BABCOCK: And you do, too, so -- yeah, I'll match my carrier against your carrier. Yeah, Mike.

MR. HATCHER: Back before we got so electronically sensitive, Paula, this committee did draft a rule, the one that went up in which if you're facing that situation, we required your opponent to furnish you a copy of it X days in advance.

MR. YELENOSKY: That's what I just said.

MR. ORSINGER: But, of course, what they won't tell you is they won't furnish you an unpublished opinion that's on your side. There's a little ethics rule out there, but --

MS. SWEENEY: Well, I think the Court can

make a footnote or whatever. I'm not advocating that this has to be part of the rule, but I do want it to be clear that it's a concern raised by at least some members of the committee that there not be built in a booby trap out there based on --

CHAIRMAN BABCOCK: That's fair to say.

MS. SWEENEY: -- that's based on old opinions that now for the first time ever will have precedential effect.

HONORABLE SARAH B. DUNCAN: It also needs to be in the appellate briefing because we're not going to know about it any more than you do.

CHAIRMAN BABCOCK: Okay. What else?

MR. SOULES: How about any opinions on the Internet?

CHAIRMAN BABCOCK: How about what?

MR. SOULES: Where do you find them?

MR. ORSINGER: We're going to have to go with --

THE REPORTER: I'm sorry. I didn't hear what you said.

MR. ORSINGER: Don't worry about it.

CHAIRMAN BABCOCK: He didn't say anything.

(Laughter.)

CHAIRMAN BABCOCK: Okay. Anything more

about this issue? I think it's a very good discussion and I think probably got -- we got to the right place. Yeah, Ralph.

MR. DUGGINS: Chip, you're going to have to deal with 47.5 on dissent, too, at some point. The last -- the second-to-the-last sentence in the paragraph.

CHAIRMAN BABCOCK: You're right.

HONORABLE F. SCOTT McCOWN: Well, couldn't you just make it an (e) to 47.4, just say, "(e) is accompanied by a concurring opinion or a dissent"?

PROFESSOR DORSANEO: That's a good idea.

CHAIRMAN BABCOCK: "An opinion shall not be labeled a memorandum opinion if it does any of the following: (e)" --

HONORABLE F. SCOTT McCOWN: "Has a concurring opinion or a dissent."

MR. ORSINGER: No. It's only if the judge wanted to publish, so you'd say "which is a concurring opinion or the same opinion"?

HONORABLE F. SCOTT McCOWN: I don't see how you can have a -- I don't see how you can say it -- I don't think two judges should say about a third judge that it's an established rule of law; he just doesn't know it. If there's a dissent --

JUSTICE HECHT: Welcome to the court of appeals.

(Laughter.)

JUSTICE HECHT: What about 5 saying about 4?

HONORABLE F. SCOTT McCOWN: If there's a dissent, it seems to me it can't be a memorandum opinion, but maybe it can.

MR. ORSINGER: There's some logic in that.

CHAIRMAN BABCOCK: That would be easier. What do people feel about that? David, what do you think about that?

HONORABLE SARAH B. DUNCAN: That's fine.

HONORABLE DAVID PEEPLES: Fine. Fine.

CHAIRMAN BABCOCK: Bill?

PROFESSOR DORSANEO: Done.

CHAIRMAN BABCOCK: Okay. So we'll add subparagraph (e) that says, "has a concurring or dissenting opinion"? Is everybody okay with that? That means we'll delete the language of 47.5. Thanks for catching that, Ralph.

MR. HAMILTON: Can I say something about that? Why would we have "concurring"? Why not just "dissenting"?

MR. ORSINGER: "Concurring" means they

don't concur in the rationale for the holding but they do agree with the holding.

HONORABLE SARAH B. DUNCAN: I've published one unpublished concurring opinion, and I sincerely regret making it unpublished because if one of the judge's reasoning is significantly different from the two members of the majority, I think that could be helpful, conceivably could be helpful to someone.

CHAIRMAN BABCOCK: Okay. Do we need to vote on this? Is there any dissent about this? Any concurrences? Okay. Are we done with this particular thorny problem?

MR. HAMILTON: Are we going to have comment? Are we going to have comments on this?

CHAIRMAN BABCOCK: Yeah. Paula is going to do a comment and circulate it to everybody. Aren't you, Paula?

MS. SWEENEY: My batteries are dead. I can't.

CHAIRMAN BABCOCK: All right. Stephen's going to do it then.

MR. YELENOSKY: A comment?

CHAIRMAN BABCOCK: A comment. Okay. Or actually, Mike, you may have language from the old one. Do you?

MR. HATCHER: Not with me, no.

CHAIRMAN BABCOCK: But somewhere?

MR. HATCHER: Yeah. I may have.

CHAIRMAN BABCOCK: Could you e-mail it or -- just get it to Carrie, and she'll e-mail it to everybody.

MR. HATCHER: I'll see what I can do.

CHAIRMAN BABCOCK: Good. Never mind. You guys are both off the hook. Okay. Bill, in the remaining -- in the waning twilight hours here, what else can we tackle?

PROFESSOR DORSANEO: We can actually do a lot which will take a lot less time. Do you-all have this packet now, Proposed Revisions Texas Rules of Appellate Procedure? We'll just take them one by one.

Page 2, the first suggestion involves Rule 9.5, Appellate Rule 9.5, and the exact issue is whether we should add language making it clear, as the Combined Committee recommended, that a party is required to serve a copy of the record in an original proceeding. Right now the original proceeding rule, Appellate Rule 52, particularly 52.7, says that the relator must file a copy of the record in an original proceeding. Actually it means that the relator must prepare and file a copy of the record. But the sentence that currently exists

in 9.5(a) literally says that a party need not serve a copy of the record without disclosing that that's only about an appeal rather than an original proceeding.

Now, the committee recommendation is just to add this language: "But a party need not serve a copy of the record except in an original proceeding." We could go with that, but Judge Womack in a memorandum that was also provided to you says that he doesn't think that's a good way to proceed because it is not clear enough. And one way to make the matter entirely clear would be to add additional language to both the first, second -- the second sentence, and to add a third sentence. I'll indicate that to you, and that really would be my recommendation.

"At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal," and then instead of saying -- and, Judge Hecht, cut me off here if you think I'm headed off in the wrong direction. "Or original proceeding," instead of saying "appeal or review." I don't think "review" means -- well, it might technically in some rare instances mean something other than an appeal or an original proceeding, but that's getting too technical. So I would recommend saying "original proceeding" rather than "review." Then say, "But a

party" or just "A party need not serve a copy of the record in an appeal," and then say, "A party must serve a copy of the record in an original proceeding," which seems to spell all of that out in the clearest possible terms.

But, again, the committee recommendation, which I would be willing for you to vote on affirmatively, is just add "except in an original proceeding." Questions. Discussion.

CHAIRMAN BABCOCK: Anybody got a motion on this?

MR. HAMILTON: I have a question. Are you going to change the word "review" to "original proceeding"?

PROFESSOR DORSANEO: Uh-huh, in the first sentence because I perceive that's what that word means.

MR. HAMILTON: Yeah. But then if you say, "But a party need not serve a copy of the record" --

PROFESSOR DORSANEO: "In an appeal."

MR. HAMILTON: Oh. You're going to add "in an appeal."

PROFESSOR DORSANEO: "In an appeal." And the last sentence would say but you do have to in an original proceeding.

CHAIRMAN BABCOCK: What's the language of

the last sentence?

PROFESSOR DORSANEO: "A party must serve a copy of the record in an original proceeding." And the committee's recommendation is to do that in Rule 9.5 rather than in 52.7. Could be done both places. You have to come to these meetings.

CHAIRMAN BABCOCK: Okay. So 9.5(a) would be amended to read, "At or before the time of a document's filing, the filing party must serve a copy on all parties to the appeal or original proceeding," period, striking the word "review" and striking the word "but," and then saying, "A party need not serve a copy of the record in an appeal," period. "However," comma, "a party must serve a copy of the record in an original proceeding," period.

PROFESSOR DORSANEO: Well, I would use "but" instead of "however," but the idea is --

CHAIRMAN BABCOCK: Okay. Well, we'll put a "but" in there.

PROFESSOR DORSANEO: In the last sentence.

CHAIRMAN BABCOCK: "But a party must serve a copy of the record in an original proceeding." Is that the proposal?

PROFESSOR DORSANEO: The proposal.

CHAIRMAN BABCOCK: Second? Carl, second?

MR. HAMILTON: I'll second it.

CHAIRMAN BABCOCK: Carl seconds it. Any more discussion? All in favor raise your hand. Anybody opposed? Unanimous.

PROFESSOR DORSANEO: The next one on page 3 is basically to add this sentence, which I think captures the entire thing without going into a lot of elaboration, to add, "A certificate of conference is not required for a motion for rehearing."

CHAIRMAN BABCOCK: And where would that be added?

PROFESSOR DORSANEO: To the end of (a)(5).

CHAIRMAN BABCOCK: 10.1(a)(5) by adding the sentence, "A certificate of conference is not required for a motion for rehearing." Okay. Any discussion on that?

MR. LOW: Second.

CHAIRMAN BABCOCK: Buddy seconds it. All in favor? Anybody oppose? Unanimous.

PROFESSOR DORSANEO: And the third one on page 4 is something that the committee didn't think needed to be changed, and I'll just ask you to glance at it for a second, but I'm not intending to talk about it because there's no committee recommendation to change anything. That takes me to 13.1.

CHAIRMAN BABCOCK: Let's just -- let's just have a record vote on the proposed -- the suggestion on Rule 11, which the committee suggests we do not adopt. Anybody opposed -- everybody in favor of adopting the Combined Committee recommendation say "aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Anybody opposed? Okay. The committee recommendation is unanimously adopted.

PROFESSOR DORSANEO: This -- did Judge McCown leave? Is he gone? Oh, he's over there. He moved. This is a committee proposal in response to Judge McCown's letter with respect to the language of 13.1(a), which now says in so many words that, "The official court reporter or court recorder must attend court sessions and make a full record of the proceedings unless excused by agreement of the parties."

Judge McCown's letter says that at the time the rule was adopted, the trial judges were assured that the new rule was not intended to mean what it said -- or what it says, and that's caused difficulties.

The committee recommends modifying or changing the language of (a) in some manner. The first draft is the one you have here, "attend court sessions and make a full record of the proceedings when requested

by the court or any party to the case." Again, Judge Womack corresponded with all of us and said that he doesn't like "when requested by the court or a party to the case" to be at the end because he can't tell whether it modifies "attend court sessions" or "make a full record of the proceedings" or both.

I thought we could move it to the beginning and that would make matters clearer, but on further reflection here, I wonder why it says that the official court reporter must attend court sessions unless -- you know, unless it's to be there. Why do we need that in there?

HONORABLE F. SCOTT McCOWN: Just take that out, and you've got a brilliant rule. "The official court reporter or court recorder must make a full record of the proceedings when requested by the court or any party to the case."

HONORABLE MICHAEL H. SCHNEIDER: That's what you got.

MR. LOW: Why not "attend"? What if they want to say, "So I can't be there. I'm just going to get a tape recorder, and I'll type it up"?

PROFESSOR DORSANEO: Interesting question.

CHAIRMAN BABCOCK: Well, they can't use a tape recorder --

MR. SOULES: They do.

CHAIRMAN BABCOCK: -- unless the Supreme Court's authorized it. I mean -- you know --

PROFESSOR ALBRIGHT: It's not -- the full record requires that they be in attendance, right?

HONORABLE F. SCOTT McCOWN: Well, I guess I thought if you put a requirement on them that they have to make a full record, that implies --

PROFESSOR ALBRIGHT: That's what I'm saying --

HONORABLE F. SCOTT McCOWN: -- by necessity they're attending.

PROFESSOR ALBRIGHT: Yeah, I'm agreeing with you. "Full record" equals you have to follow the rules relating to the record, which --

CHAIRMAN BABCOCK: But if we take this out of the rule --

MR. SOULES: Whoops. My tape recorder screwed up, and I wasn't here.

CHAIRMAN BABCOCK: If we take this out of the rule, some may argue, "Well, wait a minute. It used to be in the rule that I had to attend. You took it out, so now I don't."

MR. CHAPMAN: It ought to stay in there.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I just want to make sure we don't run afoul of something the Supreme Court's already done. Something came across my desk back when the Supreme Court was approving not rules but some sort of a handbook for court reporters for the way they -- how many lines per page, how much indention, et cetera, et cetera.

And there was some discussion, as I understood it, in that rule about the problem when a video deposition was played and confusion about whether that had to be introduced into the record or on the assumption of the trial lawyers that the court reporter was sitting there typing -- you know, taking down the words of the video deposition so that it was in the black and white transcript and you're not depending on the court of appeals to actually go in and play the videotape, which I doubt that they do with regularity.

And I -- that rule was made, I think, rather specific that the court reporter must take down the video deposition unless excused.

PROFESSOR DORSANEO: There's a whole order on how the record will be prepared by the court reporter.

HONORABLE F. SCOTT McCOWN: Does this solve the problem? Could we say, "The official court

reporter or court recorder must be available to make a full record of the proceedings when requested by the court or any party to the case"?

MR. WATSON: My point is that I think there's another rule out there or, in essence, a rule that says they shall be taking it down without a request.

MR. LOW: I move that we adopt that as written, attend and make a full recording.

MR. DUGGINS: May I ask a question?

CHAIRMAN BABCOCK: Yeah, Ralph.

MR. DUGGINS: What's meant by "court sessions" because we recently had a situation where the judge called for a conference in chambers and refused a request for a reporter?

PROFESSOR DORSANEO: That was one.

MR. DUGGINS: I'm asking because I don't know what's meant by "sessions."

CHAIRMAN BABCOCK: Are you saying in response to Ralph that that's something that's in the case law that an in-chambers conference is a court session?

PROFESSOR DORSANEO: I think so, yeah. I'm not sure I could cite a case for it.

MR. DUGGINS: I think it should be. I

just was asking a question.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, as I understand it, the only problem was raised by Judge Womack about the "when requested by the court or any party." If we put the "when" clause at the beginning of the -- of the phrase so it says, "The official court reporter or court recorder must when requested by the court or any party to the case attend court sessions and make a full record of the proceeding" --

HONORABLE F. SCOTT McCOWN: That's fine.

PROFESSOR ALBRIGHT: I guess what Judge Womack was saying is you could interpret it as saying that they must attend court sessions whether they have to make a record or not.

HONORABLE F. SCOTT McCOWN: That's fine.

CHAIRMAN BABCOCK: Where do you want to put the "when"? I'm sorry, Alex.

PROFESSOR ALBRIGHT: Right after (a).

PROFESSOR DORSANEO: Just put the first clause first. Put the last clause first.

PROFESSOR ALBRIGHT: "(a) when requested by the court or any party to the case," comma, "attend court sessions."

MR. DUGGINS: So moved.

HONORABLE F. SCOTT McCOWN: Yeah, that's good.

CHAIRMAN BABCOCK: So now it would read, "The official court reporter or court recorder must: (a) when requested by the court or any party to the case attend court sessions and make a full record of the proceedings."

PROFESSOR ALBRIGHT: Actually what would be even more elegant would be to say, "when the court or any party to the case requests," put it in active instead of passive voice.

HONORABLE F. SCOTT McCOWN: "The official court reporter must attend court sessions and make a full record of proceedings."

MR. SOULES: How about "attend court proceedings"? Does that help us with the in camera stuff?

HONORABLE F. SCOTT McCOWN: We could just say "attend court" and take out the word "sessions."

CHAIRMAN BABCOCK: That might help with in camera.

MR. SOULES: "Attend court and make a full record of all proceedings"?

MS. SWEENEY: As a practical matter, what are you going to do when a judge says, "Lawyers in

chambers," and you say, "Can I have a court reporter, please?" and the judge says, "No"?

MR. SOULES: I say, "We ain't going to chambers. We'll do it right here." Sometimes you just have to do that.

MR. CHAPMAN: You have to just say, "We're going to do it in open court, Judge. You know, I need a record."

MR. SOULES: "If you want somebody there to make a record, that's okay with me." But I want a record of everything we do, so --

CHAIRMAN BABCOCK: Okay. Are we --

MR. SOULES: -- because I don't want to get the judge looking across the desk again and saying, "I'm coming after somebody," and I don't have a record.

CHAIRMAN BABCOCK: Okay. Let's get the language straight. "The official court reporter or court recorder must: (a)" -- Alex?

PROFESSOR ALBRIGHT: "When the court or any party to the case requests," comma, "attend" -- whatever you-all decide about "court" or "court sessions" -- "and make a full record of the proceedings."

CHAIRMAN BABCOCK: We're striking "sessions." We're not getting away with -- doing away

with (a) because we've got a (b) "take all exhibits."

PROFESSOR ALBRIGHT: You could just say "attend court and make a full record."

HONORABLE F. SCOTT McCOWN: Right.

CHAIRMAN BABCOCK: Okay. "The official court reporter or court recorder must when the court or any party to the case requests attend court and make a full record of the proceedings."

HONORABLE F. SCOTT McCOWN: Right.

CHAIRMAN BABCOCK: Everybody in favor of that say "aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Anybody against?

MR. SOULES: Yes. I want "all proceedings" instead of "the proceedings."

CHAIRMAN BABCOCK: You want to put "all" in there? Is anybody opposed to putting "all" in there for this?

PROFESSOR ALBRIGHT: Yeah.

HONORABLE F. SCOTT McCOWN: I think -- I think "the" -- because you might request that they be there for part of it and not be there for some of it.

MR. SOULES: I'm trying to cover the in camera problem.

HONORABLE F. SCOTT McCOWN: Well, I think

the in camera problem is covered by deleting "sessions."

MR. SOULES: I give up.

HONORABLE F. SCOTT McCOWN: Okay.

CHAIRMAN BABCOCK: You give up? I wouldn't give up if I were you.

MR. SOULES: If somebody else wants to get on board, that's okay. I think we're missing something important.

HONORABLE F. SCOTT McCOWN: Because the thrust of this is to make clear that if you want a particular phase of the trial covered, you got to make a request --

CHAIRMAN BABCOCK: I give up, too.

HONORABLE F. SCOTT McCOWN: Okay.

CHAIRMAN BABCOCK: All right. That's unanimous. Richard.

MR. ORSINGER: I'm a little bit concerned that there may be some statutes that require a record. I know that in some instances under the Family Code, which I don't have a copy of with me, the court is required to make a record. And I don't know whether we just want to say that that's when the court should require it or whether we should say "or as otherwise required by law." But this is a little bit misleading. And there may be others like civil commitment

proceedings and other things that are governed by these rules. I don't know.

CHAIRMAN BABCOCK: Wait a second. We've had this rule forever, Richard. 13.1 we haven't?

PROFESSOR ALBRIGHT: Yeah. It's always been if you want a court reporter, you need to --

MR. CHAPMAN: Request it.

MR. ORSINGER: No. I think the Family Code provisions says that the parties must waive on the record with the approval of the court, so that doesn't violate the old language.

HONORABLE F. SCOTT McCOWN: But the court reporter is never going to know that court's been convened and that he needs to be in there unless the judge calls him. So I think it's covered if the judge tells you to do it or if any party tells you to do it, then you've got to do it. It's up to the judge and the parties to know when the law requires a record, but the court reporter doesn't independently walk in and say, "We need a record here."

PROFESSOR DORSANEO: I think that makes sense.

HONORABLE F. SCOTT McCOWN: All right. We'll be here a long time if you fight me on this one.

(Laughter.)

MR. DORSANEO: Rule 18. The next issue, Rule 18, is not necessarily a Rule 18 issue or a Rule 18 issue only. It is notice of the issuance of the mandate. Right now it doesn't say anywhere in clear terms that the appellate court clerk must mail a copy of the mandate to counsel. It might mean that in Rule 12.6 where it talks about right now, "... the clerk of an appellate court must promptly send a notice of any judgment or court order to all parties to the proceeding."

It certainly doesn't say that in 18's beginning part, which says, "The clerk of the appellate court that rendered the judgment must issue a mandate and send it to the clerk of the court to which it is directed."

And our recommendation is to say it in both places. To amend 12.6 to say, "... the clerk of an appellate court must promptly send a notice of any judgment, mandate or other court order" -- and the "other" is because I think a mandate is a court order -- "to all parties to the proceeding," and then -- and then to make a companion change in 18.1. "The clerk ... must issue a mandate in accordance with the judgment and send it to all parties to the proceeding and to the clerk of the court to which it is directed when one of the

following periods expire" -- or "expire," whatever it says in the current rule.

CHAIRMAN BABCOCK: Any discussion about this?

MR. HAMILTON: Why do you need two rules? Can't you just say "issue and send"?

PROFESSOR DORSANEO: Well, there's one general rule, 12.6, that probably is, frankly, the better place, but then 18.1 does talk about it, about sending it to the clerk of the court to which it is directed, and that kind of suggests only to the clerk of the court, so that's a belt and suspenders thing. And, frankly, I would probably say, well, change 12.6, but I don't see any great harm in saying it twice.

CHAIRMAN BABCOCK: Do we have a motion?

MR. LOW: So moved.

CHAIRMAN BABCOCK: Anybody second?

MS. JENKINS: I'll second.

CHAIRMAN BABCOCK: Any further discussion? In all in favor say "aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Any opposed?

PROFESSOR DORSANEO: The next one is 25.1(d), another one where this committee recommended no change. And, you know, time is short, and I don't want

to give it a short trip, but I do think it's worth saying about this is that some people think that the notice of appeal should contain more information. For example, it should identify the appellees, which is the gist of the suggestion. "Rule 25.1(d) might require that the notice of appeal list the names of all parties against whom the appellant intends to appeal."

We discussed this at great length, and to quote or paraphrase Richard, became exhausted by it, you know, some years back. But the Combined Committee believes that it's not a good idea to complicate the notice of appeal process by requiring that to be figured out and added into the notice of appeal and thinks the rule is fine the way it is.

MR. ORSINGER: I move we reject the suggestion and accept the committee's recommendation.

CHAIRMAN BABCOCK: Second. Any further discussion? All in favor say "aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Anybody opposed? It's unanimous.

PROFESSOR DORSANEO: All right. The next one, 25.2(b)(3), I'm not going to talk about because the Combined Committee recommendation indicates that Judge Womack says we shouldn't do anything here because the --

what is in issue involves a court of criminal appeals case that I suppose still hasn't been decided. I haven't checked myself, but there is no committee recommendation here.

CHAIRMAN BABCOCK: So what are we going to do, just pass this for the moment?

PROFESSOR DORSANEO: Leave it. Let it sit.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: This next one is -- 26.1(a)(4) is a more significant matter. Right now (a)(4), the basic rule indicating when you need to perfect an appeal, says, "The notice of appeal must be filed within 90 days," you know, rather than on the shorter 30-day track, "after the judgment is signed if any party timely files," and one of the things included in the list is "a request for findings of fact and conclusions of law if findings and conclusions are required by the Rules of Civil Procedure of, if not required, could properly be considered by the appellate court." The language in (a)(4) copies a Supreme Court case, the -- what is it, Elaine, the IKB?

PROFESSOR CARLSON: IKB.

PROFESSOR DORSANEO: -- the IKB case. The committee recommends rejection of the limitation in

(a)(4). The limitation, again, is that if the -- if the findings and conclusions, you know, are not required and could not properly be considered by the appellate court because they're not proper, like an appeal from a summary judgment, then you wouldn't get the 90 days, and you would find out about that, you know, after time elapsed.

Okay. So the committee, first of all, recommends to do this, which probably is not the primary recommendation, but it is the first one that we discussed. "A request for findings of fact and conclusions of law even if findings and conclusions are not proper or required by the Rules of Civil Procedure." This would just be a simple statement that you get on the longer track even if you were in error in requesting findings of fact and conclusions of law because they're not proper in the case you're appealing. This is to simplify appellate procedure and to remove problems for people who should know what they're doing but don't.

Once we got into discussing the matter further, we ended up thinking that really we shouldn't have dual tracks; that we should have a notice of appeal filed within 90 days after the judgment is signed for what I'll term, you know, all ordinary appeals, not without regard to what somebody files in the trial

court, you know, after the judgment. That -- as the recommendation says, "The Combined Committee believes that there is no good reason to retain two appellate timetables," for an ordinary appeal.

I think it is fair to say that once upon a time the trial court and appellate timetables were all connected, and that's kind of why we're in the shape we're in now. And that is, of course, a matter of considerably more significance than any of these other technical things, and I'll open that up for discussion. But the issue is, should we simplify appellate procedure by, you know, not worrying about when you get the longer track and just say you get the longer track, or is there any -- is there any downside to doing that?

CHAIRMAN BABCOCK: Well, one downside is we just amended -- overhauled the TRAP rules, what, two years ago, three years ago? And to now change the timetables again --

MR. ORSINGER: Well, you can't get hurt because we're going with the longer timetable. The problem is is that people now can get caught in the gap between short and long, and that's what prompted this complaint.

PROFESSOR DORSANEO: And we have a lot of case law discussing all these little issues that, you

know, you could wear yourself out worrying about it, and why bother?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH B. DUNCAN: When we discussed this, we talked about a unified tract with the '97 amendments, and my memory is -- I may be wrong, but my memory is -- and I thought it was persuasive at the time -- at the time -- there are too many cases that need to just get -- people need to know one way or the other if there's a final judgment. Most of the cases in the system are not commercial law cases or big personal injury cases. Most of the cases in the system are family law in some way or another. And 90 days is a long time to wait to find out if there's going to be an appeal on the custody issue or the property issue. I am in favor of the two-track system.

PROFESSOR DORSANEO: The only motion to this case is you get on the 90-day track anyway because somebody files one or another of the things that you could file?

HONORABLE SARAH B. DUNCAN: I doubt it.

PROFESSOR DORSANEO: Isn't the request for findings of fact and conclusions of law filed in every divorce case?

MR. ORSINGER: Yeah. But what Sarah is

saying, if nobody does anything now, you know at the end of 30 days you're free and clear. But under this new rule you won't know for 90 days. But the truth is, all they care about is that they can remarry that afternoon. And if they can, then everything is cool.

PROFESSOR DORSANEO: And it's not final until -- you know, I mean, one fellow by the name of Stubbs asked me, you know, years ago or asked somebody else if he could remarry, and he was told that he could, and he had a writ of error appeal to contend with considerably later.

MR. ORSINGER: Stubbs versus Stubbs, wasn't it, Texas Supreme Court?

HONORABLE SARAH B. DUNCAN: I think parties should be able to decide within 30 days whether they're contemplating further proceedings, and if they're not and they don't file a motion or make a request for findings and conclusions, it ought to be over with.

MR. ORSINGER: Could I propose an alternative, which is, could someone request that you don't get the extended timetable unless you file something requesting it? The thing I don't like and the thing that Buddy Hanby is complaining about is that you have to have some arcane knowledge in some instances to

know whether a request for findings is going to give you the extension or not. And so I always file a motion for a new trial even if I don't want one because of that.

HONORABLE SARAH B. DUNCAN: And we could cure that with the committee's recommendation on subparagraph 4.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH B. DUNCAN: That's all I'm saying is let's do that so that people don't have to make the difficult decision of whether findings and conclusions are appropriate for that particular matter and not change the timetables.

PROFESSOR DORSANEO: From the standpoint of the committee, the committee is -- I think maybe it's my own preference, and there weren't that many of us there at the meeting, so maybe it's kind of unfair to say the Combined Committee. But the committee would be happy with either one of these but would be happier with simplifying the whole process.

MR. ORSINGER: Let me ask you this, Bill. When could you issue execution? You still could issue execution 30 days after the judgment is signed unless a motion for new trial is filed, right?

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: So it becomes enforceable.

So the only thing this does is it lets someone know that it's no longer appealable.

CHAIRMAN BABCOCK: And it's final.

MR. ORSINGER: Okay. I favor having one track just because it's so much simpler.

CHAIRMAN BABCOCK: I tell you, we worked awfully hard with a lot of people on this, and we're about to brush it away with a skeleton committee and late in the day. I'm hesitant to do that, Frank.

MR. GILSTRAP: I'm concerned about that, too. Certainly this makes the appellate procedure much easier. But aside from the glitch on findings of fact and conclusions of law in that IKB case, how many people fall into that trap anyway? Maybe some do. I don't think -- it's nothing like the federal courts.

I'm concerned about passing a rule that says that every judgment in the state of Texas does not become final for 90 days. You know, maybe we figured out what all the consequences are, but it strikes me as maybe we're getting the cart before the horse on that one.

PROFESSOR DORSANEO: That is a significant issue that we didn't really discuss. We didn't think about the 90 days would make any difference. We didn't see this difference. And if and when we ever do the

recodification draft, the other problems with this dual scheme will be at least ameliorated if not eliminated because the motion to modify will clearly be what you file when you -- when you, you know, might now want to file a motion under Rule 301 after judgment. I mean, the recodification draft clarifies a lot of these other problems, so -- let's vote on the first alternative.

MS. SWEENEY: I think this bears more discussion than people --

HONORABLE F. SCOTT McCOWN: Have the energy for.

MS. SWEENEY: Yeah.

CHAIRMAN BABCOCK: Yeah. I'm -- you're preaching to the choir on that. I don't think their first proposal is all that controversial, though, is it?

MR. YELENOSKY: I thought exhaustion was how we always got to a vote.

CHAIRMAN BABCOCK: So the first proposal to clarify subparagraph 4 of Rule 26.1, I think -- is there any controversy about that? All in favor of that say "aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Any opposed? So, Bill, we'll unanimously approve that and leave for further study at another time the alternative, which raises

larger issues.

PROFESSOR DORSANEO: Do you want to keep going? We can get through almost all of this.

CHAIRMAN BABCOCK: Where do you want to --

PROFESSOR DORSANEO: 29.5.

CHAIRMAN BABCOCK: Let's keep going.

PROFESSOR DORSANEO: Right now there is an inconsistency between the sentence quoted twenty -- in Appellate Rule 29.5 and a provision in the Civil Practice and Remedies Code. The Civil Practices and Remedies Code says that an interlocutory appeal under Subsection (a) has the effect of staying the commencement of a trial in the trial court, whereas 29.5 says that the trial court may proceed with the trial on the merits, okay, while an appeal from an interlocutory order is pending.

The committee recommends this: "While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from, and if permitted by law, may proceed with a trial on the merits." That would not be allowed in the teeth of 51.014(b), but 51.014(b) does not cover all of the appeals from interlocutory orders.

Because of the complexity of the matter,

we also recommend adding a comment making it plain that Civil Practice and Remedies Code Section 51.041(b) prohibits commencement of trial on the merits in the types of cases, you know, that it covers. But there are others circumstances when that's not so. So the specific recommendation is to add, "and if permitted by law, may proceed with a trial on the merits."

HONORABLE F. SCOTT McCOWN: I move adoption.

MR. LOW: Second.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Second.

CHAIRMAN BABCOCK: Any discussion?

MR. ORSINGER: Let me clarify something. I thought that that suspension of the trial on the merits didn't apply to family law cases. Are you familiar with that rule? You're not? Okay. Then maybe I'm wrong.

CHAIRMAN BABCOCK: Any further discussion?

MR. ORSINGER: Richard, you can look.

CHAIRMAN BABCOCK: All in favor?

COMMITTEE MEMBERS: Aye.

CHAIRMAN BABCOCK: Anybody opposed?

HONORABLE F. SCOTT McCOWN: Mr. Chairman.

CHAIRMAN BABCOCK: Yes.

HONORABLE F. SCOTT McCOWN: When he said we could get through all of this, we're on page 11 of 27 pages. I'm not sure what he meant.

CHAIRMAN BABCOCK: Well, we've done page 23. Are you moving to adjourn?

MS. SWEENEY: Second.

(Laughter.)

HONORABLE F. SCOTT McCOWN: Well, I know that Bill can't be here tomorrow, and I don't know if there's any of this that we need to vote out with him here, but I -- I am concerned about making changes that my mind cannot evaluate.

CHAIRMAN BABCOCK: I agree. I must say I was drifting on that last one. Here's the deal.

MR. ORSINGER: This is the largest group assembled for appellate rule changes in my experience.

CHAIRMAN BABCOCK: Yeah. We're going to meet again shortly, I mean, in the next month. So, Bill -- and you're going to be able to be there next time, right?

PROFESSOR DORSANEO: Yes. I'll be here. You know, if -- if it absolutely was necessary, I probably could be here tomorrow, which would be very inconvenient.

CHAIRMAN BABCOCK: No, because Paula's

been chomping at the bit to do her little voir dire thing.

HONORABLE SARAH B. DUNCAN: Her little thing, just a little girl thing.

PROFESSOR DORSANEO: And some of these things we haven't finished where it says, you know, somebody is going to prepare an additional report. Well, that hasn't happened yet.

CHAIRMAN BABCOCK: Why don't we just knock off today and take you up at the next meeting if -- Justice Hecht, if that's all right with you.

JUSTICE HECHT: That's fine.

CHAIRMAN BABCOCK: I know you're anxious to hear about how we thought about all these things. So the motion to adjourn has been made and seconded and I'm sure passes by acclamation. So we'll see you guys tomorrow at 8:30.

(Whereupon the meeting was adjourned, and the proceedings were continued the next day as reflected in the next volume.)

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CERTIFICATION OF THE MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

- -

I, Gina S. Verduzco, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on October 20, 2000, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $_____.

CHARGED TO: Charles L. Babcock.

Given under my hand and seal of office on this the 3rd day of November, 2000.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512) 323-0626

Gina S. Verduzco

GINA S. VERDUZCO, CSR
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