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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.

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

5 2492

6 2588

7 2611

8 2611

9 2642

10 2645

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12 2657

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15 2670

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P R O C E E D I N G S

2

CHAIRMAN BABCOCK: We're back on the

3

record.

4

MR. SOULES: Mr. Chairman, we met as you

5 instructed during the months that the State Bar provided
6 us here today and came up with this for Section 11 that
7 begins on page 6. Be no changes on page 6, but on page
8 7 starting with (b), the following lines will not be
9 changed: Line 1, 2, 3, 4, and 5 will remain the same.
10 6, we put a period after "fees and costs." That
11 would -- the only departure from the statute, as I
12 understand it, would be the 31-day deadline for payment
13 and then the italicized language after that.

14 CHAIRMAN BABCOCK: That would be in or
15 out?

16 MR. SOULES: Out.

17 CHAIRMAN BABCOCK: Out. Period --

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

23 CHAIRMAN BABCOCK: Okay.

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

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1 CHAIRMAN BABCOCK: Stephen.

2 MR. TIPPS: And why are we varying from
3 the statute with regard to the obligation to pay within
4 31 days?

5 MR. SOULES: In order to work with the
6 appellate subcommittee on a -- an approach to

7 supersedeas so that we don't have to rely altogether on
8 mandamus, for example, under the Transamerican rule or
9 what's the other?

10 MR. ORSINGER: Brighton versus Downey.

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

15 MR. TIPPS: Right.

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

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

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

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

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

13 MR. TIPPS: Right.

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

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

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

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

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1 appeal.

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

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

8 MR. HAMILTON: Oh, okay. Sorry.

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

12 CHAIRMAN BABCOCK: Anyone second Luke's
13 language?

14 HONORABLE SARAH B. DUNCAN: Second.

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

17 CHAIRMAN BABCOCK: Read it again, Luke.

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

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

25 MR. SOULES: "A sanction order shall be

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1 subject to review on appeal from the final judgment."

2 MS. GAGNON: "From the final judgment"?

3 MR. SOULES: "From the final judgment."

4 CHAIRMAN BABCOCK: Okay. Although it was
5 somewhat soft, Justice Duncan -- soft voice, not in
6 commitment to the second by Justice Duncan. Any more
7 discussion about it? Okay. Everybody in favor of
8 Luke's language, raise your hand. Anybody against?
9 25 to nothing it passes, and we are --

10 MR. SOULES: I move we delete
11 paragraph 12.

12 CHAIRMAN BABCOCK: We've already done
13 that.

14 MR. SOULES: That's gone?

15 CHAIRMAN BABCOCK: That's already gone.

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

18 CHAIRMAN BABCOCK: That's correct.

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

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

7 CHAIRMAN BABCOCK: Well --

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

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

14 HONORABLE TOM LAWRENCE: I certainly stand
15 to be corrected by Justice Hecht, but the small claims
16 court provisions are in the Government Code, and I

17 wasn't aware that the Supreme Court had any rule-making
18 authority for it.

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

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

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

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

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

16 But that is the issue of unpublished
17 opinions. As you know from the materials, there is an
18 Eighth Circuit decision called Faye Anastasoff versus
19 United States, which held that a rule similar to ours

20 that says that unpublished opinions may not be cited as
21 precedent was unconstitutional under the federal
22 constitution.

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

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

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

5 CHAIRMAN BABCOCK: Yeah. It's going up.

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

7 CHAIRMAN BABCOCK: We voted that last
8 meeting.

9 MR. SOULES: Okay. Excuse me. Sorry.

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

13 MS. GAGNON: Let me see what it is.

14 CHAIRMAN BABCOCK: Yeah.

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

19 PROFESSOR DORSANEO: Well, for the purpose
20 of this precise issue, it may not be completely
21 necessary for you to have the packet, but if you do, on

22 the very last page there is a committee report on Rule
23 47.7, which now provides, "Opinions not designated for
24 publication by the court of appeals have no precedential
25 value and must not be cited as authority by counsel or

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1 by a court."

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

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

23 So with respect to this specific part of
24 Appellate Rule 47, I think there are really two or maybe

25 three issues. One, should we change the current rule?

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

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

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

25 The courts of appeals are met under

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1 another part of Appellate Rule 47 to decide whether an
2 opinion meets the criteria stated in 47.4 for
3 publication. Justice Hecht informs me and the rest of
4 us that the courts of appeals are not publishing roughly
5 80 percent of the opinions in cases decided by the
6 courts of appeals. Some courts are publishing, you
7 know, fewer opinions than others, but as I understand
8 it, the nonpublication approach isn't restricted to
9 criminal cases. It's about -- it's about 50/50, or it
10 covers civil cases, too.

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

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

23 But for our purposes, the way this came
24 up, I think we could deal with -- we could deal with the
25 47.7 issues first and then deal with the larger

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1 publication, the standard question second, although
2 dealing with the publication standard question would
3 make -- would or could make the other issue a nonissue

4 altogether. Mr. Chairman, what's your pleasure?

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

8 HONORABLE JAN P. PATTERSON: Anastasoff.

9 CHAIRMAN BABCOCK: What?

10 HONORABLE JAN P. PATTERSON: Anastasoff.

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

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

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

3 JUSTICE HECHT: Well, they're both of
4 interest to the Court. 47.7 came up first because even
5 before the Eighth Circuit case came out, the appellate

6 section or the appellate subcommittee had already looked
7 at changing Rule 47.7, and, of course, this committee
8 has debated the rule several times in the past 20 years.

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

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

19 But the numbers of unpublished opinions
20 are sort of startling. It's gone up since fiscal year
21 '95 from 75 percent to almost 85 percent through July of
22 this year are the latest numbers that I could get. And
23 my sense -- the numbers that we were able to get don't
24 go back before fiscal year '95 -- '94, and -- but my
25 sense was back in the '80s that it was a good deal lower

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

5 The latter issue is more of a structural
6 issue, I guess, of how the court system works. The
7 Eighth Circuit opinion at least raises some legal issues
8 about 47.7, and, of course, there's practical issues as

9 well because some of the courts of appeals release their
10 unpublished opinions to computer services like Westlaw
11 so that you can get them on the computer services, and
12 others of the courts of appeals don't. So it doesn't
13 strike me that that's a very good system to have some
14 courts putting them out, which they're free to do, but
15 then some courts deciding not to, which leaves the law,
16 it seems to me, in kind of a distorted way of
17 developing.

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

21 CHAIRMAN BABCOCK: Okay.

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

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

9 PROFESSOR DORSANEO: And actually beyond
10 computer services, I read the courts of appeals opinions

11 before the slip opinions, and a number of those are
12 designated not for publication. So to say they're not
13 published is really just inaccurate. They are
14 published.

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

2503

1 the question is are they going to be precedent?

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

10 The Combined Committee's recommendation is
11 at a minimum that 47.7 state that the opinions, you
12 know, may be cited. That says "as persuasive
13 authority." We might change the language, you know, to

14 some slightly different language, but that is the SCAC
15 subcommittee Combined Committee recommendation or at
16 least part of it.

17 CHAIRMAN BABCOCK: Justice Hardberger.

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

2504

1 CHAIRMAN BABCOCK: So -- yeah,
2 Justice Duncan.

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

10 CHAIRMAN BABCOCK: Well, if -- I think
11 that's a key point because as a defamation lawyer, I
12 will tell you that when the court of appeals publishes
13 the opinions of the parties in the case, it is published
14 in one sense. And what the Eighth Circuit decision
15 says, I believe, is that once that occurs, it is

16 precedent in that circuit or in that court, and that's a
17 matter of constitutional law.

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

2505

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

5 CHAIRMAN BABCOCK: That would be great.

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

16 But we're not going to decide that. Texas
17 Supreme Court ultimately is going to have to make that
18 call. We just have to recognize that if -- that

19 regardless of what we decide today, there may be a
20 decision that comes along soon that wipes it all away
21 anyway and says that they are -- that all published
22 opinions -- or all opinions are precedential, period.

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

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1 by case law.

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

4 CHAIRMAN BABCOCK: Okay. Justice Duncan.

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

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

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

19 MR. GILSTRAP: If you decide that all
20 published opinions -- that all opinions are going to be

21 precedent as a matter of prudent -- pruden -- policy,
22 it's just a prudential call you make, we decide today
23 that all opinions are precedential, then it moots the
24 constitutional issue. But if we decide anything less,
25 then it's subject to a constitutional challenge at some
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1 point.

2 CHAIRMAN BABCOCK: Right. Judge McCown.

3 HONORABLE F. SCOTT McCOWN: It seems to me
4 that when we say "precedential," that that -- that we're
5 not saying very much. I mean, different authority --
6 different authority has different weight. A Supreme
7 Court decision 9-0 yesterday has more weight than a
8 100-year-old decision from a San Antonio court of
9 appeals that was 2-1. And I have a question before me
10 today, and I have to decide what weight to give the
11 authority.

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

21 The question really becomes is whether a
22 court in the past can say to a court in the future,
23 "This opinion is tentative. Don't put much weight on it

24 in the future," or "In the future look at this on a
25 blank slate." Because when you publish or don't

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

9 CHAIRMAN BABCOCK: Justice Hecht.

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

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

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

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

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

1 people a little more explanation, which might take an
2 extra hour of a judge's time, an extra two hours, an

3 extra hour of a staff attorney's time to get an
4 explanation on paper which is three pages instead of
5 half a page, and people go away from the system feeling
6 like they got a reasonable response.

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

14 CHAIRMAN BABCOCK: Skip.

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

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

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

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

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

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

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

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

17 CHAIRMAN BABCOCK: Mike Hatcher.

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

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1 jurisdiction.

2 And I'm aware of many cases that I can
3 cite where they did have some precedential value that
4 would aid my jurisdictional statement in the Supreme
5 Court, but I'm hamstrung because I cannot use those
6 cases and I cannot get the courts to publish them. In
7 fact, if I could get them to publish them, they might

8 not be considered to be a prior opinion anyway. So I'm
9 very much in favor of giving some precedential value for
10 this unique reason.

11 CHAIRMAN BABCOCK: Okay. Justice
12 Schneider.

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

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

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

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

9 But I'm ambivalent about it because I feel

10 that, on the other hand, that when you decide a case,
11 the people ought to know what the reason is, and there
12 is some value to that. You know, we also have another
13 problem. A number of lawyers who basically handle maybe
14 10, 15 appeals, they have a good bit of experience as
15 appellate lawyers. We don't have any that are
16 published, and that's almost unfair to them, too, as
17 well.

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

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

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

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

17 CHAIRMAN BABCOCK: Sarah, then Steve.

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

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1 issues or difficult factual issues.

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

11 But if what we're talking about is
12 publishing all opinions in one medium or another, I
13 would be all in favor of it because these are opinions
14 of a court. I don't understand -- I just -- I

15 fundamentally don't get the concept that a court can
16 issue an opinion and it only have importance or legal
17 significance to the parties in the case.

18 CHAIRMAN BABCOCK: Steve and then --

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

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

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

14 So I don't see why you need one label. It
15 seems to me that the judges who are writing these short
16 opinions ought to be able to say things in them like
17 that that send a message to the reader as to whether

18 this is something that they, you know, really spent a
19 lot of time on, or it's just an effort to explain to the
20 parties. And that, I think, to me is the issue, not
21 this publication, which is ridiculous. I mean, it's
22 just --

23 CHAIRMAN BABCOCK: Judge Patterson, did
24 you have something?

25 HONORABLE JAN P. PATTERSON: Yes. I want

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

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

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

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

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

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

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

20 CHAIRMAN BABCOCK: Richard, then Frank and
21 Bill.

22 MR. ORSINGER: I think that the publishing

23 versus unpublishing issue is only theoretically relevant
24 at this point. The State Bar is on the verge, if the
25 plans go through, of making all Texas case law back to

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1 1950 available for free to all Texas lawyers. You won't
2 have to subscribe to LEXIS or Westlaw to get that.

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

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

25

The third function of publishing is that

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

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

19 CHAIRMAN BABCOCK: Frank.

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

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1 arguments, which there's huge literature on it. We've

2 touched on some of them today.

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

18 CHAIRMAN BABCOCK: Okay. Bill.

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

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1 They also don't think that books, per se,
2 are going to be things that people use. You know, like
3 at some point in the foreseeable future that electronic

4 publishing will be how things are handled. So I think
5 that problem does go away, and I'm glad that all the --
6 all the opinions are going to be, you know, made
7 available to people for free if they could just
8 figure -- figure enough expense money to be able to
9 access them.

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

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

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

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

4 CHAIRMAN BABCOCK: Steve and Buddy and
5 then Scott.

6 MR. YELENOSKY: There's one other interest

7 that I don't think has been raised here of the litigants
8 in getting an explanation. Sometimes in the public
9 interest practice, your interest is in establishing a
10 point of law that to many people, including appellate
11 judges, may not appear that significant. And you have
12 to continue to reestablish it if the appellate court
13 doesn't recognize it as being significant, and it
14 probably isn't significant out of a poverty practice.
15 But I'll give you an example since the appellate judges
16 are here, and I want to ingratiate myself to them.

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

25 Well, I could just -- it could have been

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

9 CHAIRMAN BABCOCK: Buddy.

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

14 CHAIRMAN BABCOCK: Or hers.

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

21 CHAIRMAN BABCOCK: Dispute some of its
22 distinguished awards.

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

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

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

8 HONORABLE F. SCOTT McCOWN: It seems to me
9 that we have general agreement that everything should be
10 available and that technology is going to make
11 everything available. And it seems to me we have

12 general agreement that everything should be citable,
13 that we ought to be able to tell a court what some other
14 court's done.

15 MR. SUSMAN: At least prospective.

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

25 There may be a case where the parties'

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

14 little extra.

15 CHAIRMAN BABCOCK: Justice Hardberger.

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

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

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

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

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

23 CHAIRMAN BABCOCK: Skip and then Justice
24 Schneider.

25 HONORABLE MICHAEL H. SCHNEIDER: I would

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

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

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

17 HONORABLE PHIL HARDBERGER: If I did, I
18 apologize.

19 HONORABLE MICHAEL H. SCHNEIDER: The point
20 being, though, I think we have to look at the reason why
21 the rule exists. It's not just for precedence. It is
22 one of the case management techniques developed in the
23 '50s and so forth, and all I say is factor that in.
24 That it -- you know, I think -- I think we're prepared
25 to publish every one of them.

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1 CHAIRMAN BABCOCK: Skip, then Paula.

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

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

15 For most litigants in the state of
16 Texas -- let's say 90 percent to use round numbers --
17 the court of appeals is the only constitutional right of
18 appeal they are going to receive. If there is any need
19 to use case management techniques on one set of cases as
20 opposed to another set of cases, there is at least the
21 implication that was dealt with head-on in Anastasoff

22 that there are two tiers of justice, at least two tiers
23 in which the amount of time, resources, et cetera, are
24 dedicated to cases. I don't think we can have even the
25 appearance of that.

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

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

24 one-paragraph decision will come.

25 The only way I can see around that is to

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1 do what Frank said at the get-go, and I think there was
2 a lot of wisdom there that we hadn't thought through.

3 And that is to let the move to full precedential use of
4 every opinion not come from us, not even come from the
5 Texas Supreme Court. Let it come from the U.S. Supreme
6 Court of saying, This is what the rule of law requires.

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

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

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

24 MR. WATSON: It's en banc.

25 MR. GILSTRAP: And they haven't granted

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1 the motion. The motion is pending.

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

6 MR. WATSON: No.

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

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

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

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

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

24 MR. WATSON: Absolutely.

25 CHAIRMAN BABCOCK: Paula had her hand up a

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1 long time ago and then Bill and then Richard.

2 MS. SWEENEY: I as a practitioner have

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

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

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

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1 is dispositive on the statewide constitutional issue.
2 And if -- if the burden does indeed turn out to be
3 prohibitive, then I think attention has to be given in
4 the legislature to staffing up the courts. But I
5 strongly favor making the opinions public, having them

6 all be citable, usable, precedential, and available to
7 all litigants.

8 CHAIRMAN BABCOCK: Bill.

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

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

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

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1 know, precedential authority, but that gets into these
2 other -- other questions. But as far as the exact
3 recommendation, you have the committee recommendation on
4 the one hand, which really didn't focus on the language,
5 "have no precedential value," and then, you know,
6 another choice would be to just simply say, as I've said
7 and as has been said by others, "Opinions not designated

8 for publication by the court of appeals may be cited as
9 authority by counsel or by a court," which avoids some
10 problems but seems to address a lot of concerns that
11 people have expressed here.

12 CHAIRMAN BABCOCK: Richard.

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

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

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

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

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

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

7 MR. ORSINGER: I think it would be
8 beneficial to everyone if we took the issue of whether
9 it's precedent or not and severed it from the issue of
10 whether it's officially published or not because that

11 basically -- we're saying that we're giving the
12 publisher of our official journal control over our
13 documents that are precedential, but we don't give them
14 the documents that are not precedential, and yet we all
15 know they're all going to be available. I think
16 everybody here is probably in favor of them being
17 available.

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

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1 "not published" on the opinion.

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

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

11 If we get in -- with Bill's proposal if we
12 get in and just say they're authority, I don't know what

13 that means. Are they precedent, or are they not? And
14 if they are precedent, then we've changed the rule and
15 gone to the kind of radical proposal that everything is
16 precedent. I think we need to maintain the distinction
17 between published and unpublished and precedent and
18 unprecedent and decide -- and nonprecedent and decide,
19 you know, whether we can cite some of them. That's all.

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

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

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

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

10 CHAIRMAN BABCOCK: Justice Hecht has the
11 floor.

12 JUSTICE HECHT: I personally agree with
13 Phil, but I would hate for us to litigate from now on
14 whether an opinion is precedential or authority or
15 citable, or because it has a SW 2d cite, that means it's

16 in one class of cases preferred; because it has a big
17 long Westlaw number, that makes it not so good or -- it
18 seems to me we need to go one way or the other. I
19 agree.

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

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

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

8 PROFESSOR DORSANEO: What?

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

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

13 (Laughter.)

14 CHAIRMAN BABCOCK: Let the record show the
15 laughter.

16 HONORABLE SARAH B. DUNCAN: I've been
17 sitting here wondering what -- what does "precedent"

18 mean as opposed to "persuasive authority" as opposed to
19 "authority"? I don't think this committee is really
20 able to decide that.

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

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

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

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

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

20 CHAIRMAN BABCOCK: Steve Susman.

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

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1 They're all published.

2 CHAIRMAN BABCOCK: Right.

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

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

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

20 CHAIRMAN BABCOCK: Carlyle.

21 MR. CHAPMAN: I'm persuaded after hearing
22 the discussion that we really are making a mistake to

23 concern ourselves with the problems of LEXIS, Westlaw,
24 and the West Publishing Company. It seems to me that
25 the -- that the wise thing to do is to say, as Carl just

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

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

11 CHAIRMAN BABCOCK: Luke.

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

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

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

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

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

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

1 see that there -- there's two kinds of opinions.

2 There's a written opinion, and there's a memorandum
3 opinion in the succeeding sentences. The written
4 opinion is to be as brief as possible, but it's to
5 address every issue raised and so forth necessary to the
6 final disposition of the appeal. Maybe we're talking
7 about too many issues. Maybe some of them aren't
8 necessary. If so, we don't have to talk about those
9 when we write.

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

21 CHAIRMAN BABCOCK: Steve, then Frank.

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

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1 the court acts, whatever it does and whatever it says,
2 parties should be able to bring that to the attention of
3 someone else and argue that it has value and if -- and
4 whatever value they think it has and not be precluded

5 because it's been labeled one way or another.

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

15 CHAIRMAN BABCOCK: Frank.

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

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

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

7 they're not. Maybe they're all precedent, but we can't
8 get away from that notion.

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

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

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

25 CHAIRMAN BABCOCK: Judge -- I'm sorry.

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1 You get trumped by the Supreme Court judge.

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

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

9 MR. ORSINGER: I second that.

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

22 MR. ORSINGER: Why?

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

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

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1 and pick it up --

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

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

6 MR. SOULES: Okay.

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

11 MR. SOULES: If West orders the opinions

12 from the court and wants to publish them, they got them.

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

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

19 PROFESSOR DORSANEO: That will happen
20 anyway.

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

23 CHAIRMAN BABCOCK: Bill -- Mike.

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

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1 most of those are criminal cases. In fact, I would
2 say -- I would say almost 80 percent of those that don't
3 get published are criminal cases, and they're -- they
4 can be 30 pages long. And it's basically because the
5 criminal law is -- you just don't have a big pool of
6 laws to reach to to handle the case. And so -- and many
7 times you have indigent -- or pardon me -- pro se
8 defendants who are raising things that have not only
9 been -- maybe not waived, but it's just like the other
10 40 cases we had that week.

11 I don't think you really want -- I mean, I
12 don't want to be presumptuous, but I think if you saw
13 the number of cases, if you read our unpublished cases
14 at least on the 1st Court of Appeals, I don't think that

15 it would contribute any to the jurisprudence, and I
16 think it's impractical to do this. I'll just say that.
17 I understand where you're coming from, it sounds good,
18 but I don't think it's good government. And, I mean,
19 good government means looking out for the individual, of
20 your particular client's interest.

21 CHAIRMAN BABCOCK: Bill.

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

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

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

12 MR. WATSON: You tried.

13 MR. EDWARDS: But now we've got the
14 electronic stuff available, and as long as the stuff is
15 electronically available, there's no reason for not
16 having it all available and precedential if it will be,

17 not decided by somebody else. I think there's going to
18 have to be, as long as there's an official printed
19 reporter, some method of thinning out the number of
20 cases that get reported, or we're going to price the
21 thing clean out of any reasonable reason for having it
22 at all, which may be okay, but there needs to be some
23 way of getting things that people think are really
24 important in print as long as it's going to be printed.

25 CHAIRMAN BABCOCK: But, Bill, don't you

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1 think the market is going to take care of that?

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

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

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

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

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

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

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1 CHAIRMAN BABCOCK: Wallace.

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

12 And so the one thing I would favor is you
13 ought to be able to cite them, and they ought to be
14 going to Westlaw or some publication. I don't think
15 they ought to all be in the books because many
16 unpublished opinions are useless to any practitioner or
17 to any other judge, but I think they ought to all go to
18 some sort of electronic service just to discipline the
19 courts and to allow the parties to say, "There's
20 something going on here. You need to resolve this," to
21 ask for -- seek en banc review when there's a conflict

22 within one district on the court of appeals. So I would
23 be in favor of some sort of rule that forces at least
24 electronic publication or access.

25 CHAIRMAN BABCOCK: We got Bill, then Jan

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1 and then Stephen.

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

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

22 CHAIRMAN BABCOCK: I think Jan --

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

25

HONORABLE SARAH B. DUNCAN: Each court has

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1 their own web site.

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

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

12 MR. ORSINGER: Whatever's in the database.

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

19 HONORABLE MICHAEL H. SCHNEIDER: That's
20 true.

21 CHAIRMAN BABCOCK: Jan and then Steve
22 Tipps.

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

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

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

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

25 But it's not so much the nature of our

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1 opinions as it is the nature of the briefing and the
2 numbers of issues and the number of decisions and the
3 information overload. Just because the information is

4 made available, it doesn't mean that the quality is
5 going to be better. And so some of these brief
6 discussions are going to be distorted, and even now you
7 see -- the opinions may be briefer in dealing with more
8 issues, I get the sense. And you'll see courts of
9 appeals citing as overwhelming precedent a decision of
10 another court of appeal that just deals with it in a
11 sentence. And so I worry really about the quality here.

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

25 CHAIRMAN BABCOCK: Tipps, Buddy, and

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

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

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

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

18 CHAIRMAN BABCOCK: Do you mind if Justice
19 Schneider --

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

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

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

5 In addition to that, there could be -- I
6 could see a system where if the court -- court makes
7 it -- court would -- the appellate court would say
8 basically this case should be published or it should not

9 be published, that that very issue itself could be
10 appealed to some type of group, whether or not it's a
11 bar group or whatever, that would point out what the
12 precedent -- what they thought should be published.

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

17 CHAIRMAN BABCOCK: Stephen Tipps.

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

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

10 HONORABLE JAN P. PATTERSON: We are

11 delighted that there is obviously a clamoring out there
12 that is occurring.

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

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

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

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

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

4 MR. LOW: I'm not against these things
5 being available, but designated -- and courts can give
6 them what weight as they want to, but I don't think just
7 giving them more is going to give more quality; it's
8 going to give more confusion. And we are not in the
9 publishing business, but I can tell you right now -- I
10 mean, I know of one case involving several billion
11 dollars, and the lawyers did not -- I mean, they had
12 lawyers hired in Washington and every place. They
13 didn't find a case that was directly in point out of

14 Iowa's published federal circuit case. That was found
15 by a clerk. So they're not using what they got.

16 CHAIRMAN BABCOCK: Carlyle.

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

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

4 CHAIRMAN BABCOCK: Scott --

5 MR. CHAPMAN: Excuse me, Chairman.

6 CHAIRMAN BABCOCK: I'm sorry.

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

10 HONORABLE F. SCOTT McCOWN: I would just
11 like to make one point. I'm going to have to run. I
12 hope to be able to come back. But I agree with
13 Carlyle's suggestion. It ought to all be available.
14 You ought to be able to cite all of it. It all ought to
15 have whatever value as precedent it's worth as a matter

16 of logic, but -- but we still need standards for
17 publication, and some of it should be cited -- I mean,
18 should be published, and some of it shouldn't. And I'm
19 going to give you a reason that hadn't been suggested so
20 far.

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

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

8 PROFESSOR DORSANEO: Mr. Chairman.

9 CHAIRMAN BABCOCK: Yeah, Bill.

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

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

19 PROFESSOR DORSANE0: It's an official book
20 that has one-fifth of the cases.

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

24 PROFESSOR DORSANE0: All right. Well,
25 then we're going to have these other cases that are kind

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1 of --

2 MR. ORSINGER: After we take a vote --

3 PROFESSOR DORSANE0: West is not even
4 going to publish without --

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

8 PROFESSOR DORSANE0: To try to go back to
9 the days that we need -- we need fewer cases because
10 it's too much to read, that's just silly. I mean, if
11 the cases have precedential value, they're going to be
12 published, and you're going to want all of them. You're
13 not going to want just some --

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

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

20 HONORABLE F. SCOTT McCOWN: And people are

21 going to take books that the court of appeals judges
22 have said, This is worth publishing because it meets
23 these standards and it leaves out the junk. It is a
24 book with junk edited out, and people will buy that, and
25 judges will do better work if they have the option of

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1 putting it in the book.

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

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

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

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

22 HONORABLE F. SCOTT McCOWN: Exactly.

23 CHAIRMAN BABCOCK: Elaine had her hand up

24 a minute ago.

25 HONORABLE F. SCOTT McCOWN: I got to go.

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

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

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

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

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

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

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

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

20 MR. ORSINGER: No.

21 MR. JEFFERSON: They've done it.

22 MR. SOULES: What?

23 MR. JEFFERSON: They've done it.

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

1 MR. ORSINGER: It's a public record, but
2 you have to know about it to request it. If they don't

3 submit it to a database, you have to know about the
4 opinion in order to request it.

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

9 MR. SOULES: Even if they ask for it.

10 HONORABLE SARAH B. DUNCAN: I'm sorry?

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

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

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

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

25 CHAIRMAN BABCOCK: I'm going to make a

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1 proposal, and then we're going to take a break, and we
2 can think about it. The proposal is to delete 47.4,
3 47.6, and 47.7 and to amend 47.3 to say, "All opinions
4 of the court of appeals must be made available to the

5 public including public reporting services, print or
6 electronic," period.

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

11 CHAIRMAN BABCOCK: It may or may not be.

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

14 HONORABLE SARAH B. DUNCAN: Could you --

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

19 HONORABLE JAN P. PATTERSON: Upon request.

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

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

25 CHAIRMAN BABCOCK: I'm sorry. I said

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1 delete 47.7 --

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

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

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

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

10 HONORABLE MICHAEL H. SCHNEIDER: Okay.

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

13 (Whereupon a recess was taken.)

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

17 MS. SWEENEY: They said what at all costs?

18 CHAIRMAN BABCOCK: Vote. But others say
19 that this is too important an issue to race through,
20 so -- Judge Peeples is with that camp. But I'll throw
21 something on the table to talk about, and it is a
22 proposal that 47.4, 6, and 7 be deleted and we amend
23 47.3 to say, "All opinions of the courts of appeals must
24 be made available to the public including public
25 reporting services," comma, "print or electronic."

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

9 In the absence of that contract, West

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

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

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

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

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

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

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1 47.7.

2 CHAIRMAN BABCOCK: Four, six, and seven.

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

6 CHAIRMAN BABCOCK: I'm amending 47.3.

7 MR. EDWARDS: And you're also going to
8 have to look -- if you're going to do away with 47.7, I
9 think you have to look at Rule 48, and that is where the
10 courts of appeals are required to send their opinions.
11 We're talking about making them available, and if we're
12 going to do that, then we need to provide that those

13 opinions be sent somewhere where we have a reasonable
14 chance of having them available.

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

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

25 CHAIRMAN BABCOCK: Well, the way it works

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

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

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

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

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

13 PROFESSOR DORSANEO: And that's how
14 they're available to you now, not because anybody tells

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

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

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

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

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

19 MR. GILSTRAP: It says -- 47.3(b) says

20 you've got to put on the opinion "publish" or "not
21 publish." That's how you decide.

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

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

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

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

5 MR. YELENOSKY: So --

6 CHAIRMAN BABCOCK: They just do it.

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

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

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

15 MS. SWEENEY: And why would anyone buy it?

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

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

21 MR. ORSINGER: Because the courts choose
22 to make them available, and since they're available, the

23 electronic services make them available to the lawyers,
24 and then the lawyers use them.

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

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

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

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

8 MR. ORSINGER: His motion.

9 CHAIRMAN BABCOCK: That's what my --

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

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

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

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

24 MR. GILSTRAP: Leaving that aside.

25 Leaving that aside. We can't decide whether Anastasoff

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

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

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

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

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

23 MR. GILSTRAP: Whatever it is in Texas.

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

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1 MR. JEFFERSON: If I could just make one

2 comment, I regularly don't follow 47.7 anyway. I mean,
3 it says you can't cite it as authority. I'll cite it,
4 and I'll say, you know, This isn't precedent, but it's
5 persuasive to me anyway, and, Court, here's an opinion
6 that came down.

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

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

18 MR. JEFFERSON: As authority.

19 CHAIRMAN BABCOCK: So what are you citing
20 it for.

21 MR. JEFFERSON: Like the Law Review
22 articles.

23 MR. SUSMAN: You were circumventing the
24 rule.

25 MR. JEFFERSON: Very clearly, but I think

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1 I'm authorized to do that.

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

4 CHAIRMAN BABCOCK: Sarah.

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

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

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

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1 MR. MEADOWS: Chip, should the courts be
2 signaling in some way then what they think is their best
3 work? This whole concept that was talked about earlier
4 by Elaine and Scott is very appealing to me, which is
5 that most lawyers in most cases really just need the
6 core stuff, the really good stuff. And it's in the more

7 substantial or more complex cases where lawyers are
8 going to look for the nugget. And I'm strongly of the
9 view that they ought to be able to use the nugget. We
10 ought to have everything available, and you ought to be
11 able to cite it.

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

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

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

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1 CHAIRMAN BABCOCK: Yeah. If the --

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

4 MR. MEADOWS: No.

5 CHAIRMAN BABCOCK: You came in late.

6 PROFESSOR ALBRIGHT: It's not?

7 CHAIRMAN BABCOCK: No.

8 MR. ORSINGER: How does F.Supp. make a

9 decision what federal district court opinions are
10 published?

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

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

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

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

12 cited as authority is just not appropriate.

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

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

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

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

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

13 JUSTICE HECHT: Well, a true memorandum

14 opinion like the circuit uses you could hardly ever cite
15 for anything because you can't tell on its face what it
16 says other than it approves some U.S. Supreme Court
17 case. And if the courts of appeal wrote opinions like
18 that, then the problem would sort of solve itself
19 because unless you went back behind it, it would be hard
20 to cite it.

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

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

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

14 I've heard that said several times here
15 today, that you perhaps don't publish because you're
16 either ashamed of it -- it's really -- as I say, I think

17 the 1st Court, not to sound self-righteous, but I really
18 think that we take that very seriously and try to do it
19 only if it contributes to the jurisprudence of the
20 state.

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

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

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

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

12 CHAIRMAN BABCOCK: Judge Peeples, anything
13 else?

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

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

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

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

25 MR. HAMILTON: I think there was a motion

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

2 CHAIRMAN BABCOCK: No.

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

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

7 HONORABLE DAVID PEEPLES: If we take out
8 47.4, does that commit us on the issue of making
9 distinctions among cases --

10 HONORABLE SARAH B. DUNCAN: That's right.

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

13 CHAIRMAN BABCOCK: Say that again.

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

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

21 MR. GILSTRAP: You're going to have to

22 create something.

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

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

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

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

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

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

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

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

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

8 MR. ORSINGER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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1 did not know that's what we're voting on, and I don't
2 think we did vote on that. I specifically asked you if

3 that was part of it, and you said, no, that this action
4 would not commit us one way or the other on the SW 3d,
5 West Publishing, you know, distinctions among cases.

6 CHAIRMAN BABCOCK: I believe that.

7 HONORABLE DAVID PEEPLES: Huh?

8 CHAIRMAN BABCOCK: I believe that.

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

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

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

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

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

4 HONORABLE SARAH B. DUNCAN: My point is
5 that in practical effect when you tell the courts of

6 appeals you don't have to make this decision anymore,
7 it's not going to get made, and the only way West can
8 make that decision, the default is going to be to put it
9 in SW 3d.

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

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

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

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

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1 making it, so everything is going to get published.

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

8 have, the market will probably pick up those opinions.

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

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

21 HONORABLE SARAH B. DUNCAN: For the most
22 part.

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

25 MS. SWEENEY: Which court?

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1 (Laughter.)

2 HONORABLE MICHAEL H. SCHNEIDER: Austin.

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

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

11 we're right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 CHAIRMAN BABCOCK: Luke.

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

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

4 HONORABLE SARAH B. DUNCAN: I absolutely
5 do.

6 MR. SOULES: -- for some purpose.

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

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

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

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

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1 offices.

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

9 CHAIRMAN BABCOCK: Stephen.

10 MR. YELENOSKY: Earlier I was asked why we
11 voted for this. I voted for this because I think the
12 Eighth Circuit was right. And with all due respect to
13 Frank Gilstrap, I think there have been a number of
14 occasions when we've been asked to make a decision as to
15 what -- or a recommendation to the Supreme Court as to
16 what comports with the constitutional law. I think the
17 decision is right, and on page 12 I also think it's
18 right that the practicalities have to follow your
19 judgment as the constitutionality. The court there said
20 this may be less convenient, it may increase the case --

21 the caseload or the workload, but so be it. That cannot
22 overcome the constitutional issue.

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

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

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

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

20 CHAIRMAN BABCOCK: Carlyle.

21 MR. CHAPMAN: I was persuaded that in the
22 grand scheme of things when the courts of appeals take a

23 look at the concept that all things are available to be
24 published, that by the use of either per curiam opinions
25 or memorandum opinions, those things that fall into the

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

6 CHAIRMAN BABCOCK: Judge Lawrence.

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

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

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

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

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

11 CHAIRMAN BABCOCK: Buddy.

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

22 CHAIRMAN BABCOCK: Bill and then Carl.

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

1 whatever publisher that would be in the business of

2 doing -- printing books, or they're going to publish,
3 you know, everything. They're going to do whatever
4 they're going to do, and I think it's more or less
5 inevitable that those things will happen anyway.

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

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

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

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1 to. Maybe some trial judges would say that, Well, if
2 it's not in this book, I'm not counting it even though
3 it's a court of appeals decision that's -- that's -- you
4 know, that's relevant. I'm just not going to pay

5 attention to that. What kind of a system would that be?

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

11 CHAIRMAN BABCOCK: Before we get too
12 troubled by all this, think about what's going on in the
13 Eighth Circuit now. The cite -- the cite to the opinion
14 that the court felt bound to follow is Christie vs.
15 United States, No. 91-2375MN, (8th Circuit, March 20,
16 1992) (per curiam) (unpublished).

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

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

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

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

6 MR. GILSTRAP: Judge Arnold is not

7 concerned about that.

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

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

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

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

4 CHAIRMAN BABCOCK: Paula.

5 MS. SWEENEY: I don't think, Carl, that
6 they're all unpublished because the unpublished opinions
7 are all junk. There are a whole lot of considerations
8 that go into it. I know, for instance, opinions
9 involving sensitive issues in the legal community

10 sometimes are unpublished. There are a variety of
11 reasons where something might not be published other
12 than that it's not an interesting case or that it might
13 not have precedential value if it were published. And
14 that's just been an observation over the years from
15 reading a lot of unpublished opinions.

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

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

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

7 MR. ORSINGER: It's people like Carl.

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

11 MR. GILSTRAP: To answer Carl's question,

12 the value of the unpublished -- the unpublished junk
13 opinion is very valuable to the litigants, and they're
14 very valuable if you're trying to get Supreme Court
15 review. To me one of the most dismaying things about
16 this whole process is a suggestion that we're going to
17 get more memorandum opinions.

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

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1 CHAIRMAN BABCOCK: Okay. Richard and then
2 Justice Hardberger.

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

14 Everybody is publishing the electronic

15 stuff that they can get their hands on. And so the real
16 question here is, should we only have the unpublished
17 opinions from the 1st and the 14th and the 5th and the
18 4th Court of Appeals, or should we have the unpublished
19 opinions from all of the courts and everybody has equal
20 access to the law?

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

24 CHAIRMAN BABCOCK: Justice Hardberger.

25 HONORABLE PHIL HARDBERGER: I think equal

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

9 CHAIRMAN BABCOCK: Okay. Let me make a
10 suggestion. I just leaned over and asked Justice Hecht
11 if he was comfortable with where we are, and I think he
12 is, but there is -- there is a minority of our committee
13 that feels strongly about this and as I did with the
14 summary judgment rule when I was outvoted consistently
15 22 to 4 or 5, I wrote a minority report on this issue.

16 So before our -- we won't send this up to

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

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

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

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

7 HONORABLE JAN P. PATTERSON: Judge Peeples
8 was.

9 HONORABLE DAVID PEEPLES: Yes, absolutely.
10 Is there any sympathy for breaking this into three
11 separate votes? Two of them would be very easy. The
12 first one would be, should all opinions be
13 electronically available? Should we make the courts
14 that are not doing that do it? Okay. The second would
15 be, Can you cite it? I think we're all for that. The
16 third issue, which I think would be more -- would be
17 closer than 21 to 7 would be, should there be some way
18 that judges can categorize opinions? Now, I don't
19 mean -- you can talk about publish or hard copy or

20 whatever, and the terminology is not important to me,
21 but I think that's an issue that we're going to be
22 divided on, and I think we need to discuss it more
23 because we're talking about changing the way we practice
24 law really. I would like to break it into those three.
25 Is there any --

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1 MS. SWEENEY: I agree with that.

2 CHAIRMAN BABCOCK: Anybody on majority can
3 move for --

4 HONORABLE DAVID PEEPLES: And I so move.

5 HONORABLE SARAH B. DUNCAN: And I second.

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

8 HONORABLE DAVID PEEPLES: I voted with
9 the 21.

10 CHAIRMAN BABCOCK: Okay.

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

13 CHAIRMAN BABCOCK: Yeah, Buddy.

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

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

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

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

5 CHAIRMAN BABCOCK: David, you want to have
6 a separate vote on -- let's have one vote on deleting
7 47.7 --

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

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

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

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

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

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

25

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

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1 do it in steps and see what --

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

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

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

12 HONORABLE DAVID PEEPLES: That's good
13 enough.

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

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

23 PROFESSOR DORSANEO: That's deleting 47.7.

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

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1 to nothing to delete 47.7.

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

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

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

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

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1 fundamental question here is, do we want to go whole hog
2 and say every opinion comes out looking the same and
3 we're not going to give West any guidance on what goes

4 into the books and so forth? That's a big decision.

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

15 CHAIRMAN BABCOCK: Okay.

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

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

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

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

4 HONORABLE DAVID PEEPLES: Well put.

5 HONORABLE SARAH B. DUNCAN: Elaine had a

6 -- I've got a good suggestion. Instead of "do not
7 publish" or "publish," "for electronic publication
8 only."

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

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

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

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

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

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

4 And what we're talking about is the
5 establishment of a canon, or we are saying that the
6 judges who write the opinion make an editorial or a
7 judicial decision that this will be in the official
8 reporter. Everything will be available, everything will

9 be cited, but I'm saying as the judge I'm doing some
10 editing in advance, I'm helping you call through my
11 work, which is voluminous, and saying, This is in the
12 canon.

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

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

17 CHAIRMAN BABCOCK: Paula.

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

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1 it, and neither can anyone else in this room.

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

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

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

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

16 MS. SWEENEY: No. My opponent who's got
17 19 little weenie law clerks will have found a nugget.

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

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

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

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

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

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

16 CHAIRMAN BABCOCK: Judge Lawrence.

17 MS. SWEENEY: And I -- we --

18 PROFESSOR DORSANEO: Suppose there are ten
19 cases.

20 MS. SWEENEY: Huh?

21 PROFESSOR DORSANEO: Suppose there are ten
22 cases.

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

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

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

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

15 HONORABLE TOM LAWRENCE: Today if it's

16 unpublished, then it has no precedence, so it's not
17 something you need to worry about, so --

18 CHAIRMAN BABCOCK: Can't even be cited.

19 HONORABLE TOM LAWRENCE: That's correct.

20 So now tomorrow everything is going to be published, so
21 we're going to distinguish in some way, canonize it,
22 call it "published" or call it something. Is there
23 going to be a different weight given to whatever we
24 designate as being published so that that becomes the
25 valuable case and the other case, even though it's out

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1 there, is not going to be of any value or any use?

2 What's going to be the relative weight of these two
3 designations?

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

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

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

19 the standards --

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

25 HONORABLE SARAH B. DUNCAN: I agree.

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

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

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

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

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

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

25 HONORABLE SARAH B. DUNCAN: No.

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1 MR. ORSINGER: Sure they do.

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

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

17 HONORABLE SARAH B. DUNCAN: I completely
18 agree.

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

23 MR. SOULES: This is a recommendation.

24 HONORABLE DAVID PEEPLES: Yeah.

25 MR. SOULES: The panel recommends don't

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1 waste your paper or vice versa.

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

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

11 MR. SOULES: What's wrong with that?

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

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

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

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

23 MR. WATSON: Yeah.

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

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

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

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

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

14 MR. ORSINGER: Or all boring and new.

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

21 MR. WATSON: I don't want it.

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

25 MR. YELENOSKY: That's substantively

1 different from what was being proposed before, and I can
2 accept that. But what you were saying before was a lot

3 broader. It was that you can create two tiers of law
4 based on other factors other than whether it's new. If
5 you're just signaling there's nothing new here and if
6 Paula didn't read it, she can rely on the fact that if
7 it's labeled as nothing new for her malpractice claim,
8 that's one thing, and I can go with that.

9 MS. SWEENEY: Thank you.

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

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

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

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

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1 going to have to look for everything except something
2 the judge says there's nothing new here. You're going
3 to have to search it. And as far as there being 600
4 cases turned up if you put "Transamerica" in, well, then

5 you narrow your search. You don't just put in
6 "Transamerica." You look for other words that pertain
7 to what you're looking for. We do that all the time.

8 CHAIRMAN BABCOCK: David, are you -- I
9 don't think you're -- why don't we see if we can narrow
10 the issue this way. Are you suggesting that we retain
11 47.4 and 47.6 as worded? I mean, do you want to vote on
12 that?

13 HONORABLE SARAH B. DUNCAN: No.

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

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

19 HONORABLE DAVID PEEPLES: I don't know.

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

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

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

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

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

4 CHAIRMAN BABCOCK: No, no, no. What I'm
5 getting at is there's a two-step process. Do you
6 want -- is the vote to keep this as worded? Because I'd
7 vote one way on that. And if we're not going to keep it

8 as worded, do you want to replace 47.4 principally with
9 different language, with a different standard, with a
10 different concept, with a different something, or do you
11 just want to keep the standards for publication language
12 as it is?

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

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

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

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

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1 and try to define -- one of the discussions went along
2 the lines of what's well settled? We already have in
3 47.1, "Where the issues are settled, the court should
4 write a brief memorandum opinion no longer than
5 necessary."

6 I would suggest that the concept is -- not
7 necessarily the wording, but the concept is where the
8 issues are settled or where the case does not present,
9 and then A through B -- A through D of 47.4 is what

10 we're trying to get at. We're trying to make a
11 distinction between those things that, as Paula says, I
12 need to concern myself with, that's new law, that's
13 something significant, and those things that are settled
14 and don't raise anything new.

15 CHAIRMAN BABCOCK: Joan.

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

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

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

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

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

12 MR. CHAPMAN: You could exclude memorandum

13 opinions from the search. You have the standard which
14 gives you what the written opinion is, and it falls
15 right within the standard of 47.4 that we've been
16 talking about and comfortable with, and the memorandum
17 opinions would not be something that you would have to
18 deal with.

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

23 MR. CHAPMAN: I know. I --

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

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

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

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

10 (Laughter.)

11 CHAIRMAN BABCOCK: Judge Lawrence --

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

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

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

20 CHAIRMAN BABCOCK: Judge Lawrence.

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

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1 whatever we end up calling it.

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

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

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

20 that the courts of appeals justices would do the
21 first-line editing on whether this case is important
22 enough for people like Paula to research or not, and
23 you're performing that function instead of the West
24 Publishing Company editor performing that function or
25 instead of an automatic rule that all of them are worthy

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1 of being searched.

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

9 CHAIRMAN BABCOCK: Justice Hecht.

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

23 (Laughter.)

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

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1 value-neutral term, that's fine.

2 CHAIRMAN BABCOCK: Joan.

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

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

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

25 value-laden term, and that's one reason I tried to stay

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1 away from terminology.

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

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

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

12 (Laughter.)

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

15 HONORABLE DAVID PEEPLES: Yeah.

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

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

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1 MR. ORSINGER: I think it's very dangerous

2 for you to brief a point of law and to categorically
3 exclude everything that has "MEM" after it if it's
4 precedential.

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

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

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

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

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

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

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1 because when they look at it --

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

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

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

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

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

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

17 CHAIRMAN BABCOCK: Right.

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

19 MR. CHAPMAN: "Memorandum opinion."

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

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

25 MR. CHAPMAN: "Memorandum opinions."

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

7 CHAIRMAN BABCOCK: "Shall" or "may"?

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

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

14 HONORABLE DAVID PEEPLES: That's fine.

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

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

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

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

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

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

5 (Laughter.)

6 CHAIRMAN BABCOCK: Bill.

7 PROFESSOR DORSANEO: What about the --
8 what about the first -- maybe I missed something. What

9 about the language in 47.1 that sets other standards for
10 memorandum opinions as to be brief? Are we going to
11 move that down? If you're going to label it a
12 memorandum opinion, it better be short.

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

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

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

25 PROFESSOR DORSANEO: You better put that

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1 first sentence from 1 in there as the first thing.

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

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

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

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

11 CHAIRMAN BABCOCK: Right.

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

16 CHAIRMAN BABCOCK: Okay.

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

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

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

25 CHAIRMAN BABCOCK: "Any of the following."

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1 Then A, B, C, and D.

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

4 CHAIRMAN BABCOCK: Okay. A, B, C, and D.

5 And would we -- what would we do with 4.6 (sic) here?

6 Do you want to leave 4 point -- 47.6 in here?

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

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

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

13 CHAIRMAN BABCOCK: Okay. Here's the

14 proposal --

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

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

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

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

25 HONORABLE F. SCOTT McCOWN: Why would we

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

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

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

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

13 HONORABLE SARAH B. DUNCAN: Right.

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

16 (Laughter.)

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

20 MR. CHAPMAN: "If."

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

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1 it does any of the following," colon, subparagraph
2 "(a) establishes a new rule of law, alters or modifies
3 an existing rule, or applies an existing rule to a novel
4 fact situation likely to recur in future cases,"
5 semicolon, "(b) involves a legal issue of continuing
6 public interest," semicolon, "(c) "criticizes existing
7 law," semicolon, "or (d) resolves an apparent conflict
8 of authority." In addition, we are going to delete
9 47.6. All in favor of that raise your hand.

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

12 CHAIRMAN BABCOCK: We're voting on what
13 we're voting on. All opposed? It passes by a vote of
14 18 to 7. Okay. Richard, do you want to further
15 complicate things now?

16 MR. ORSINGER: Yeah. On the -- since
17 we're putting "should" in there instead of "may" -- and
18 I would be really happy if it just said "may" -- I'm

19 concerned about the fact that there's a dispute among
20 our court of appeals justices as to whether the law in a
21 particular court of appeals district is precedent only
22 in that district and not others. And I think that we
23 ought -- if we're going to tell them they shouldn't
24 publish it, we ought to say "establishes a new rule of
25 law in the district" or somehow encourage the courts to

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1 take a position --

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

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

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

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

14 MR. CHAPMAN: That's it.

15 HONORABLE SARAH B. DUNCAN: So the
16 catch-all would be if it creates -- if it's the first
17 case on the issue in that district or it -- it
18 actually -- it doesn't resolve a conflict, but it
19 exposes a preexisting conflict within that court of
20 appeals that's never been recognized because it's a
21 nonpublished opinion before September 1st, 1995. There

22 might be a lot of reasons to publish it that are not in
23 this list.

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

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

3 HONORABLE DAVID PEEPLES: Yeah.

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

6 MR. ORSINGER: I like that a lot better.

7 MS. JENKINS: That's a good idea.

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

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

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

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

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

23 CHAIRMAN BABCOCK: -- "if it does any of

24 the following." Okay?

25 MR. CHAPMAN: Yeah.

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1 CHAIRMAN BABCOCK: Paula.

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

8 CHAIRMAN BABCOCK: Let's get this done
9 first.

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

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

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

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

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1 modified to read, "An opinion should not" -- adding the
2 word "not" -- "be labeled a memorandum opinion if it
3 does any of the following," A, B, C, and D taken from
4 47.4. Okay. We're all set on that? Okay.

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

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

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

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

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1 that we build in for that so that a litigant who didn't
2 happen to be on the court of appeals and doesn't have

3 that particular opinion -- they're not in the
4 marketplace. They're not publicly accessible to
5 everybody in all instances, and so we're creating now a
6 situation where there could be "gotcha's" for which
7 there's no remedy.

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

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

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

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

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

22 MS. SWEENEY: And call them all?

23 MR. ORSINGER: Yeah --

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

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

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

5 MS. SWEENEY: No.

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

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

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

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

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

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

25 MS. SWEENEY: Well, I think the Court can

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

6 CHAIRMAN BABCOCK: That's fair to say.

7 MS. SWEENEY: -- that's based on old

8 opinions that now for the first time ever will have
9 precedential effect.

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

13 CHAIRMAN BABCOCK: Okay. What else?

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

16 CHAIRMAN BABCOCK: How about what?

17 MR. SOULES: Where do you find them?

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

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

22 MR. ORSINGER: Don't worry about it.

23 CHAIRMAN BABCOCK: He didn't say anything.

24 (Laughter.)

25 CHAIRMAN BABCOCK: Okay. Anything more

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

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

8 CHAIRMAN BABCOCK: You're right.

9 HONORABLE F. SCOTT McCOWN: Well, couldn't
10 you just make it an (e) to 47.4, just say, "(e) is

11 accompanied by a concurring opinion or a dissent"?

12 PROFESSOR DORSANEO: That's a good idea.

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

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

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

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

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1 JUSTICE HECHT: Welcome to the court of
2 appeals.

3 (Laughter.)

4 JUSTICE HECHT: What about 5 saying
5 about 4?

6 HONORABLE F. SCOTT McCOWN: If there's a
7 dissent, it seems to me it can't be a memorandum
8 opinion, but maybe it can.

9 MR. ORSINGER: There's some logic in that.

10 CHAIRMAN BABCOCK: That would be easier.
11 What do people feel about that? David, what do you
12 think about that?

13 HONORABLE SARAH B. DUNCAN: That's fine.

14 HONORABLE DAVID PEEPLES: Fine. Fine.

15 CHAIRMAN BABCOCK: Bill?

16 PROFESSOR DORSANEO: Done.

17 CHAIRMAN BABCOCK: Okay. So we'll add
18 subparagraph (e) that says, "has a concurring or
19 dissenting opinion"? Is everybody okay with that? That
20 means we'll delete the language of 47.5. Thanks for
21 catching that, Ralph.

22 MR. HAMILTON: Can I say something about
23 that? Why would we have "concurring"? Why not just
24 "dissenting"?

25 MR. ORSINGER: "Concurring" means they

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1 don't concur in the rationale for the holding but they
2 do agree with the holding.

3 HONORABLE SARAH B. DUNCAN: I've published
4 one unpublished concurring opinion, and I sincerely
5 regret making it unpublished because if one of the
6 judge's reasoning is significantly different from the
7 two members of the majority, I think that could be
8 helpful, conceivably could be helpful to someone.

9 CHAIRMAN BABCOCK: Okay. Do we need to
10 vote on this? Is there any dissent about this? Any
11 concurrences? Okay. Are we done with this particular
12 thorny problem?

13 MR. HAMILTON: Are we going to have
14 comment? Are we going to have comments on this?

15 CHAIRMAN BABCOCK: Yeah. Paula is going

16 to do a comment and circulate it to everybody. Aren't
17 you, Paula?

18 MS. SWEENEY: My batteries are dead. I
19 can't.

20 CHAIRMAN BABCOCK: All right. Stephen's
21 going to do it then.

22 MR. YELENOSKY: A comment?

23 CHAIRMAN BABCOCK: A comment. Okay. Or
24 actually, Mike, you may have language from the old one.
25 Do you?

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1 MR. HATCHER: Not with me, no.

2 CHAIRMAN BABCOCK: But somewhere?

3 MR. HATCHER: Yeah. I may have.

4 CHAIRMAN BABCOCK: Could you e-mail it
5 or -- just get it to Carrie, and she'll e-mail it to
6 everybody.

7 MR. HATCHER: I'll see what I can do.

8 CHAIRMAN BABCOCK: Good. Never mind. You
9 guys are both off the hook. Okay. Bill, in the
10 remaining -- in the waning twilight hours here, what
11 else can we tackle?

12 PROFESSOR DORSANEO: We can actually do a
13 lot which will take a lot less time. Do you-all have
14 this packet now, Proposed Revisions Texas Rules of
15 Appellate Procedure? We'll just take them one by one.

16 Page 2, the first suggestion involves Rule
17 9.5, Appellate Rule 9.5, and the exact issue is whether

18 we should add language making it clear, as the Combined
19 Committee recommended, that a party is required to serve
20 a copy of the record in an original proceeding. Right
21 now the original proceeding rule, Appellate Rule 52,
22 particularly 52.7, says that the relator must file a
23 copy of the record in an original proceeding. Actually
24 it means that the relator must prepare and file a copy
25 of the record. But the sentence that currently exists

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1 in 9.5(a) literally says that a party need not serve a
2 copy of the record without disclosing that that's only
3 about an appeal rather than an original proceeding.

4 Now, the committee recommendation is just
5 to add this language: "But a party need not serve a
6 copy of the record except in an original proceeding."
7 We could go with that, but Judge Womack in a memorandum
8 that was also provided to you says that he doesn't think
9 that's a good way to proceed because it is not clear
10 enough. And one way to make the matter entirely clear
11 would be to add additional language to both the first,
12 second -- the second sentence, and to add a third
13 sentence. I'll indicate that to you, and that really
14 would be my recommendation.

15 "At or before the time of a document's
16 filing, the filing party must serve a copy on all
17 parties to the appeal," and then instead of saying --
18 and, Judge Hecht, cut me off here if you think I'm
19 headed off in the wrong direction. "Or original
20 proceeding," instead of saying "appeal or review." I

21 don't think "review" means -- well, it might technically
22 in some rare instances mean something other than an
23 appeal or an original proceeding, but that's getting too
24 technical. So I would recommend saying "original
25 proceeding" rather than "review." Then say, "But a

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1 party" or just "A party need not serve a copy of the
2 record in an appeal," and then say, "A party must serve
3 a copy of the record in an original proceeding," which
4 seems to spell all of that out in the clearest possible
5 terms.

6 But, again, the committee recommendation,
7 which I would be willing for you to vote on
8 affirmatively, is just add "except in an original
9 proceeding." Questions. Discussion.

10 CHAIRMAN BABCOCK: Anybody got a motion on
11 this?

12 MR. HAMILTON: I have a question. Are you
13 going to change the word "review" to "original
14 proceeding"?

15 PROFESSOR DORSANEO: Uh-huh, in the first
16 sentence because I perceive that's what that word means.

17 MR. HAMILTON: Yeah. But then if you say,
18 "But a party need not serve a copy of the record" --

19 PROFESSOR DORSANEO: "In an appeal."

20 MR. HAMILTON: Oh. You're going to add
21 "in an appeal."

22 PROFESSOR DORSANEO: "In an appeal." And

23 the last sentence would say but you do have to in an
24 original proceeding.

25 CHAIRMAN BABCOCK: What's the language of

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1 the last sentence?

2 PROFESSOR DORSANEO: "A party must serve a
3 copy of the record in an original proceeding." And the
4 committee's recommendation is to do that in Rule 9.5
5 rather than in 52.7. Could be done both places. You
6 have to come to these meetings.

7 CHAIRMAN BABCOCK: Okay. So 9.5(a) would
8 be amended to read, "At or before the time of a
9 document's filing, the filing party must serve a copy on
10 all parties to the appeal or original proceeding,"
11 period, striking the word "review" and striking the word
12 "but," and then saying, "A party need not serve a copy
13 of the record in an appeal," period. "However," comma,
14 "a party must serve a copy of the record in an original
15 proceeding," period.

16 PROFESSOR DORSANEO: Well, I would use
17 "but" instead of "however," but the idea is --

18 CHAIRMAN BABCOCK: Okay. Well, we'll put
19 a "but" in there.

20 PROFESSOR DORSANEO: In the last sentence.

21 CHAIRMAN BABCOCK: "But a party must serve
22 a copy of the record in an original proceeding." Is
23 that the proposal?

24 PROFESSOR DORSANEO: The proposal.

25 CHAIRMAN BABCOCK: Second? Carl, second?

1 MR. HAMILTON: I'll second it.

2 CHAIRMAN BABCOCK: Carl seconds it. Any
3 more discussion? All in favor raise your hand. Anybody
4 opposed? Unanimous.

5 PROFESSOR DORSANEO: The next one on page
6 3 is basically to add this sentence, which I think
7 captures the entire thing without going into a lot of
8 elaboration, to add, "A certificate of conference is not
9 required for a motion for rehearing."

10 CHAIRMAN BABCOCK: And where would that be
11 added?

12 PROFESSOR DORSANEO: To the end of (a)(5).

13 CHAIRMAN BABCOCK: 10.1(a)(5) by adding
14 the sentence, "A certificate of conference is not
15 required for a motion for rehearing." Okay. Any
16 discussion on that?

17 MR. LOW: Second.

18 CHAIRMAN BABCOCK: Buddy seconds it. All
19 in favor? Anybody oppose? Unanimous.

20 PROFESSOR DORSANEO: And the third one on
21 page 4 is something that the committee didn't think
22 needed to be changed, and I'll just ask you to glance at
23 it for a second, but I'm not intending to talk about it
24 because there's no committee recommendation to change
25 anything. That takes me to 13.1.

1 CHAIRMAN BABCOCK: Let's just -- let's

2 just have a record vote on the proposed -- the
3 suggestion on Rule 11, which the committee suggests we
4 do not adopt. Anybody opposed -- everybody in favor of
5 adopting the Combined Committee recommendation say
6 "aye."

7 COMMITTEE MEMBERS: Aye.

8 CHAIRMAN BABCOCK: Anybody opposed? Okay.
9 The committee recommendation is unanimously adopted.

10 PROFESSOR DORSANEO: This -- did
11 Judge McCown leave? Is he gone? Oh, he's over there.
12 He moved. This is a committee proposal in response to
13 Judge McCown's letter with respect to the language of
14 13.1(a), which now says in so many words that, "The
15 official court reporter or court recorder must attend
16 court sessions and make a full record of the proceedings
17 unless excused by agreement of the parties."

18 Judge McCown's letter says that at the
19 time the rule was adopted, the trial judges were assured
20 that the new rule was not intended to mean what it
21 said -- or what it says, and that's caused difficulties.

22 The committee recommends modifying or
23 changing the language of (a) in some manner. The first
24 draft is the one you have here, "attend court sessions
25 and make a full record of the proceedings when requested

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1 by the court or any party to the case." Again, Judge
2 Womack corresponded with all of us and said that he
3 doesn't like "when requested by the court or a party to
4 the case" to be at the end because he can't tell whether

5 it modifies "attend court sessions" or "make a full
6 record of the proceedings" or both.

7 I thought we could move it to the
8 beginning and that would make matters clearer, but on
9 further reflection here, I wonder why it says that the
10 official court reporter must attend court sessions
11 unless -- you know, unless it's to be there. Why do we
12 need that in there?

13 HONORABLE F. SCOTT McCOWN: Just take that
14 out, and you've got a brilliant rule. "The official
15 court reporter or court recorder must make a full record
16 of the proceedings when requested by the court or any
17 party to the case."

18 HONORABLE MICHAEL H. SCHNEIDER: That's
19 what you got.

20 MR. LOW: Why not "attend"? What if they
21 want to say, "So I can't be there. I'm just going to
22 get a tape recorder, and I'll type it up"?

23 PROFESSOR DORSANEO: Interesting question.

24 CHAIRMAN BABCOCK: Well, they can't use a
25 tape recorder --

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1 MR. SOULES: They do.

2 CHAIRMAN BABCOCK: -- unless the Supreme
3 Court's authorized it. I mean -- you know --

4 PROFESSOR ALBRIGHT: It's not -- the full
5 record requires that they be in attendance, right?

6 HONORABLE F. SCOTT McCOWN: Well, I guess

7 I thought if you put a requirement on them that they
8 have to make a full record, that implies --

9 PROFESSOR ALBRIGHT: That's what I'm
10 saying --

11 HONORABLE F. SCOTT McCOWN: -- by
12 necessity they're attending.

13 PROFESSOR ALBRIGHT: Yeah, I'm agreeing
14 with you. "Full record" equals you have to follow the
15 rules relating to the record, which --

16 CHAIRMAN BABCOCK: But if we take this out
17 of the rule --

18 MR. SOULES: Whoops. My tape recorder
19 screwed up, and I wasn't here.

20 CHAIRMAN BABCOCK: If we take this out of
21 the rule, some may argue, "Well, wait a minute. It used
22 to be in the rule that I had to attend. You took it
23 out, so now I don't."

24 MR. CHAPMAN: It ought to stay in there.

25 CHAIRMAN BABCOCK: Skip.

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1 MR. WATSON: I just want to make sure we
2 don't run afoul of something the Supreme Court's already
3 done. Something came across my desk back when the
4 Supreme Court was approving not rules but some sort of a
5 handbook for court reporters for the way they -- how
6 many lines per page, how much indention, et cetera,
7 et cetera.

8 And there was some discussion, as I
9 understood it, in that rule about the problem when a

10 video deposition was played and confusion about whether
11 that had to be introduced into the record or on the
12 assumption of the trial lawyers that the court reporter
13 was sitting there typing -- you know, taking down the
14 words of the video deposition so that it was in the
15 black and white transcript and you're not depending on
16 the court of appeals to actually go in and play the
17 videotape, which I doubt that they do with regularity.

18 And I -- that rule was made, I think,
19 rather specific that the court reporter must take down
20 the video deposition unless excused.

21 PROFESSOR DORSANEO: There's a whole
22 order on how the record will be prepared by the court
23 reporter.

24 HONORABLE F. SCOTT McCOWN: Does this
25 solve the problem? Could we say, "The official court

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1 reporter or court recorder must be available to make a
2 full record of the proceedings when requested by the
3 court or any party to the case"?

4 MR. WATSON: My point is that I think
5 there's another rule out there or, in essence, a rule
6 that says they shall be taking it down without a
7 request.

8 MR. LOW: I move that we adopt that as
9 written, attend and make a full recording.

10 MR. DUGGINS: May I ask a question?

11 CHAIRMAN BABCOCK: Yeah, Ralph.

12 MR. DUGGINS: What's meant by "court
13 sessions" because we recently had a situation where the
14 judge called for a conference in chambers and refused a
15 request for a reporter?

16 PROFESSOR DORSANEO: That was one.

17 MR. DUGGINS: I'm asking because I don't
18 know what's meant by "sessions."

19 CHAIRMAN BABCOCK: Are you saying in
20 response to Ralph that that's something that's in the
21 case law that an in-chambers conference is a court
22 session?

23 PROFESSOR DORSANEO: I think so, yeah.
24 I'm not sure I could cite a case for it.

25 MR. DUGGINS: I think it should be. I

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1 just was asking a question.

2 CHAIRMAN BABCOCK: Alex.

3 PROFESSOR ALBRIGHT: Well, as I understand
4 it, the only problem was raised by Judge Womack about
5 the "when requested by the court or any party." If we
6 put the "when" clause at the beginning of the -- of the
7 phrase so it says, "The official court reporter or court
8 recorder must when requested by the court or any party
9 to the case attend court sessions and make a full record
10 of the proceeding" --

11 HONORABLE F. SCOTT McCOWN: That's fine.

12 PROFESSOR ALBRIGHT: I guess what Judge
13 Womack was saying is you could interpret it as saying
14 that they must attend court sessions whether they have

15 to make a record or not.

16 HONORABLE F. SCOTT McCOWN: That's fine.

17 CHAIRMAN BABCOCK: Where do you want to
18 put the "when"? I'm sorry, Alex.

19 PROFESSOR ALBRIGHT: Right after (a).

20 PROFESSOR DORSANEO: Just put the first
21 clause first. Put the last clause first.

22 PROFESSOR ALBRIGHT: "(a) when requested
23 by the court or any party to the case," comma, "attend
24 court sessions."

25 MR. DUGGINS: So moved.

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1 HONORABLE F. SCOTT McCOWN: Yeah, that's
2 good.

3 CHAIRMAN BABCOCK: So now it would read,
4 "The official court reporter or court recorder must:
5 (a) when requested by the court or any party to the case
6 attend court sessions and make a full record of the
7 proceedings."

8 PROFESSOR ALBRIGHT: Actually what would
9 be even more elegant would be to say, "when the court or
10 any party to the case requests," put it in active
11 instead of passive voice.

12 HONORABLE F. SCOTT McCOWN: "The official
13 court reporter must attend court sessions and make a
14 full record of proceedings."

15 MR. SOULES: How about "attend court
16 proceedings"? Does that help us with the in camera

17 stuff?

18 HONORABLE F. SCOTT McCOWN: We could just
19 say "attend court" and take out the word "sessions."

20 CHAIRMAN BABCOCK: That might help with
21 in camera.

22 MR. SOULES: "Attend court and make a full
23 record of all proceedings"?

24 MS. SWEENEY: As a practical matter, what
25 are you going to do when a judge says, "Lawyers in

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1 chambers," and you say, "Can I have a court reporter,
2 please?" and the judge says, "No"?

3 MR. SOULES: I say, "We ain't going to
4 chambers. We'll do it right here." Sometimes you just
5 have to do that.

6 MR. CHAPMAN: You have to just say, "We're
7 going to do it in open court, Judge. You know, I need a
8 record."

9 MR. SOULES: "If you want somebody there
10 to make a record, that's okay with me." But I want a
11 record of everything we do, so --

12 CHAIRMAN BABCOCK: Okay. Are we --

13 MR. SOULES: -- because I don't want to
14 get the judge looking across the desk again and saying,
15 "I'm coming after somebody," and I don't have a record.

16 CHAIRMAN BABCOCK: Okay. Let's get the
17 language straight. "The official court reporter or
18 court recorder must: (a)" -- Alex?

19 PROFESSOR ALBRIGHT: "When the court or

20 any party to the case requests," comma, "attend" --
21 whatever you-all decide about "court" or "court
22 sessions" -- "and make a full record of the
23 proceedings."

24 CHAIRMAN BABCOCK: We're striking
25 "sessions." We're not getting away with -- doing away

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1 with (a) because we've got a (b) "take all exhibits."

2 PROFESSOR ALBRIGHT: You could just say
3 "attend court and make a full record."

4 HONORABLE F. SCOTT McCOWN: Right.

5 CHAIRMAN BABCOCK: Okay. "The official
6 court reporter or court recorder must when the court or
7 any party to the case requests attend court and make a
8 full record of the proceedings."

9 HONORABLE F. SCOTT McCOWN: Right.

10 CHAIRMAN BABCOCK: Everybody in favor of
11 that say "aye."

12 COMMITTEE MEMBERS: Aye.

13 CHAIRMAN BABCOCK: Anybody against?

14 MR. SOULES: Yes. I want "all
15 proceedings" instead of "the proceedings."

16 CHAIRMAN BABCOCK: You want to put "all"
17 in there? Is anybody opposed to putting "all" in there
18 for this?

19 PROFESSOR ALBRIGHT: Yeah.

20 HONORABLE F. SCOTT McCOWN: I think -- I
21 think "the" -- because you might request that they be

22 there for part of it and not be there for some of it.

23 MR. SOULES: I'm trying to cover the
24 in camera problem.

25 HONORABLE F. SCOTT McCOWN: Well, I think

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1 the in camera problem is covered by deleting "sessions."

2 MR. SOULES: I give up.

3 HONORABLE F. SCOTT McCOWN: Okay.

4 CHAIRMAN BABCOCK: You give up? I
5 wouldn't give up if I were you.

6 MR. SOULES: If somebody else wants to get
7 on board, that's okay. I think we're missing something
8 important.

9 HONORABLE F. SCOTT McCOWN: Because the
10 thrust of this is to make clear that if you want a
11 particular phase of the trial covered, you got to make a
12 request --

13 CHAIRMAN BABCOCK: I give up, too.

14 HONORABLE F. SCOTT McCOWN: Okay.

15 CHAIRMAN BABCOCK: All right. That's
16 unanimous. Richard.

17 MR. ORSINGER: I'm a little bit concerned
18 that there may be some statutes that require a record.
19 I know that in some instances under the Family Code,
20 which I don't have a copy of with me, the court is
21 required to make a record. And I don't know whether we
22 just want to say that that's when the court should
23 require it or whether we should say "or as otherwise
24 required by law." But this is a little bit misleading.

25 And there may be others like civil commitment

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1 proceedings and other things that are governed by these
2 rules. I don't know.

3 CHAIRMAN BABCOCK: Wait a second. We've
4 had this rule forever, Richard. 13.1 we haven't?

5 PROFESSOR ALBRIGHT: Yeah. It's always
6 been if you want a court reporter, you need to --

7 MR. CHAPMAN: Request it.

8 MR. ORSINGER: No. I think the Family
9 Code provisions says that the parties must waive on the
10 record with the approval of the court, so that doesn't
11 violate the old language.

12 HONORABLE F. SCOTT McCOWN: But the court
13 reporter is never going to know that court's been
14 convened and that he needs to be in there unless the
15 judge calls him. So I think it's covered if the judge
16 tells you to do it or if any party tells you to do it,
17 then you've got to do it. It's up to the judge and the
18 parties to know when the law requires a record, but the
19 court reporter doesn't independently walk in and say,
20 "We need a record here."

21 PROFESSOR DORSANEO: I think that makes
22 sense.

23 HONORABLE F. SCOTT McCOWN: All right.
24 We'll be here a long time if you fight me on this one.

25 (Laughter.)

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1 MR. DORSANEIO: Rule 18. The next issue,
2 Rule 18, is not necessarily a Rule 18 issue or a Rule 18
3 issue only. It is notice of the issuance of the
4 mandate. Right now it doesn't say anywhere in clear
5 terms that the appellate court clerk must mail a copy of
6 the mandate to counsel. It might mean that in Rule 12.6
7 where it talks about right now, "... the clerk of an
8 appellate court must promptly send a notice of any
9 judgment or court order to all parties to the
10 proceeding."

11 It certainly doesn't say that in 18's
12 beginning part, which says, "The clerk of the appellate
13 court that rendered the judgment must issue a mandate
14 and send it to the clerk of the court to which it is
15 directed."

16 And our recommendation is to say it in
17 both places. To amend 12.6 to say, "... the clerk of an
18 appellate court must promptly send a notice of any
19 judgment, mandate or other court order" -- and the
20 "other" is because I think a mandate is a court order --
21 "to all parties to the proceeding," and then -- and then
22 to make a companion change in 18.1. "The clerk ... must
23 issue a mandate in accordance with the judgment and send
24 it to all parties to the proceeding and to the clerk of
25 the court to which it is directed when one of the

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1 following periods expire" -- or "expire," whatever it
2 says in the current rule.

3 CHAIRMAN BABCOCK: Any discussion about

4 this?

5 MR. HAMILTON: Why do you need two rules?
6 Can't you just say "issue and send"?

7 PROFESSOR DORSANEO: Well, there's one
8 general rule, 12.6, that probably is, frankly, the
9 better place, but then 18.1 does talk about it, about
10 sending it to the clerk of the court to which it is
11 directed, and that kind of suggests only to the clerk of
12 the court, so that's a belt and suspenders thing. And,
13 frankly, I would probably say, well, change 12.6, but I
14 don't see any great harm in saying it twice.

15 CHAIRMAN BABCOCK: Do we have a motion?

16 MR. LOW: So moved.

17 CHAIRMAN BABCOCK: Anybody second?

18 MS. JENKINS: I'll second.

19 CHAIRMAN BABCOCK: Any further discussion?

20 In all in favor say "aye."

21 COMMITTEE MEMBERS: Aye.

22 CHAIRMAN BABCOCK: Any opposed?

23 PROFESSOR DORSANEO: The next one is
24 25.1(d), another one where this committee recommended no
25 change. And, you know, time is short, and I don't want

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1 to give it a short trip, but I do think it's worth
2 saying about this is that some people think that the
3 notice of appeal should contain more information. For
4 example, it should identify the appellees, which is the
5 gist of the suggestion. "Rule 25.1(d) might require

6 that the notice of appeal list the names of all parties
7 against whom the appellant intends to appeal."

8 We discussed this at great length, and to
9 quote or paraphrase Richard, became exhausted by it, you
10 know, some years back. But the Combined Committee
11 believes that it's not a good idea to complicate the
12 notice of appeal process by requiring that to be figured
13 out and added into the notice of appeal and thinks the
14 rule is fine the way it is.

15 MR. ORSINGER: I move we reject the
16 suggestion and accept the committee's recommendation.

17 CHAIRMAN BABCOCK: Second. Any further
18 discussion? All in favor say "aye."

19 COMMITTEE MEMBERS: Aye.

20 CHAIRMAN BABCOCK: Anybody opposed? It's
21 unanimous.

22 PROFESSOR DORSANEO: All right. The next
23 one, 25.2(b)(3), I'm not going to talk about because the
24 Combined Committee recommendation indicates that Judge
25 Womack says we shouldn't do anything here because the --

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1 what is in issue involves a court of criminal appeals
2 case that I suppose still hasn't been decided. I
3 haven't checked myself, but there is no committee
4 recommendation here.

5 CHAIRMAN BABCOCK: So what are we going to
6 do, just pass this for the moment?

7 PROFESSOR DORSANEO: Leave it. Let it
8 sit.

9 CHAIRMAN BABCOCK: Okay.

10 PROFESSOR DORSANEO: This next one is --
11 26.1(a)(4) is a more significant matter. Right now
12 (a)(4), the basic rule indicating when you need to
13 perfect an appeal, says, "The notice of appeal must be
14 filed within 90 days," you know, rather than on the
15 shorter 30-day track, "after the judgment is signed if
16 any party timely files," and one of the things included
17 in the list is "a request for findings of fact and
18 conclusions of law if findings and conclusions are
19 required by the Rules of Civil Procedure of, if not
20 required, could properly be considered by the appellate
21 court." The language in (a)(4) copies a Supreme Court
22 case, the -- what is it, Elaine, the IKB?

23 PROFESSOR CARLSON: IKB.

24 PROFESSOR DORSANEO: -- the IKB case. The
25 committee recommends rejection of the limitation in

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1 (a)(4). The limitation, again, is that if the -- if the
2 findings and conclusions, you know, are not required and
3 could not properly be considered by the appellate court
4 because they're not proper, like an appeal from a
5 summary judgment, then you wouldn't get the 90 days, and
6 you would find out about that, you know, after time
7 elapsed.

8 Okay. So the committee, first of all,
9 recommends to do this, which probably is not the primary
10 recommendation, but it is the first one that we

11 discussed. "A request for findings of fact and
12 conclusions of law even if findings and conclusions are
13 not proper or required by the Rules of Civil Procedure."
14 This would just be a simple statement that you get on
15 the longer track even if you were in error in requesting
16 findings of fact and conclusions of law because they're
17 not proper in the case you're appealing. This is to
18 simplify appellate procedure and to remove problems for
19 people who should know what they're doing but don't.

20 Once we got into discussing the matter
21 further, we ended up thinking that really we shouldn't
22 have dual tracks; that we should have a notice of appeal
23 filed within 90 days after the judgment is signed for
24 what I'll term, you know, all ordinary appeals, not
25 without regard to what somebody files in the trial

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1 court, you know, after the judgment. That -- as the
2 recommendation says, "The Combined Committee believes
3 that there is no good reason to retain two appellate
4 timetables," for an ordinary appeal.

5 I think it is fair to say that once upon a
6 time the trial court and appellate timetables were all
7 connected, and that's kind of why we're in the shape
8 we're in now. And that is, of course, a matter of
9 considerably more significance than any of these other
10 technical things, and I'll open that up for discussion.
11 But the issue is, should we simplify appellate procedure
12 by, you know, not worrying about when you get the longer
13 track and just say you get the longer track, or is there

14 any -- is there any downside to doing that?

15 CHAIRMAN BABCOCK: Well, one downside is
16 we just amended -- overhauled the TRAP rules, what, two
17 years ago, three years ago? And to now change the
18 timetables again --

19 MR. ORSINGER: Well, you can't get hurt
20 because we're going with the longer timetable. The
21 problem is is that people now can get caught in the gap
22 between short and long, and that's what prompted this
23 complaint.

24 PROFESSOR DORSANEO: And we have a lot of
25 case law discussing all these little issues that, you

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1 know, you could wear yourself out worrying about it, and
2 why bother?

3 CHAIRMAN BABCOCK: Sarah.

4 HONORABLE SARAH B. DUNCAN: When we
5 discussed this, we talked about a unified tract with the
6 '97 amendments, and my memory is -- I may be wrong, but
7 my memory is -- and I thought it was persuasive at the
8 time -- at the time -- there are too many cases that
9 need to just get -- people need to know one way or the
10 other if there's a final judgment. Most of the cases in
11 the system are not commercial law cases or big personal
12 injury cases. Most of the cases in the system are
13 family law in some way or another. And 90 days is a
14 long time to wait to find out if there's going to be an
15 appeal on the custody issue or the property issue. I am

16 in favor of the two-track system.

17 PROFESSOR DORSANEEO: The only motion to
18 this case is you get on the 90-day track anyway because
19 somebody files one or another of the things that you
20 could file?

21 HONORABLE SARAH B. DUNCAN: I doubt it.

22 PROFESSOR DORSANEEO: Isn't the request for
23 findings of fact and conclusions of law filed in every
24 divorce case?

25 MR. ORSINGER: Yeah. But what Sarah is

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1 saying, if nobody does anything now, you know at the end
2 of 30 days you're free and clear. But under this new
3 rule you won't know for 90 days. But the truth is, all
4 they care about is that they can remarry that afternoon.
5 And if they can, then everything is cool.

6 PROFESSOR DORSANEEO: And it's not final
7 until -- you know, I mean, one fellow by the name of
8 Stubbs asked me, you know, years ago or asked somebody
9 else if he could remarry, and he was told that he could,
10 and he had a writ of error appeal to contend with
11 considerably later.

12 MR. ORSINGER: Stubbs versus Stubbs,
13 wasn't it, Texas Supreme Court?

14 HONORABLE SARAH B. DUNCAN: I think
15 parties should be able to decide within 30 days whether
16 they're contemplating further proceedings, and if
17 they're not and they don't file a motion or make a
18 request for findings and conclusions, it ought to be

19 over with.

20 MR. ORSINGER: Could I propose an
21 alternative, which is, could someone request that you
22 don't get the extended timetable unless you file
23 something requesting it? The thing I don't like and the
24 thing that Buddy Hanby is complaining about is that you
25 have to have some arcane knowledge in some instances to

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1 know whether a request for findings is going to give you
2 the extension or not. And so I always file a motion for
3 a new trial even if I don't want one because of that.

4 HONORABLE SARAH B. DUNCAN: And we could
5 cure that with the committee's recommendation on
6 subparagraph 4.

7 CHAIRMAN BABCOCK: Right.

8 HONORABLE SARAH B. DUNCAN: That's all I'm
9 saying is let's do that so that people don't have to
10 make the difficult decision of whether findings and
11 conclusions are appropriate for that particular matter
12 and not change the timetables.

13 PROFESSOR DORSANEO: From the standpoint
14 of the committee, the committee is -- I think maybe it's
15 my own preference, and there weren't that many of us
16 there at the meeting, so maybe it's kind of unfair to
17 say the Combined Committee. But the committee would be
18 happy with either one of these but would be happier with
19 simplifying the whole process.

20 MR. ORSINGER: Let me ask you this, Bill.

21 When could you issue execution? You still could issue
22 execution 30 days after the judgment is signed unless a
23 motion for new trial is filed, right?

24 PROFESSOR DORSANEO: Uh-huh.

25 MR. ORSINGER: So it becomes enforceable.

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1 So the only thing this does is it lets someone know that
2 it's no longer appealable.

3 CHAIRMAN BABCOCK: And it's final.

4 MR. ORSINGER: Okay. I favor having one
5 track just because it's so much simpler.

6 CHAIRMAN BABCOCK: I tell you, we worked
7 awfully hard with a lot of people on this, and we're
8 about to brush it away with a skeleton committee and
9 late in the day. I'm hesitant to do that, Frank.

10 MR. GILSTRAP: I'm concerned about that,
11 too. Certainly this makes the appellate procedure much
12 easier. But aside from the glitch on findings of fact
13 and conclusions of law in that IKB case, how many people
14 fall into that trap anyway? Maybe some do. I don't
15 think -- it's nothing like the federal courts.

16 I'm concerned about passing a rule that
17 says that every judgment in the state of Texas does not
18 become final for 90 days. You know, maybe we figured
19 out what all the consequences are, but it strikes me as
20 maybe we're getting the cart before the horse on that
21 one.

22 PROFESSOR DORSANEO: That is a significant
23 issue that we didn't really discuss. We didn't think

24 about the 90 days would make any difference. We didn't
25 see this difference. And if and when we ever do the

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1 recodification draft, the other problems with this dual
2 scheme will be at least ameliorated if not eliminated
3 because the motion to modify will clearly be what you
4 file when you -- when you, you know, might now want to
5 file a motion under Rule 301 after judgment. I mean,
6 the recodification draft clarifies a lot of these other
7 problems, so -- let's vote on the first alternative.

8 MS. SWEENEY: I think this bears more
9 discussion than people --

10 HONORABLE F. SCOTT McCOWN: Have the
11 energy for.

12 MS. SWEENEY: Yeah.

13 CHAIRMAN BABCOCK: Yeah. I'm -- you're
14 preaching to the choir on that. I don't think their
15 first proposal is all that controversial, though, is it?

16 MR. YELENOSKY: I thought exhaustion was
17 how we always got to a vote.

18 CHAIRMAN BABCOCK: So the first proposal
19 to clarify subparagraph 4 of Rule 26.1, I think -- is
20 there any controversy about that? All in favor of that
21 say "aye."

22 COMMITTEE MEMBERS: Aye.

23 CHAIRMAN BABCOCK: Any opposed? So, Bill,
24 we'll unanimously approve that and leave for further
25 study at another time the alternative, which raises

1 larger issues.

2 PROFESSOR DORSANEEO: Do you want to keep
3 going? We can get through almost all of this.

4 CHAIRMAN BABCOCK: Where do you want to --

5 PROFESSOR DORSANEEO: 29.5.

6 CHAIRMAN BABCOCK: Let's keep going.

7 PROFESSOR DORSANEEO: Right now there is an
8 inconsistency between the sentence quoted twenty -- in
9 Appellate Rule 29.5 and a provision in the Civil
10 Practice and Remedies Code. The Civil Practices and
11 Remedies Code says that an interlocutory appeal under
12 Subsection (a) has the effect of staying the
13 commencement of a trial in the trial court, whereas 29.5
14 says that the trial court may proceed with the trial on
15 the merits, okay, while an appeal from an interlocutory
16 order is pending.

17 The committee recommends this: "While an
18 appeal from an interlocutory order is pending, the trial
19 court retains jurisdiction of the case and may make
20 further orders, including one dissolving the order
21 appealed from, and if permitted by law, may proceed with
22 a trial on the merits." That would not be allowed in
23 the teeth of 51.014(b), but 51.014(b) does not cover all
24 of the appeals from interlocutory orders.

25 Because of the complexity of the matter,

1 we also recommend adding a comment making it plain
2 that Civil Practice and Remedies Code Section 51.041(b)

3 prohibits commencement of trial on the merits in the
4 types of cases, you know, that it covers. But there are
5 others circumstances when that's not so. So the
6 specific recommendation is to add, "and if permitted by
7 law, may proceed with a trial on the merits."

8 HONORABLE F. SCOTT McCOWN: I move
9 adoption.

10 MR. LOW: Second.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: Second.

13 CHAIRMAN BABCOCK: Any discussion?

14 MR. ORSINGER: Let me clarify something.

15 I thought that that suspension of the trial on the
16 merits didn't apply to family law cases. Are you
17 familiar with that rule? You're not? Okay. Then maybe
18 I'm wrong.

19 CHAIRMAN BABCOCK: Any further discussion?

20 MR. ORSINGER: Richard, you can look.

21 CHAIRMAN BABCOCK: All in favor?

22 COMMITTEE MEMBERS: Aye.

23 CHAIRMAN BABCOCK: Anybody opposed?

24 HONORABLE F. SCOTT McCOWN: Mr. Chairman.

25 CHAIRMAN BABCOCK: Yes.

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1 HONORABLE F. SCOTT McCOWN: When he said
2 we could get through all of this, we're on page 11 of 27
3 pages. I'm not sure what he meant.

4 CHAIRMAN BABCOCK: Well, we've done page

5 23. Are you moving to adjourn?

6 MS. SWEENEY: Second.

7 (Laughter.)

8 HONORABLE F. SCOTT McCOWN: Well, I know
9 that Bill can't be here tomorrow, and I don't know if
10 there's any of this that we need to vote out with him
11 here, but I -- I am concerned about making changes that
12 my mind cannot evaluate.

13 CHAIRMAN BABCOCK: I agree. I must say I
14 was drifting on that last one. Here's the deal.

15 MR. ORSINGER: This is the largest group
16 assembled for appellate rule changes in my experience.

17 CHAIRMAN BABCOCK: Yeah. We're going to
18 meet again shortly, I mean, in the next month. So,
19 Bill -- and you're going to be able to be there next
20 time, right?

21 PROFESSOR DORSANEO: Yes. I'll be here.
22 You know, if -- if it absolutely was necessary, I
23 probably could be here tomorrow, which would be very
24 inconvenient.

25 CHAIRMAN BABCOCK: No, because Paula's

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1 been chomping at the bit to do her little voir dire
2 thing.

3 HONORABLE SARAH B. DUNCAN: Her little
4 thing, just a little girl thing.

5 PROFESSOR DORSANEO: And some of these
6 things we haven't finished where it says, you know,
7 somebody is going to prepare an additional report.

8 Well, that hasn't happened yet.

9 CHAIRMAN BABCOCK: Why don't we just knock
10 off today and take you up at the next meeting if --
11 Justice Hecht, if that's all right with you.

12 JUSTICE HECHT: That's fine.

13 CHAIRMAN BABCOCK: I know you're anxious
14 to hear about how we thought about all these things. So
15 the motion to adjourn has been made and seconded and I'm
16 sure passes by acclamation. So we'll see you guys
17 tomorrow at 8:30.

18 (Whereupon the meeting was adjourned, and
19 the proceedings were continued the next
20 day as reflected in the next volume.)

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2 CERTIFICATION OF THE MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE
4 - - - - -

5 I, Gina S. Verduzco, Certified Shorthand
6 Reporter, State of Texas, hereby certify that I reported
7 the above hearing of the Supreme Court Advisory
8 Committee on October 20, 2000, and the same were
9 thereafter reduced to computer transcription by me.

10 I further certify that the costs for my
11 services in this matter are \$.

12 CHARGED TO: Charles L. Babcock.

13

14 Given under my hand and seal of office on this
15 the 3rd day of November, 2000.

16

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