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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 15, 2001

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 15th day of June, 2001, between the hours of 9:02 a.m. and 12:11 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: We're here on our May meeting, and we have a full agenda, and to start with Justice Hecht is going to talk to us, Hatchell, if you'll sit down.

HONORABLE ANN McCLURE: He can't hear you down here.

CHAIRMAN BABCOCK: I know. Mike, we're starting.

MR. HATCHELL: We're trying to figure out what time the meeting started.

CHAIRMAN BABCOCK: 9:00 o'clock, as many of the e-mails apparently correctly said.

Justice Hecht, I guess we have referred a number of rules to the Court, the recusal rule being one of them, so whatever you want to report to us.

JUSTICE HECHT: We have not taken action on that. The legislative session has just recently ended. Representative Dunnam, who is a member of this committee by designation of the Speaker, introduced legislation that he introduced last session that would impact the Court's rule-making power and this group's operations. One of the reasons he gave for sponsoring that legislation was that our recusal rule goes too far in judicial campaign reform, which he argued should be the province of the Legislature.

That bill at first failed in the House, and there was a revote under a procedure where if ten members of the House, I think it is, say that they didn't know what they were doing, you can take another vote; so they took another vote and it passed and then it died in committee in the Senate. So during that period of time we thought it not appropriate to move forward with the recusal rule, but we will now that that's over with.

We had a good session in the sense that nothing bad happened to us, and that's a great victory I think, and particularly with respect to rules, the Legislature seemed much less concerned this session than they were the session before. So I think we have done a lot to alleviate those concerns by reporting in regularly, letting them know what we're doing, inviting their participation in the group, making it more open. Chip's website is great. Lots of materials that are available, so I think all of that has helped a great deal, and I think -- I'm hopeful that next session we won't even be an item for discussion. So that's where we ended up in the Legislature.

We have had a resignation on our Court in the last few days. Justice Abbott has resigned to run for lieutenant governor. I'm sure you all know that. So we hope the governor will appoint somebody quickly, although

we're coming to the end of our term in a few weeks, so it may be the summer before we get somebody. But Judge Jefferson is on board and working very hard and looking forward to moving to Austin in a few weeks and not looking forward to campaigning for the next 17 months, but that's the nature of it.

And, of course, the Court is concentrating on opinions this month, and I don't look for us to do much rule stuff until the summertime and when we reconvene in September, but we have got stuff that's pretty high on the list like the summary judgment rule that we could have done in the spring almost at any time, but we were hopeful that it wouldn't be a legislative issue either and that we could do it at the same time as some other rules, like the appellate rules or something so that we wouldn't just put out a single rule, and I think as close as the appellate rules are, that looks like that's going to be doable.

Let's see. Christina Crain has resigned from the committee to accept the governor's appointment to the Texas Department of Criminal Justice, so I assume we will get another person on the committee from the lieutenant governor's office, and I think the only other thing I have is that we have referred two matters to the committee that came through the Court. One of them is whether there should be time restrictions on ungranting a

new trial, sent that to the appropriate people; and the other is whether you can execute on Sunday, not under a criminal jurisdiction but a civil jurisdiction.

You can enjoin a tax garnish, sequester, and distress on Sunday, but you can't execute; and we have a request from a lawyer in Houston that asked us to look at that, so we sent that to whoever that is; and I think that's all I've got unless there are questions.

CHAIRMAN BABCOCK: Anybody have any questions? Okay. The first matter, which is raised by the case of Fulton vs. Stinch about ungranting a motion for new trial has been referred to Bill Dorsaneo's committee; and, Bill, I know you at least were shown to be a recipient of this e-mail from Justice Hecht; and the other matter, the execution on Sunday, will be referred to Pam Baron's subcommittee; and I'll have to make a note to let her know since I don't think she's here; but that's a letter we just received.

So, moving right along, we've got TRAP 47 and other items that Bill Dorsaneo has been working on, so, Bill, the floor is yours.

PROFESSOR DORSANEO: Okay. Thank you, Chip. I believe that Chris Griesel handed out another copy of Justice Hecht's letter to Chip Babcock dated March 28, 2001, just a few moments ago. If you can look at that,

you can refresh your recollection as to the status of the proposals for amending Rule 47. This is how the chairman and Justice Hecht referred the subject of Appellate Rule 47 back to the appellate rules subcommittee of this committee; and last week the committee, six of us in person or by return memo, discussed the number of issues concerning Rule 47 raised by the letter and the two appendices, Appendix A and Appendix B; and basically in a nearly unanimous way and with a few additional matters the subcommittee recommends the adoption of the version of Appellate Rule 47 that's labeled "Appendix A" to Justice Hecht's letter.

This is -- the proposal was recommended by the Supreme Court Advisory Committee and modified based on comments received from justices of the courts of appeals at a conference held last spring. With respect to the matters that are of potential significance, we can go down the rule, you know, paragraph by paragraph, and I can, you know, identify them. I don't know if they need a separate vote. That will be really, I suppose, up to the committee members and the chair.

47.1 is not changed. You can see that the last sentence of 47.1 is crossed out, but it's simply been moved in a slightly modified form to the beginning of 47.4, which provides "If the issues are settled, the Court

should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it." That's a reorganizational adjustment only.

47.2 has undergone some change since the last time we talked about this. If you look at Note 2, the SCAC recommended that Rule 47.2 not be changed, and as a result of the -- presumably as a result of the input from the justices of the courts of appeals 47.2 is rewritten to provide not only for signing, but to deal with the process of the designation of court opinions. And this -- in my view, you know, largely a clarification, but it's a clarification that crystallizes what this rule is really about in terms of replacing unpublished opinions with memorandum opinions, and that's editorial on my part. It says what it says.

47.3 I think is not really new. Justice Hecht, correct me if I'm wrong. I mean, that's the idea we clearly voted on before, that all opinions of the courts of appeals must be made available to the public, including public reporting services, print or electric.

CHAIRMAN BABCOCK: That's the language that we approved in previous --

PROFESSOR DORSANEO: Yeah. That's what I thought. So 47.4 is essentially the same. There is an

issue here as to how -- there are several issues on 47.4, I guess. The sentence, the second sentence, "An opinion should not be labeled a memorandum opinion if it does any of the following." In Justice Hecht's letter, several justices toward the end of the letter recommended that "an opinion should be labeled a memorandum opinion unless it does any of the following." A matter of wording and some emphasis. The members of the subcommittee voted a preference for "an opinion should not be labeled a memorandum opinion if it does any of the following," but I suppose that's an issue that could be controversial.

CHAIRMAN BABCOCK: Any dissent in your subcommittee from that, Bill?

PROFESSOR DORSANEO: I don't think so. But there were six of us voting at that point. The subcommittee believed that the word "should" is not a good word and that the word "should" should be changed to "must" because "should" is susceptible to the interpretation that you could ignore the requirement of the subdivision if you just simply didn't want to go by that; and the subcommittee members who voted -- and I believe it was unanimous -- thought that this should not be aspirational, it should be mandatory; but, of course, there is no real enforcement mechanism, so it's mandatory in that sense only.

An issue that's related to 47.4(e) contains a concurrence or dissent that was controversial and -- is John Cayce here?

HONORABLE SARAH DUNCAN: No. He's speaking at the annual meeting.

PROFESSOR DORSANEO: He particularly thought that (e) should say "contains a concurring or dissenting opinion" rather than "contains a concurrence or dissent." The idea there is that somebody should not be able to preclude a memorandum opinion designation simply by noting a dissent or, I guess, indicating a concurrence without explanation. The members of the subcommittee thought that that would be unlikely, okay, that that would be a problem and that it would be a difficult matter to police and somebody could say, "I dissent for the reasons stated in such-and-so case" or whatever; and basically without, I think, feeling particularly strongly about it, I wanted to bring the issue to the committee, as to whether that should say "contains a concurrence or dissent" or "a concurring or dissenting opinion."

Beyond that, the subcommittee thought that the language that we didn't carry forward in 47.5's first two sentences should be carried forward into the final version of Appellate Rule 47, and the members of the committee also unanimously thought that 47.6 adjusted

sentence, "A court en banc may change a panel's designation of an opinion" was either a good idea or not a bad one.

And in behalf of the members of the appellate rules subcommittee who were able to participate in the conference on short and probably inadequate notice, I move adoption of -- to get the ball rolling, of the version of Rule 47 that is indicated in Appendix A.

CHAIRMAN BABCOCK: Okay. Anybody want to second that?

HONORABLE ANN McCLURE: Second.

CHAIRMAN BABCOCK: Okay. So it's seconded. What about the discussion? Anybody have any comments on this? Judge Patterson.

HONORABLE JAN PATTERSON: On the point of concurring or dissenting, and maybe this is why I think that it should remain that "an opinion should" because I don't think these are matters that require policing, as you say or as you suggest, or should be -- they are something more than inspirational or aspirational, but they are something short of criminal conduct. So I think that the language "should" is appropriate, but also, I think there was widespread support among the court of appeals judges -- and, Sarah, correct me if I'm wrong -- that on this point about concurrence or dissent that if

there's just a notation that it shouldn't change the form of the opinion.

So I don't think that was just Judge Cayce's viewpoint. I think it also came from other judges and he more or less adopted it as a statement of his group of judges and also there were other judges -- I know my group of judges supported that, and I think it came from our group, in fact.

PROFESSOR DORSANEO: Well, to talk about this a little further, now, Phil Hardberger participated in our conference, and I did have, you know, your written information, Justice Patterson, and correspondence from Chief Justice Cayce. When we discussed this matter we recognized that the addition of (e) is really the thing that makes the "should" or "must" issue consequential, because all of the other things are -- I won't say subjective, but debatable; but it's not debatable as to whether there is a concurrence or dissent.

HONORABLE JAN PATTERSON: Right.

PROFESSOR DORSANEO: And the issue would be, well, put yourself in the position of somebody who believes that this majority opinion makes a significant modification in the law and that this should not be a memorandum opinion, and you want to stop that. Okay. Now, probably you'll write a dissenting opinion that is

lengthy and relatively, you know, informative, indicating, you know, why you think there is an inauspicious change in the law; and presumably that would keep the thing from being designated a memorandum opinion.

HONORABLE JAN PATTERSON: Right.

PROFESSOR DORSANEO: But "should" might mean to some people that they can designate it as a memorandum opinion because you're nuts.

HONORABLE JAN PATTERSON: Right.

PROFESSOR DORSANEO: Or just simply not thinking clearly on the point.

HONORABLE JAN PATTERSON: Well, my concern is that it might deter people from concurring or dissenting in a word if all of the sudden that -- the larger issue of how it's designated becomes involved; and as a practical matter -- and that's the perfect example I think where it would be, where it's -- there's a mild goofiness about it; but you don't necessarily -- I mean, if there's any kind of strong feeling at all, I think people concur/dissent with full opinions, but just to kind of note an exception that "I don't want my name entirely associated with this product" shouldn't convert -- shouldn't raise the issue of how it's designated, I guess is my concern.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I have no idea what other court of appeals judges think, but I concur on a lot of judgments because I think the opinion doesn't go into enough analysis or goes too far in some respect, but it's not worth writing a dissent over. I dissent to almost every opinion that has a settlement agreement where the parties have not indicated the disposition that they want and our court automatically reverses the judgment and remands the cause, and to me we don't mean -- we shouldn't be reversing judgments unless we know exactly what we're doing, but our court has an opinion that says that's what we do, and I dissent in every single one of them.

It shouldn't change it from a memorandum opinion to a full opinion, because I do it in every one of them. I'm not adding anything to the jurisprudence of the state. I'm just reiterating my belief that this is incorrect, and I don't know why we would want to make it an opinion rather than a memorandum opinion just because somebody isn't comfortable with the language or has a long-standing disagreement that is published in that line of cases.

CHAIRMAN BABCOCK: So you support Judge Patterson in that?

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: What I'm hearing these two appellate judges say is that this language in (e) coupled with the word "must" would inhibit the right to concur or dissent or the ability to concur or dissent. The way to solve that problem is simply leave the word "should" and take (e) out, leave it like it was.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Frank, do you really -- if a judge goes to the trouble of writing a concurring or dissenting opinion, should it be a memorandum opinion?

MR. GILSTRAP: Well, I thought that's what you were saying, that you wanted to be able to concur or dissent and not have that transform it from a memorandum opinion to a full-blown opinion.

CHAIRMAN BABCOCK: And the argument here --

HONORABLE SARAH DUNCAN: The distinction I'm drawing is between concurring or dissenting without an opinion --

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Okay.

HONORABLE SARAH DUNCAN: -- and concurring or dissenting with opinion.

MR. GILSTRAP: So you want to keep "concurrence or dissent."

HONORABLE SARAH DUNCAN: No. I want to say "concurring or" --

MR. GILSTRAP: "Concurring or dissenting opinion." Okay.

PROFESSOR DORSANEO: You want to say "must" or leave it at "should"?

HONORABLE SARAH DUNCAN: I would prefer "must."

PROFESSOR DORSANEO: Uh-huh. I think that's the issue, Mr. Chairman, and I think the issues go together.

CHAIRMAN BABCOCK: Yeah. So version one would be as we see it. Version two would change "should" to "must." "An opinion must not be labeled" and then subpart (e) would be changed in that version to say "contains a concurring or dissenting opinion," right, Justice Duncan?

HONORABLE SARAH DUNCAN: And to add to this, I mean, maybe it's not right on my part, but it's something that I do. There are times when I could dissent with an opinion, but I am so sure the Supreme Court is going to take it and can see right through the problems in the majority opinion that I will do a one-line dissenting opinion because as the rule stands right now I have the ability to publish the entire opinion because I designate

my dissent to be published.

CHAIRMAN BABCOCK: How often are you right about your prediction on the Supreme Court?

HONORABLE SARAH DUNCAN: I will stand on my record.

CHAIRMAN BABCOCK: And, Justice McClure, do you have any thoughts about this?

HONORABLE ANN McCLURE: I understand the comments that Sarah is making, and I can see the necessity of allowing somebody to concur in the judgment even or to note their dissent without writing an opinion. I think the language ought be "must" and limited to where a concurring or dissenting opinion is.

CHAIRMAN BABCOCK: It looks to me like we've got a majority without dissent of the appellate justices present, and it seems to me that's their call more than the practitioners. So the proposal then, Bill, would be to change "should" to "must" and amend subpart (e) to say "contains a concurring or dissenting opinion," correct?

Is everybody okay with that? Is that satisfactory, Judge Patterson?

HONORABLE JAN PATTERSON: We were not unanimous on the "must" or "should."

CHAIRMAN BABCOCK: What do you think about the "must" or "should"?

HONORABLE JAN PATTERSON: Well, I just think that all of these factors, except the last one are so subjective --

CHAIRMAN BABCOCK: Eye of the beholder.

HONORABLE JAN PATTERSON: Well, really, when you talk about criticizing existing law, I mean, that can be a passing soft comment or it can be a stronger -- I mean, what is a criticism of existing law and continuing public interest, establishing a new rule of law, everybody differs about whether we make law or don't and what is new law. That issue comes up all of the time with very small issues, and so that's why I think that this is something that -- and, frankly, I think that there is an element of good faith in all of this.

CHAIRMAN BABCOCK: Sure.

HONORABLE JAN PATTERSON: And that's what we were resting our hopes in rather than anything that requires further policing.

HONORABLE HARVEY BROWN: Chip, I have a question. What is the purpose of changing it from "should" to "must"? I mean, is it -- is there a thought that you can mandamus the appellate court? Is the thought that it internally allows you to argue with the other justices in the panel who don't want to publish it?

PROFESSOR DORSANEO: Yes.

HONORABLE HARVEY BROWN: Or is it both?

PROFESSOR DORSANEO: It seems to me that the one writing the dissent could say, "You cannot label this a memorandum opinion just because you think I'm wrong. I have written a dissent."

CHAIRMAN BABCOCK: So there.

HONORABLE HARVEY BROWN: So you think it's for both purposes, both for persuasiveness internally and possibly a mandamus action?

PROFESSOR DORSANEO: Well, I don't know about that.

HONORABLE SARAH DUNCAN: I don't think you're going to get very far with a mandamus action, but --

HONORABLE HARVEY BROWN: Well, I just saw you nodding your head "yes." That's why I --

HONORABLE SARAH DUNCAN: But I think it could alter the discussion among the judges on the panel, and I think from a lawyer's perspective, I think a motion to eliminate memorandum notation would be much more persuasive if --

HONORABLE HARVEY BROWN: It's a "must"?

HONORABLE SARAH DUNCAN: -- you're within one of these categories and it's a "must."

CHAIRMAN BABCOCK: Judge Patterson, where

are you on the "must"/"should" controversy here? You still think it should be "should"?

HONORABLE JAN PATTERSON: I strongly think it should be "should."

CHAIRMAN BABCOCK: Okay. Okay. Frank.

MR. GILSTRAP: As Bill points out, the thing that has caused this problem is inclusion of (e). If (e) weren't there, everyone would agree that this should simply be "should."

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: It should be hortatory language. So we can solve the problem by leaving the word "should" and taking (e) and moving it to 47.5 as a separate provision and saying, "If there's a concurring or dissenting opinion then the court may not designate its opinion as a memorandum opinion." Everybody gets to have his cake and eat it, too.

HONORABLE JAN PATTERSON: That would do it.

HONORABLE SARAH DUNCAN: Now that Frank has said that everyone would agree, I don't take that as a challenge, but I will note my exception. I don't care whether (e) is in or out. I think the court, any court, should be given a straight-up statement of "This is your responsibility to do. It's not something that we're suggesting to you. It's something that is your duty to

do."

CHAIRMAN BABCOCK: So you're a "must" person.

HONORABLE SARAH DUNCAN: I'm a "must" person all the way.

CHAIRMAN BABCOCK: Okay. Justice McClure, you want to break this deadlock here?

HONORABLE ANN McCLURE: I can tell you there was some concern expressed at the judicial conference about the perception of the practitioners if we are labeling opinions as memorandum opinions that some attorneys might think or their clients might think they were getting short shrift and that we were belittling the merits of their case by addressing it in a memorandum opinion. If you have "must" language in there, it takes the heat off of us. I'll throw that on the table, and it explains that it is the intention of the Supreme Court that we do handle them in memorandum opinions, and I think that would give some comfort to a lot of them.

CHAIRMAN BABCOCK: So you're a --

HONORABLE ANN McCLURE: I'm a "must" person.

CHAIRMAN BABCOCK: You're a must person. Skip.

MR. WATSON: I'd like to hear from Judge Brister.

CHAIRMAN BABCOCK: That's right. I've been omitting Judge Brister.

HONORABLE SCOTT BRISTER: I'm still a trial judge to everybody.

CHAIRMAN BABCOCK: We're going to trial next week.

HONORABLE SARAH DUNCAN: Better not be.

HONORABLE SCOTT BRISTER: Oh, I don't have strong -- I'd probably lean toward "must" just because "should" always leads to argument about is that mandatory or is that optional, and sometimes one, sometimes the other. You just never know.

CHAIRMAN BABCOCK: So you're a weak "must" person.

Judge Brown.

MR. WATSON: I didn't set that up.

HONORABLE HARVEY BROWN: Ann was saying that one of the benefits of this is that it gives the judges cover, so to speak, from the memorandum opinion; but it seems to me it doesn't do that because the committee switched this. Where it used to be the presumption that it was a memorandum opinion, now it's the presumption that it's not a memorandum opinion. So if that's what you're looking for, it seems to me we should do it the way we did before, which is the presumption is memorandum; therefore,

you're not getting short shrift. You get a full opinion. You're getting extra, so to speak.

HONORABLE ANN McCLURE: I'm not sure I agree with that, but I'm comfortable with it the way it's proposed in the alternative.

CHAIRMAN BABCOCK: Okay. Anybody else on the "must/should" debate?

HONORABLE SARAH DUNCAN: Can we make that "must unless/should" debate?

CHAIRMAN BABCOCK: The "must unless/should" debate. Okay.

PROFESSOR DORSANEO: Everybody understand that?

CHAIRMAN BABCOCK: I'm not sure I do.

PROFESSOR DORSANEO: There are two versions of that sentence. One as in Appendix A --

HONORABLE JAN PATTERSON: May I make just one final comment?

CHAIRMAN BABCOCK: Yes, Judge Patterson.

HONORABLE JAN PATTERSON: Keep in mind that we have ratcheted up everything to make it published, so to have a final bright line, to try to draw a final bright line, I think it's going to make more issues on the court and tie up a lot of time, but I think the great virtue of the rule is that everything is now published, and so it's

not as though -- we're now making the bar even higher, I think, by trying to draw fine lines, and I can envision time spent on something that may not be as worthy of attention.

CHAIRMAN BABCOCK: Yeah. Okay. Bill, do you want to read the two versions of the rule or not?

PROFESSOR DORSANEO: Well, my suggestion would be that we vote on the "must," the "must/concurring or dissenting opinion" issue and then discuss the "unless" issue next. I think it will be easier for people to follow that way.

CHAIRMAN BABCOCK: Read the sentence you propose voting on.

HONORABLE JAN PATTERSON: And where does Frank's idea come in?

MR. GILSTRAP: Died for lack of a second.

PROFESSOR DORSANEO: All right. I'll talk about the "unless" thing. Look at Justice Hecht's -- look at the current rule, okay, without anything being crossed out. Where is it? Two-sided pages make it difficult for me to be able to function.

HONORABLE DAVID PEEPLES: Are you talking about Appendix A?

PROFESSOR DORSANEO: Just the way it's written in the current rule, "An opinion should be

published only if it does any of the following."

"An opinion should be published only if it does any of the following." So the presumption is -- contrary to what most lawyers, you know, might have thought was a good idea, the presumption is that this opinion you're reading should be unpublished. Okay. You know, it's only to be published if it does any of the following: establishes a new rule of law, involves an issue, etc. So the current rule has a presumption against publication. Okay.

This Appendix A draft, to the extent that the memorandum opinion designation is kind of a substitute for, you know, nonpublication, has, you know, grammatically at least, a presumption in favor of the opinion not being labeled a memorandum opinion, which is kind of different, okay, running in a direction from the language that talked previously about publication.

At the -- and now look at Justice Hecht's letter, second page. "Several justices commented that the second sentence of Rule 47.4 appears to change the presumption against published opinions and should be changed to read, 'An opinion should be labeled,'" -- if we change to it must, "'An opinion must be labeled a memorandum opinion unless it does any of the following,'" and that kind of establishes a presumption that we're

going to have a memorandum opinion "unless." Okay?

CHAIRMAN BABCOCK: But your subcommittee came up with the language "An opinion should not be labeled."

PROFESSOR DORSANEO: Well, we went with Appendix A, we talked about it, and I don't think you can read too much into thinking that the subcommittee thought this was a big issue.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: All right. And I think it's fair to say that the subcommittee comprised mostly of practicing lawyers, you know, was thinking about what do the courts of appeals justices want, and that's --

HONORABLE JAN PATTERSON: They think of little else, right?

PROFESSOR DORSANEO: Huh?

HONORABLE JAN PATTERSON: They think of little else.

PROFESSOR DORSANEO: Oh, yes. We're trying to be as deferential as we can be, and both Appendix A and Appendix B are worded this way.

CHAIRMAN BABCOCK: Okay. So we have got three options here. One is to leave it as it is written here in Exhibit A, "An opinion should not be labeled a memorandum opinion if it does any of the following."

That's one option for us.

The second option is "An opinion must not be labeled a memorandum opinion if it does any of the following." That's option two, and then option three, you say, is from Justice Hecht's letter, page two. "An opinion should be labeled a memorandum opinion unless it does any of the following."

PROFESSOR DORSANEO: And I guess we have four. Justice Duncan would say she wants to change that to "must unless."

CHAIRMAN BABCOCK: Okay. So we have got two "shoulds" and two "musts," but one is not and one is.

PROFESSOR DORSANEO: And I'm assuming in all of your proposals you're saying "concurring or dissenting opinion."

CHAIRMAN BABCOCK: Right. Right. Okay. So those are the four choices we have. Frank.

MR. GILSTRAP: I agree with Bill. I think you should separate it down into "should" and "must" and then decide the presumption issue. I think it makes more sense to try and do it that way rather than try to vote on four different things.

CHAIRMAN BABCOCK: Okay. Everybody comfortable with that? Judge Peeples.

HONORABLE DAVID PEEPLES: I want to be sure

I understand the consequences of what we're doing here. No matter how this vote goes people can cite anything, and no matter how this vote goes they will have access to everything if they have got a computer.

CHAIRMAN BABCOCK: That's right.

HONORABLE DAVID PEEPLES: And we don't really know what West will do in terms of what West puts in the hard copy books or not, and we can't control that, but we kind of think that if it's a memorandum they probably won't do it.

HONORABLE SARAH DUNCAN: Huh-uh. I believe Justice Hecht's information was that West will now publish everything.

HONORABLE DAVID PEEPLES: Everything.

HONORABLE SARAH DUNCAN: Which I would also like to raise.

JUSTICE HECHT: I didn't talk to them, but our court administrator talked to them, and they said this is going on in several other states, and they're not sure, but they're in the publishing business, so they will probably publish it one way or another. Now, whether they will have a Texas sup. like the New York sup. or something and put these in there, they're not sure. They don't know if they will put them in the Southwest Reporter.

MR. ORSINGER: My vote on "should" or "must"

would depend on what the presumption is. If it's the same to you I would rather vote on the presumption before we vote on the "should" or "must."

PROFESSOR DORSANEO: Fine.

CHAIRMAN BABCOCK: It's all the same to me.

PROFESSOR DORSANEO: Do the presumption first then.

CHAIRMAN BABCOCK: Anybody want to discuss the presumption, which way we ought to go with it?

HONORABLE DAVID PEEPLES: I think the presumption ought to be that most opinions are not publishable, quote, or memorandum type opinions, because that's just the reality in the terms -- you know, every judge who's ever sat, I think, published fewer than -- designated for publication less than 50 percent. Have we ever had an appellate justice that thought more than half of his or her opinions ought to be published?

HONORABLE SARAH DUNCAN: I think Chief Justice Hardberger probably publishes more than that.

MR. ORSINGER: The Corpus Christi court of appeals --

HONORABLE DAVID PEEPLES: Well, not very many.

HONORABLE SARAH DUNCAN: I'm just saying I think that's the reality.

HONORABLE DAVID PEEPLES: Not very many do.

HONORABLE SARAH DUNCAN: And I think it's out of his concern that people think he's trying to hide his opinions from review, and he has a preference for publication. I mean, I remember before I went on the court, and you told me that I would publish far fewer than I thought I was going to publish, and I will say that it's far fewer than you thought I was going to publish anyway. I mean, there's just not a lot worth publishing.

HONORABLE SCOTT BRISTER: It is shocking how much junk there is.

HONORABLE DAVID PEEPLES: Yeah. I think the presumption ought to be they are memorandum opinions and not really good opinions.

HONORABLE JAN PATTERSON: I agree.

PROFESSOR DORSANEO: Well, from the standpoint of someone who reads all of the opinions and tries to digest them, I read a lot of opinions that have, you know, a treatise on the law, which you kind of have to read to see whether somebody is kind of on purpose or by accident changing some of the law of personal jurisdiction and then you finally get to the opinion, which is the last paragraph, and you say, "Boy, that took me about a half an hour to read all that and it didn't really tell me anything that I wanted to know." And from the standpoint

of a reader, publication full scale is not necessarily desirable.

CHAIRMAN BABCOCK: Yeah. I guess we're all a product of our own experiences, but I'll tell you I've received a couple of opinions in the last few weeks, 40, 50-page opinions, beautifully written, well-reasoned, we won, and --

PROFESSOR DORSANEO: But you're going like this, right?

CHAIRMAN BABCOCK: And there's a lot of new stuff in there about a new statute, and, again, you get to the end it's DNP.

HONORABLE SARAH DUNCAN: But consider, though, that once everything is citable there is no incentive to designate an opinion "do not publish" for any reason other than it's simply not got a lot of substance to it.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: And, also, I would also ask you-all to consider that I think it's true on average amongst the 14 courts of appeals over 60 percent of the docket is criminal, and until you have read that 60 percent of the docket, you really don't have a full appreciation --

CHAIRMAN BABCOCK: That's probably true.

HONORABLE SARAH DUNCAN: -- for the effect of the presumption.

CHAIRMAN BABCOCK: Yeah. Judge Patterson.

HONORABLE JAN PATTERSON: The other point of this may be -- we may be over this hump here, but somebody expressed a concern last time that because we are putting this large amount of information into public domain now that there is a concern that people are going to have to read too much, and so to the extent that we can add to the signals to give them, I think that remains an important bit of information.

CHAIRMAN BABCOCK: Okay. Judge Brister.

HONORABLE SCOTT BRISTER: This may be too late in the day, but the thing that's always -- I totally agree with the idea everything should be something you can cite to, but especially on the criminal docket, probably I do probably three or four opinions a month on people who have plea bargained and then probation revoked and they file either a pro se or appeal and there's just -- you just can't appeal from that. The law is clear once you plea bargain guilty you have to appeal then. You can't wait until your probation is revoked. I do four or five of those a month.

Has anybody discussed with the criminal lawyers do we really need all of those in a Texas sup. or

anything? Could we -- I mean, there's a difference in the civil appeals because, of course, in the civil appeals both sides are paying their attorneys; and they tend not to do that if there's just no point in it; but, of course, in the criminal cases almost nobody is paying the attorneys. They are all appealed.

If you tell people, "Well, look, you can either get a free appeal or go ahead and spend your 40 years in prison," they all appeal; and there is no -- I understand, you know, many of the TRAP rules are for both civil and criminal appeals and the more they're alike the better, but is it too late in the day to consider maybe a do not publish but you can cite as to criminal cases only? Because it is -- that is what is going to be a ton of stuff in any kind of book you buy, and it is of no value.

CHAIRMAN BABCOCK: Well, why don't we try to get through the problem we're facing right now and --

HONORABLE SCOTT BRISTER: Well, that's right.

CHAIRMAN BABCOCK: Where do you come out on the -- on which version, Judge Brister?

HONORABLE SCOTT BRISTER: Well, yeah, the general rule ought to be "memorandum opinion unless."

PROFESSOR DORSANEO: Question.

CHAIRMAN BABCOCK: Yes. Call the question.

We haven't heard from Justice McClure on this issue of the -- you're not going to escape me.

HONORABLE ANN McCLURE: Memo unless.

CHAIRMAN BABCOCK: Okay. All right. So we call the question. Anybody else want to say anything? How do we frame this? The version in Exhibit A says, "An opinion should not," and the other version is "An opinion should be labeled a memorandum opinion unless."

PROFESSOR DORSANEO: Right.

CHAIRMAN BABCOCK: Do we want to vote -- how many people favor "unless"?

HONORABLE SARAH DUNCAN: I'm not sure. Are we voting that we will presume a memorandum opinion unless?

HONORABLE JAN PATTERSON: This is the Hecht language.

CHAIRMAN BABCOCK: Yes. Yeah. We will call it the Hecht language.

Against? A weighty vote, but nevertheless only one. 18 to 1 with Hatchell against. So we'll put the Hecht language in here, and so now it would read, "An opinion should be labeled a memorandum opinion unless it does any of the following" and then go forward (a) through (e), changing (e) to "contains a concurring or dissenting opinion."

PROFESSOR DORSANEO: We still have the issue of whether it should be "should" or "must."

CHAIRMAN BABCOCK: Right. We were getting to that, but that's where we are right now. "Should" or "must," Justice McClure?

HONORABLE ANN McCLURE: I like "must" language.

CHAIRMAN BABCOCK: You want "must." Judge Brister, same?

HONORABLE SCOTT BRISTER: Same.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: Well, I'd like the Gilstrap proposal included in that vote.

HONORABLE DAVID PEEPLES: Could we have that restated?

CHAIRMAN BABCOCK: What's the Gilstrap proposal?

MR. GILSTRAP: The proposal was to keep the "should" language in 47.4 and delete (e) and then add to 47.5 a sentence saying in substance if there is a concurring or dissenting opinion then the court shall not or must not designate its opinion as a memorandum opinion.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I like that.

CHAIRMAN BABCOCK: That's the Gilstrap

proposal. Hatchell, how do you feel about that?

MR. HATCHELL: I'm kind of neutral on that.

CHAIRMAN BABCOCK: So you're not going to dissent again?

MR. HATCHELL: I don't mind it the way it is. I mean, I think Frank's thing is very acceptable really.

HONORABLE DAVID PEEPLES: Isn't the important thing here that if anybody on the panel thinks it ought to be published it should be, quote, published.

HONORABLE ANN McCLURE: They are all published.

HONORABLE DAVID PEEPLES: Not a memorandum, I mean.

MR. ORSINGER: No. That's not really what this says.

HONORABLE DAVID PEEPLES: That's not what he said, but that's what it used say.

MR. ORSINGER: You have to have a concurring opinion or a dissenting opinion or the majority can make it a memo over the objection of one justice.

HONORABLE DAVID PEEPLES: Yeah. But the language in the rule right now at the bottom of that page that's been taken out left it to the discretion of the author of dissent or concurrence to insist that it be

published, didn't it?

MR. GILSTRAP: Huh-uh.

HONORABLE DAVID PEEPLES: No, may, if the judgment -- if the author meets one of the criteria. 47.5 at the bottom.

MR. GILSTRAP: Okay. Yeah.

HONORABLE DAVID PEEPLES: Because I can remember cases in which it was a fact-specific appeal that wasn't ever going to be precedent or anything. I think one case was cited in the opinion. It was a two-one decision with a lot of facts. Why not leave that to the discretion of the panel as to whether to say it's a memorandum? Why say it has to be not memorandum because it got a dissent.

I mean, why can't we trust the judges on -- it can be cited. Everybody is going to have it electronically. Why not let the judges who are on that panel, if any one of them wants it not memorandum, to say so? Why make it be a full -- you know, a nonmemorandum?

HONORABLE JAN PATTERSON: I agree with that, because very often those are the kinds of controversies that draw dissents, because they are very fact-specific, very complex facts, and I agree with that.

HONORABLE DAVID PEEPLES: If one person on the panel wants it not memorandum, that person can say so.

Why not give them the discretion to make that decision?

CHAIRMAN BABCOCK: Is that Frank's proposal?

MR. GILSTRAP: No.

HONORABLE DAVID PEEPLES: His is a little different.

MR. ORSINGER: No. His proposal would require a full-fledged opinion if there is a dissent or concurrence, and David is saying, well, there are some dissents or concurrences that don't merit the full treatment.

MR. GILSTRAP: Dissenting or concurring opinion. Dissenting or concurring opinion.

MR. ORSINGER: That's what I meant.

HONORABLE DAVID PEEPLES: I think what I'm saying is the language that has been stricken at the bottom of page A-2 ought to be put back in. "A concurring or dissenting opinion may be published" -- isn't the right word -- "if in the judgment of its author it meets one of the criteria." That would mean the majority can't silence the dissenter, but -- or I guess not silence, but can't keep it memorandum when the author of the concurrence or the dissent wants it to be.

HONORABLE JAN PATTERSON: What if we vote on whether to include (e) in 47.4 and take that step first and then work on the language of 47.5, if the drift is

that it ought to be included there?

CHAIRMAN BABCOCK: Bill, what do you think? Is that okay with you?

PROFESSOR DORSANEO: Anything is okay with me.

CHAIRMAN BABCOCK: You're agreeable this morning, aren't you?

PROFESSOR DORSANEO: Well, you know, and I can only imagine the dynamics of this process, but my thinking is a memorandum opinion is going to be pretty opaque, and the best way to hide the ball is not to say much. Now, if somebody writes a dissent and says, "This is a significant issue," I would hope that a court would, you know, rethink the idea as to whether this ought to be a one-line, "See Guardian Royal," and try to deal with the argument of the dissenting justice in a reasonable manner, even if that takes a lot of time and even if they think that the dissenting justice is just completely wrong.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: I would hope that our courts would operate like that, and I think that they would be more inclined to do so if they couldn't label it a memorandum opinion. That's my thinking, but, again, it's just what I imagine. I don't know. I have never been an appellate judge.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm attracted to Frank's proposal because I think that sometimes, certainly in my experience, a dissent is aggrieved by a majority opinion not because it does any of the things that are in (a), (b), (c), or (d), but because it ignores controlling precedent in disposing of the case; and I think that that is done sometimes because the result that the majority wants to reach can't be reached if you apply controlling precedent; and so what the majority will sometimes do is they don't mention the adverse cases and they construct a rationale to support the result and the dissent says you've -- you know, you've failed to distinguish or overrule three or four controlling cases that are the opposite of what you just said; and a situation like that, the dissenting justice should be able to force the opinion to the full level --

HONORABLE JAN PATTERSON: Yes.

MR. ORSINGER: -- so that it will be disposed. Now, if everything is published, that's better than it used to be, because it used to be that was done in the dark of night and the Supreme Court was less likely to review because it wasn't going to impact the -- but I would like to strengthen the hand of the dissenting justice --

HONORABLE JAN PATTERSON: Yes. Yes.

MR. ORSINGER: -- to require full treatment even if (a), (b), (c), and (d) are not met.

HONORABLE JAN PATTERSON: Well, and I think the old rule worked well in that regard because the dissenting judge could force the hand; and if the dissenter wanted it to be published, it would be; and I think that is the good call because that dissenter can make the decision whether this is fact-specific and we need to give this other side credibility and --

CHAIRMAN BABCOCK: Why would you be writing a dissenting opinion if it's just fact-specific? I mean, what are you going to say, "The facts aren't what" --

HONORABLE DAVID PEEPLES: It gives the Supreme Court jurisdiction, for one thing. It gives the Supreme Court easier jurisdiction.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: I mean, if that's the way you call it, you ought to write it.

HONORABLE JAN PATTERSON: Yeah. And you listened to the lawyers and you believed that just the majority is not correct. I mean, there are occasions where you might go along with the majority even if you are not completely convinced, but where you go one step further and you are convinced that it should be that way

the other side should know that.

HONORABLE DAVID PEEPLES: Or maybe you are writing for the parties.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: I think there's essentially no real difference between David's proposal and mine. David's does -- it gives the concurring or dissenting judge a little bit more leeway in that it might be possible for him to write a concurring or dissenting opinion and still say it's a memorandum opinion, you see. But under his proposal, if he wants to keep it from being a memorandum opinion, he writes a concurring or dissenting opinion and says, "This can't be a memorandum opinion," in which case the whole thing is not a memorandum opinion.

CHAIRMAN BABCOCK: Gotcha. Okay. Anybody else? Judge Patterson asked that we kind of consider first whether we should take 47.4(e) out of that rule and in some way or shape or form get it into 47.5.

MR. GILSTRAP: And with that goes -- you change the "must" back to "should," I think, in 47.4.

CHAIRMAN BABCOCK: It still is "should" right now.

MR. GILSTRAP: And essentially leave it like it is.

CHAIRMAN BABCOCK: Okay. Judge Brown.

HONORABLE HARVEY BROWN: I think it should be "should" and not "must" because at least as I understood the dynamics that the appellate judges were talking about, the reason you wanted it "must" before was to kind of convince your colleagues on the panel that this is something that should be published, something that had some weightiness to it; and now that we have reversed that presumption it seems that "must" doesn't work. You don't want to have pressure not to make a full opinion. You want to make that more advisory.

CHAIRMAN BABCOCK: Yeah. You're exactly right about that I think. I think that's exactly right, don't you?

HONORABLE SARAH DUNCAN: Huh-uh.

CHAIRMAN BABCOCK: Yeah?

HONORABLE SARAH DUNCAN: I think appellate court judges need a "must" to tell them what to do.

CHAIRMAN BABCOCK: Okay. Even when you switch the presumption?

HONORABLE SARAH DUNCAN: (Nods head.)

CHAIRMAN BABCOCK: Okay. Well, there's not unanimity on that, Judge Brown.

HONORABLE SARAH DUNCAN: I think Judge McClure made a good point when she talked about "must," if it must be a memorandum opinion unless it does one of the

following -- and I am not talking about (e) right now -- the response to someone who is unhappy about their opinion being labeled a memorandum opinion is, "That is a duty on my part to make it a memorandum opinion unless it does one of the following."

HONORABLE HARVEY BROWN: So back to Justice Hardberger, you are going to now tell him, "No, you can't label that a full opinion. We want that to be a memorandum in order to fight over that."

HONORABLE SARAH DUNCAN: Huh-uh. I wouldn't fight with any judge about labeling. As long as I have the right to force the publication of the majority opinion, I frankly don't care if it's memorandum opinion.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: If we keep "must," there is no point in moving part (e). It can just stay where it is.

MR. WATSON: Yeah.

CHAIRMAN BABCOCK: I think that's right, too. Do you agree with that, Sarah? If we keep "must" there's no reason to move subpart (e)?

PROFESSOR DORSANEO: True.

MR. ORSINGER: Well, that defeats David's point that there are some dissents that are just not -- I mean, the whole thing is --

HONORABLE SARAH DUNCAN: Right.

MR. ORSINGER: Is not worth full treatment. Everybody agrees, even the dissenting judge, and yet if we leave it up here in 4 and make it a "must" then even though all three justices don't want it we force it on them.

JUSTICE HECHT: That would be true if you move it, too, right?

MR. ORSINGER: No. I think if you move it to 47.5 and write it the way David is suggesting, the dissenting or concurring author can make an election to require that it be given full treatment or not, as he or she wishes.

HONORABLE DAVID PEEPLES: It's a summary judgment and they disagree two to one on whether there is a fact issue buried in there somewhere. Something never going to happen again. If that's what they think, you know, under my proposal they wouldn't have to nonmemo it.

CHAIRMAN BABCOCK: Make it a full opinion.

MR. GILSTRAP: And you could still keep "must" up in 47.4 simply to make it stronger.

HONORABLE DAVID PEEPLES: Yeah.

MR. GILSTRAP: I agree.

CHAIRMAN BABCOCK: What do you think, Justice Hecht? You're "Hmmm-ing."

JUSTICE HECHT: No, I was just trying to -- all of these are fairly subtle points that are important I think. I'm not sure I would have seen them all.

HONORABLE DAVID PEEPLES: I think we ought to vote and move on. It makes very little difference to the quality of life in this state.

PROFESSOR DORSANEO: We have another issue that I don't want to forget, retroactivity.

CHAIRMAN BABCOCK: All right. Is there a consensus on "must" versus "should"?

Justice McClure, "must"?

HONORABLE ANN McCLURE: I'm still a "must" person.

MR. ORSINGER: Don't we have to know whether we are moving (e) or not? Because, again, (e) is going to affect my vote on "must" or "should." Can we vote on moving (e) down to 47.5 before we vote on "must" or "should"?

CHAIRMAN BABCOCK: I think some people view it the other way around.

MR. ORSINGER: Okay. Then I'm just not going to vote.

CHAIRMAN BABCOCK: Well, I think there's a pretty strong consensus for "must." I may be wrong, but --

PROFESSOR DORSANEO: I think so.

CHAIRMAN BABCOCK: Why don't we just vote on it. How many people think it ought to be "must"?

And how many opposed? 15 to 3, so "must" it will be.

Now, should we move subpart (e)? You want to move subpart (e). Bill Dorsaneo says "no" by a shake of the head. Bobby Meadows.

MR. MEADOWS: No.

CHAIRMAN BABCOCK: Should not move it. Okay. Judge Patterson, what do you think?

HONORABLE JAN PATTERSON: I'm inclined to move it. I would like to see as few changes made in the current rule as possible. "Should" was in the old rule, and I think the current rule works well in all respects except what we were changing is that everything is going to be published, so now we're changing a lot more things than that.

CHAIRMAN BABCOCK: Okay.

HONORABLE JAN PATTERSON: And it wasn't broken.

CHAIRMAN BABCOCK: Anybody else feel strongly about this?

MR. ORSINGER: I favor moving (e) to 47.5 and giving the individual justice authority to either require promotion or not.

HONORABLE DAVID PEEPLES: Anyone on the panel.

MR. ORSINGER: Oh, okay. Anyone on the panel.

HONORABLE DAVID PEEPLES: Well, I guess any author of a concurrence or dissent is what --

MR. ORSINGER: I think that's what --

HONORABLE JAN PATTERSON: Which is the current rule.

CHAIRMAN BABCOCK: Okay. Does everybody understand the (e)? Yeah. Stephen.

MR. TIPPS: I don't. What is it that the concurring or dissenting justice has the power to do by objecting to the fact that the majority wants to write a memorandum opinion? Does that justice have the right to say, "No, you've got to do more than write a memorandum opinion"?

HONORABLE JAN PATTERSON: You have to designate it, I think is what --

MR. TIPPS: Can the majority satisfy that complaint simply by saying, "Well, we will take off the word 'memorandum,' but we're going to leave it exactly the way it is, bare bones"?

MR. ORSINGER: Sure.

MR. GILSTRAP: Yes.

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Yeah.

MR. TIPPS: So we don't get any more explanation. In other words, we will just lose the designation.

CHAIRMAN BABCOCK: That's right. Sarah.

HONORABLE SARAH DUNCAN: Something just occurred to me that may be too devious for this discussion, but I was just thinking about some instances I know about where people tried to use memorandum opinions because they thought a case truly was not -- was not elevated to one of the 47.7 -- that status.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: And wrote a concurrence and published a concurrence or was going to publish a concurrence saying, "This shouldn't be a memorandum opinion for X, Y, and Z reasons"; and I've never known it to happen, but it's conceivable that it could happen that there could be an effort to get a memorandum opinion transformed into a full-blown opinion simply to create more work. Because once you take off that memorandum label, you could leave it just the same --

PROFESSOR DORSANEO: But they won't.

HONORABLE SARAH DUNCAN: But the chances are a lot of people would not feel comfortable -- I would not

feel comfortable writing a memorandum opinion without the "memorandum opinion" label. So I was persuaded of Judge Peeples' suggestion until that thought flickered across my mind, and now I'm not so sure that a concurrence or dissent should be able to change a memorandum opinion from a memorandum opinion, and I'm trying to think about it in the context of everything that's going to be published and available, and that changes things.

HONORABLE JAN PATTERSON: But, Sarah, think of it in terms of the old published/nonpublished and when there was a dissent who insisted that it become public. Then you have the option of revising or adding or embellishing the majority, but I've never heard of an instance where somebody did that solely to cause somebody additional work. That just boggles my mind.

HONORABLE SARAH DUNCAN: Well, and I'm not accusing anyone of doing it solely to cause someone additional work. I have changed an opinion from what was to have been a memorandum opinion to a full-blown opinion to keep a concurrence from being published that was critical of the fact that it was a memorandum opinion, and I'm not accusing that person of doing it solely to cause me more work, although it cost me a great deal of additional work.

I'm just thinking that -- I mean, I'm trying

to think of it not in terms of publication because under this rule everything will be published.

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: So why should a person that writes a concurrence or dissent be able to force an opinion into full-blown opinion status rather than memorandum status?

HONORABLE JAN PATTERSON: Because they're one of three, they've already found themselves in the minority and not expressing the view of the majority, and they are the ones who automatically ought to make the call about how important that is, and it's the way it's done now.

HONORABLE SARAH DUNCAN: But it's done now because it forces publication.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: That is the purpose of giving the dissenter or the concurrer the power to force -- to determine how the opinion is to be labeled.

CHAIRMAN BABCOCK: Yeah. Sarah, the reason -- I think the reason why this subpart (e) is here is because we speculate or anticipate that there's going to be a certain opprobrium attached to a memorandum opinion. It's going to be given some lesser status in the constellation of opinions, both by the higher court, by

the Supreme Court, and perhaps by practitioners, maybe West Publishing; and the theory behind subpart (e) is if a member of the panel feels strongly enough such that they write a concurring opinion or a dissenting opinion then that should withdraw or remove the label that we have put on the opinion, which otherwise would exist.

That's the theory behind it. I'm not saying I agree or not. I'm just saying I think that's the theory.

HONORABLE SARAH DUNCAN: Well, and that's what I'm challenging, is the theory. Once everything is published -- let's get ourselves in that mindset -- if I as the author of the majority opinion strongly believe that the law in this area is well-settled and that there is nothing new in this case and I choose to write a memorandum opinion that says, "We're having a dispute about X. Supreme Court authority directly on point. Affirmed." And there is a concurrence or a dissent that argues, you know, law that existed 20 years ago and not law that was announced last year and blah-blah, it's not going to change my mind about what the appropriate label of that opinion is, and they're welcome to write whatever concurrence or dissent they want to write, and it's all going to be published anyway.

HONORABLE DAVID PEEPLES: How can we fix

your problems and move on? What can we do to fix it?

HONORABLE SARAH DUNCAN: Well, I think I may be the sole voice for this.

HONORABLE DAVID PEEPLES: How do we fix it?

HONORABLE SARAH DUNCAN: So I am not sure that you should fix my problems.

HONORABLE DAVID PEEPLES: The issue is whether a mere concurrence or dissent gets an automatically nonmemorandum or whether the people on the panel have some discretion. If somebody wants to --

HONORABLE SARAH DUNCAN: Well, I would go one step forward. I'm now of the view -- and I have changed my mind on this -- that just because there is a concurring or dissenting opinion shouldn't give that justice the power to determine whether the majority opinion is a memorandum opinion or an opinion.

CHAIRMAN BABCOCK: Skip wants to say something.

MR. WATSON: I was just wondering if a slightly different approach might work. If, as we just voted, everything -- nothing is memorandum if it meets these criteria, including if it contains a concurrence or a dissent, and that's the general rule, if we drop down in 47.5 on concurring and dissenting opinions and add a last sentence in that that says "notwithstanding the foregoing,

an opinion can become a memorandum opinion if so designated by the author of the concurrence or dissent."

That would give the author of the fact-specific case and/or the criminal case that has those, the ability -- the one who would ordinarily be thought of as wanting it to have the higher designation, the ability to as a matter of practice come in and say, "No, it doesn't merit that just because of my concurrence or dissent," pull it back.

MR. GILSTRAP: That's David's proposal, I think.

HONORABLE SARAH DUNCAN: That's David's proposal.

MR. ORSINGER: Sarah is going to the other extreme. Right now if there's a published concurrence or dissent and the dissenter wants to publish it then that forces the majority opinion to be published. Sarah wants the rule to be that the majority controls.

MR. WATSON: I understand.

CHAIRMAN BABCOCK: Right. But -- yeah, Elaine.

PROFESSOR CARLSON: To me there's a difference between the concurrence and the dissenting opinions. If the dissent forms the basis for -- and it does -- potential Supreme Court jurisdiction, it would

seem the litigants could be fairly well harmed by a memorandum opinion that precludes perhaps the higher court getting the full picture.

I mean, does everyone think that concurring and dissenting opinions should be treated on the same playing field? I mean, to me I can see having an obligatory full opinion when there's a dissent unless the dissenting justice agrees not to it.

HONORABLE SARAH DUNCAN: That is precisely the problem that has caused me concern. That's exactly what I'm talking about. Should the fact of a concurring or dissenting opinion force the author to write something other than a memorandum opinion when the author believes it is a memorandum opinion situation.

PROFESSOR CARLSON: Well, that's the judicial perspective, but what about the litigants' perspective?

MR. ORSINGER: Well, and what about the perspective of the law? My point is a little bit different from yours, but I'm concerned about the majority that is not following the law and the dissenter that doesn't agree with that and wants to call attention to that; and if I knew right now that the Texas Supreme Court was going to review memorandum opinions as seriously as they would others then I might not feel so nervous about

this; but one of the criterion here for full-status opinion is not that the majority has failed to follow controlling law.

That's just something we have to trust the dissenter to pick up; and I, frankly, think it's a safeguard of the rule of law if a dissenter can force the majority through a vigorous dissent that requires full opinion status to say, "Explain why the following three Supreme Court cases are being ignored and not even being mentioned in your majority opinion." And so for me that's an important safeguard for the law apart from Elaine's point about the individual litigants.

CHAIRMAN BABCOCK: Mike Hatchell, what do you think about that?

MR. HATCHELL: Well, I agree with Richard, frankly. I get concerned about moving from a do-not-publish to what Bill Dorsaneo calls an opaque opinion, and I'm going to have a comment about some of -- one of the other criteria in a minute from -- but along the same lines, I mean, the body of jurisprudence that we develop in the lower level is extremely important to our ability to get into the Supreme Court and to demonstrate that something is, quote, "important to the jurisprudence of Texas."

And I'm not -- would not for a moment

suggest that, of course, we attempt to manipulate the Supreme Court's ability to hear cases; but I think their own view subjectively in applying these admittedly subjective criteria can influence, you know, what's out there for the Court to review and can seriously impact the ability of the Supreme Court to consider and understand cases that are very important.

CHAIRMAN BABCOCK: Okay. Stephen, do you have a perspective on this? You do a lot of appellate work.

MR. TIPPS: Well, it seems to me that -- pardon me, I've got my mouth full. The real pressure results from the concurring justice or the dissenting justice being able to force the majority to choose between leaving its bare bones opinion as its opinion but not being able to designate it as a memorandum opinion or by writing, forcing the majority to write more and go into greater detail. But, I mean, it seems to me that the real issue is whether or not the concurring or dissenting justice is in a position to force the majority to elaborate more.

CHAIRMAN BABCOCK: Yeah. Sarah.

HONORABLE SARAH DUNCAN: I just have a question. I may be becoming persuaded again, but I have a question. As things stand right now I can write a

memorandum opinion and I can label it a memorandum opinion and if a dissent or concurrence comes in, I have the ability to choose whether to stand on my memorandum opinion as written and the label or change it to a full-blown opinion and flesh out more of the reasoning or respond to the dissent or concurrence or whatever.

CHAIRMAN BABCOCK: Under 47.4 as we now have it?

PROFESSOR DORSANEO: No.

HONORABLE SARAH DUNCAN: No. Under the --

CHAIRMAN BABCOCK: Or under the existing rule?

HONORABLE SARAH DUNCAN: Under the existing rule.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: So my question is, is the view the dissenting or concurring judge should be able to deprive an opinion of memorandum status, which is a change in the way it is now, is that because of the proponents' belief that memorandum status under this rule will be different from memorandum status under the existing rule?

MR. WATSON: Yes.

MR. ORSINGER: I think your premise is wrong. I think a dissenting or concurring justice now can

force publication.

HONORABLE SARAH DUNCAN: They can force publication, but they can't force me to change my majority opinion.

MR. ORSINGER: Well, you don't have to -- you don't ever have to change anything for any reason, if it's your opinion. The only question is whether it's published or not or whether it's memorandum or not.

Right now your poorly written opinion can be forced published, if you write one, or if it's inadequate or whatever, they can force it published now.

HONORABLE SARAH DUNCAN: Right. But they can't force me to change the label from "memorandum opinion" to "opinion."

MR. ORSINGER: Are you writing memorandum opinions now? I mean something called a "memorandum opinion."

HONORABLE SARAH DUNCAN: Yes.

MR. ORSINGER: Okay. Well, I'm just not familiar with that because it's not in the Rules of Appellate Procedure.

HONORABLE SARAH DUNCAN: It is in the Rules of Appellate Procedure.

MR. ORSINGER: A memorandum opinion is?

HONORABLE SARAH DUNCAN: Yes.

MR. ORSINGER: Excuse me. It's nothing I've ever come across.

HONORABLE SARAH DUNCAN: It is and no one can force me to change the label of my opinion from "memorandum opinion" to "opinion." As someone who takes those terms to have meaning.

MR. ORSINGER: The use of that word "memorandum" now I think is different from what it will be under this rule, because under this rule "memorandum" is a secondary category precedent that's of either lesser precedential value or no precedential value.

HONORABLE SARAH DUNCAN: Well, that's true under the existing rule as well.

CHAIRMAN BABCOCK: Okay. We've got this pretty well talked out, so let's -- is Dorsaneo still here?

PROFESSOR DORSANEO: I'm here.

CHAIRMAN BABCOCK: Let's take a vote on leaving (e) right where it is, up or down, and that necessarily -- if you vote for that you will defeat Judge Peeples' concept that it ought to be moved to 47.5 and change it and to make it discretionary with the dissenting or concurring justice.

So how many people want to leave (e) right where it is? Raise your hand.

How many against? By a vote of 12 to 5 the subpart (e) will not stay where it is and will be moved to 47.5.

So now we've got to decide whether we're going to adopt Judge Peeples' proposal, which is to allow a concurring or dissenting opinion, or the author of a concurring or dissenting opinion, the discretion to cause the memorandum opinion to change its title or lose its memorandum status or allow it to retain its memorandum status. Is that a fair --

HONORABLE DAVID PEEPLES: I think so.

CHAIRMAN BABCOCK: -- recitation of what you've got, Judge Peeples? Any further discussion about that? We've talked about it a lot. Bill.

PROFESSOR DORSANEO: Would that be worded something like this: "If a concurring or dissenting opinion is handed down, the author of the opinion may prohibit the opinion from being labeled a memorandum opinion"?

MR. ORSINGER: Well, depends on which opinion you mean.

CHAIRMAN BABCOCK: The majority opinion.

MR. ORSINGER: Well, it ought to say that then.

PROFESSOR DORSANEO: Yeah. The majority

opinion. That's what I mean.

HONORABLE DAVID PEEPLES: There's something about "may prohibit" that I kind of don't like, but I think that gets to the --

PROFESSOR DORSANEO: And my next question would be from -- I don't know how, and if I were writing a rule I would like to give guidance as to how you may do that, you know, may prohibit, you know, by notifying the Chief Justice or some mechanism that a court of appeals justice would suggest is a, you know, sensible one, put that in there.

HONORABLE SARAH DUNCAN: Notifying the clerk.

PROFESSOR DORSANEO: Notifying the clerk?

MR. GILSTRAP: How about "stating it in his concurring or dissenting opinion"?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Okay. Before we get to -- I don't think the details are going to be controversial.

HONORABLE DAVID PEEPLES: Uh-huh.

PROFESSOR DORSANEO: Well, but I -- yeah, they don't get controversial until somebody writes it down.

MR. ORSINGER: Well, we may not even have to

write it if the vote fails.

CHAIRMAN BABCOCK: We're going to write it if it passes. So how many people are in favor of Judge Peeples' proposal?

And we will get language that we will later approve, but just to move things along, how many people are in favor of Judge Peeples' proposal to give the author of a concurring or dissenting opinion the discretion to cause the majority opinion to be labeled memorandum or not? Raise your hand.

And how many opposed? By a vote of 13 to 6 Judge Peeples' proposal is adopted, so we will add language to 47.5 that Judge Peeples and Professor Dorsaneo will come up with over the break, which is going to occur right now.

HONORABLE JAN PATTERSON: And, Bill, you may want to refer to the language in the current 47.5, which talks in terms of "publish."

PROFESSOR DORSANEO: I've looked at it, and I don't think it's useful language.

HONORABLE JAN PATTERSON: Well, it works.

MR. ORSINGER: Just say "an opinion must not be labeled."

CHAIRMAN BABCOCK: Get with Judge Peeples about that.

(Recess from 10:21 a.m. to 10:37 a.m.)

CHAIRMAN BABCOCK: Okay. We are back on the record, and Judge Peeples has got language for us in connection with Professor Dorsaneo. So, lay it on us.

HONORABLE DAVID PEEPLES: Yeah, I've got some language, and the preface is the Supreme Court can always clean up what we have done, as they did in the discovery rules.

Okay. Richard Orsinger and Bill Dorsaneo proposed this language, and I think we want it to go at the end of 47.4, not as a new sub (e) but as just a new sentence.

CHAIRMAN BABCOCK: All right.

HONORABLE DAVID PEEPLES: It would say, "An opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation."

CHAIRMAN BABCOCK: Read it one more time, please.

HONORABLE DAVID PEEPLES: You want to say "a majority opinion," Bill, Richard?

MR. ORSINGER: That would be okay, but --

HONORABLE DAVID PEEPLES: We mean "A majority opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes

that designation."

MR. ORSINGER: The only irregularity would be if you have three opinions, and so --

HONORABLE DAVID PEEPLES: I think it gets it done if we just say, "An opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation. And we thought designated was a better word than "labeled," which would mean that on the fourth line of 47.4 we would say change "labeled" to "designated."

HONORABLE JAN PATTERSON: Good change.

PROFESSOR DORSANEO: I would rather it said "majority opinion." I don't think you're going to run into too many issues. I think it creates more problems to say "opinion."

MR. ORSINGER: What happens when you have three opinions, because that does happen, Bill? Then there's no rule.

PROFESSOR DORSANEO: We'll wait and see.

HONORABLE DAVID PEEPLES: But, Richard, all we're talking about is the designation "memorandum" or not. Let's leave something out there for people to fight about.

CHAIRMAN BABCOCK: Justice McClure.

HONORABLE ANN McCLURE: Was the decision to

use "may" language rather than "shall" language deliberate, and if so, why?

HONORABLE DAVID PEEPLES: Well, in this context "may" --

HONORABLE ANN McCLURE: "May" means "shall"?

HONORABLE DAVID PEEPLES: -- gets the job done.

PROFESSOR DORSANEO: It was conscious. Maybe we could say that "The court's opinion may not be designated as a memorandum opinion." Does that help, Richard?

MR. ORSINGER: Yes. But, Ann, do you feel like that "may" somehow makes it unenforceable?

HONORABLE ANN McCLURE: I was just concerned whether out of the deference to Sarah's comments that would remove some of the power from the dissenting judge.

MR. ORSINGER: We are intending that the dissenting judge controls, and the language needs to make that clear.

CHAIRMAN BABCOCK: So "must" would be a better word, "must not"?

HONORABLE DAVID PEEPLES: I think when you have got a negative like this it's mandatory, isn't it? "May not be."

CHAIRMAN BABCOCK: Okay. That's right.

Stephen.

MR. TIPPS: I have an observation. It's not a recommendation, but the observation is that in the rule otherwise the distinction that we're drawing between full-blown opinions, or whatever word we use to characterize longer opinions, and memorandum opinions is not a distinction based upon designation, but it's a distinction based upon substance. But that's the old distinction in 47.1, that the court must hand down a written opinion that addresses all the issues, but if the issues are settled it should write a brief memorandum opinion.

What we're now doing with this proposed change is changing the name of something that remains in substance, I suppose, a brief memorandum opinion; and I'm not really sure what we understand the consequences of that to be. If all opinions are citable, whether they're full-blown or shorter, what are we intending to accomplish by giving the dissent the power to cause the majority to call its opinion something different from what it would prefer to call it? I mean, are we assuming that if the majority calls it "memorandum opinion" that it really doesn't carry as much weight, necessarily? I just don't know.

CHAIRMAN BABCOCK: I think that is an

assumption that a lot of people have. It may not prove true in reality, but I think that's what everybody is assuming. Sarah.

HONORABLE SARAH DUNCAN: I echo Stephen's comments. Also, in response to Richard's question, it doesn't help to call it "the court's opinion" because if there are three opinions there is no opinion of the court. That's -- and not infrequently it will happen that there will be a majority opinion at first and a dissenting opinion and the person who hasn't written yet will write a concurring opinion to prevent what was the majority opinion from being an opinion of the court.

MR. ORSINGER: Okay. So in that event there is no lead opinion, quote-unquote?

HONORABLE SARAH DUNCAN: That's right. There is no majority opinion, and there is no opinion of the court. So if you're one of the those people who thinks that the court's opinions bind you, there is no opinion of the court in that case and no one is bound on that court or otherwise.

HONORABLE DAVID PEEPLES: If that happens, isn't that case flagged for everybody to read and to notice as an unusual, interesting, you know, must-read opinion?

CHAIRMAN BABCOCK: Yeah. Elaine.

PROFESSOR CARLSON: Judge Peeples, can I ask you a question? Is your proposal not that every concurring or dissenting opinion be published unless the dissenting or concurring justice doesn't object to the memorandum? You're taking the opposite approach. Do I understand that right?

HONORABLE DAVID PEEPLES: I'm giving the dissenting justice the right to say, "The memorandum label shouldn't be on this opinion." Or concurring.

PROFESSOR CARLSON: So opinions that contain dissenting or concurring opinions under your proposal are not required to be published unless the dissenter or concurring judge insists.

CHAIRMAN BABCOCK: You didn't mean to say "published." You meant --

PROFESSOR CARLSON: I know.

MR. ORSINGER: Yes, that's correct.

HONORABLE DAVID PEEPLES: Or the majority.

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

MR. TIPPS: So are we saying then that the dissenting judge is being given the power to cause the majority opinion that the majority wants to call a memorandum opinion to carry more weight by insisting that it not be designated as a memorandum opinion even though

he dissents from it?

MR. ORSINGER: Yes.

HONORABLE SARAH DUNCAN: Yep.

MR. TIPPS: What would be the point of that?

MR. ORSINGER: The point of that is exactly what all of our concern is, that justices will do things in memorandum opinions that they're not going to do in full-fledged opinions; and that's an important role of dissent; and, in fact, that's the whole philosophy behind requiring opinions on appellate courts. When you are required to articulate the basis for your decision and defend it against intellectual criticism it forces intellectual honesty. That's my knothole of it.

MR. TIPPS: So is our thinking then that by giving the dissenter this right to force or to prohibit the majority from calling its opinion a memorandum opinion that what, in fact, will happen is that the majority will not want to have this bare bones kind of opinion and will, in fact, take the next step and articulate its reasons and respond to the dissent? I mean, I can see that to be a --

MR. ORSINGER: I believe that will happen.

MR. TIPPS: If that's the objective, that would be a worthwhile thing to try to accomplish.

MR. ORSINGER: That's driving my support for this proposal.

CHAIRMAN BABCOCK: Okay. Here's the proposal. We're going to change the word in the introductory paragraph to 47.4 "label" to "designated" so that the sentence will read, "An opinion must be designated a memorandum opinion unless it does any of the following." That's one change.

And the second change is, "An opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation." Now, the only thing we're voting on is whether or not the language is okay because we've already taken a prior vote to say we're going to have something. So this is a vote on whether that language is acceptable to us or not. Everybody who thinks that language is acceptable?

PROFESSOR DORSANEO: Could you read it again, please?

CHAIRMAN BABCOCK: Sure. Change "label" to "designated" in the introductory paragraph, and the sentence at the end after (d), "An opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation." So everybody that thinks that language change is acceptable raise your hand.

Everybody opposed? 18 to -- anybody got their hand up over there? 18 to 1 it passes.

PROFESSOR DORSANEO: Chris, do you have that language?

MR. GRIESEL: Yes, sir.

CHAIRMAN BABCOCK: Okay. So we got through that. Anything else in 47 -- in Rule 47 that we need to discuss?

PROFESSOR DORSANEO: Well, we didn't -- well, I was going to say we didn't vote on the whole thing.

CHAIRMAN BABCOCK: I know.

MR. ORSINGER: Let me point out in passing that 47.6 provides that the court en banc can undo what we just decided, so everyone just needs to understand that the sin can be squelched by the entire court en banc.

MR. GILSTRAP: We can change that, too. We can change that, too.

CHAIRMAN BABCOCK: Mike.

MR. HATCHELL: Did you ask if we had anything more on 47?

CHAIRMAN BABCOCK: Yeah.

MR. HATCHELL: I do. I'd like to call attention to 47.4(b). I think when you move from a do-not-publish attitude that you simply deprive something of authority to the quality of an opinion that (b) is -- to me doesn't do anything, and I am very concerned that

because we have so many cases or types of cases on which the Supreme Court does not have jurisdiction except in conflict situations and because the Court is very concerned about deciding only issues that are important to the jurisprudence of Texas, that we ought to encourage courts of appeals to write a full-blown, fully legally analyzed opinion.

If it involves a matter of important constitutional principle or a matter important to the jurisprudence of Texas, just saying it involves a legal issue of continuing public interest seems to me, number one, where Scott's concerns -- I mean, I'm sure it's probably a matter of continuing legal or continuing public interest as to whether or not people can appeal when their probation is revoked, and I'm also of the view that the public has a curio interest in things that are not extremely important in law.

I would change 47(b) to read as follows: "Involves issues of constitutional law or other legal issues important to the jurisprudence of Texas."

CHAIRMAN BABCOCK: Okay.

MR. HATCHELL: Justice Hecht wrote an opinion not too long ago in which he, I think, may have uncovered -- it was a dissenting opinion from the denial of jurisdiction in an interlocutory appeal in which it

appears that there may be a scholarly debate for it as to whether or not they have jurisdiction unless they have a specific holding in a case that conflicts with another holding. If these opinions get so abstract that they are meaningful only to the parties, you know, involved in the cases, I'm concerned that we will develop an entire body of jurisprudence that is extremely important to the jurisprudence of Texas but the Court cannot hear. Look how long it took us to get anything meaningful on class actions, for example. Okay.

CHAIRMAN BABCOCK: You want to read your language again?

MR. HATCHELL: I would change (b) to read "involves issues of constitutional law or other legal issues important to the jurisprudence of Texas."

HONORABLE SCOTT BRISTER: Every criminal case, of course, has involved some constitutional --

HONORABLE JAN PATTERSON: Yeah. That's --

MR. HATCHELL: And it falls under (b) now.

HONORABLE ANN McCLURE: Well, I'm not sure I agree with that. But I agree with Scott that in every criminal case there are constitutional implications and every time that I read a brief filed on behalf of the defendant appellant, they're going to claim that the harm analysis is one of constitutional dimension and it --

perhaps, if you want to divide it into civil and criminal that would rectify the problem because I'm not saying your concerns are unfounded, Mike. I think they are very valid comments. I'm concerned about requiring a full-blown opinion in every criminal case if we adopt your language.

MR. ORSINGER: Well, what if you said "unsettled constitutional law"? Because if this is the 55th plea appeal from a guilty plea and well-established under the Texas Constitution that that's okay --

HONORABLE ANN McCLURE: That would solve a lot of it.

MR. ORSINGER: Would that still do your work, Mike?

HONORABLE SCOTT BRISTER: Depends on, you know, is it settled when the U.S. Supreme Court rules on it or the Court of Criminal Appeals? I mean --

MR. ORSINGER: Well, the Federal issue isn't settled until the U.S. Supreme Court rules, but the state issue is settled by the Court of Criminal Appeals.

HONORABLE SCOTT BRISTER: Right, but Court of Criminal Appeals is discretionary. They don't take everything, and some things may appear easy to us, and we've decided literally 50 times on the first court of appeals. Do we have to keep publishing the same thing over and over until the Court of Criminal Appeals finally

takes jurisdiction? Surely not.

HONORABLE JAN PATTERSON: All of these are good reasons why it should be "should" and not "must."

CHAIRMAN BABCOCK: Any --

MR. ORSINGER: I would like to -- I'm still thinking Mike's proposal through, but I do think that the public interest angle was more important when we had unpublished opinions that were not available to the public; and now that they're all going to be available to the public, I think that de-emphasizes the importance of the public finding out about them and leaves us still with the concern about the courts of last resort finding out about them or having them in the category of cases that they take more seriously, and so I like Mike's proposal, but I don't want every appeal from a guilty plea to have to be a nonmemorandum opinion.

CHAIRMAN BABCOCK: You want to read your language again as amended, Mike?

MR. HATCHELL: "Involves issues of constitutional law or other legal issues important to the jurisprudence of Texas."

MR. WATSON: Mike, why did you say "constitutional law" there?

MR. HATCHELL: Let me give you an example. We have a developing body of law in special appearance

cases which are tossed off in two or three-line opinions by courts of appeals which involve issues of extremely important constitutional law and specific and general jurisdiction in the exercise of in persona jurisdiction over foreign defendants.

That's just an example of the kind of thing we're getting. I'm -- well, I don't want to talk about cases. You can find cases that dispose of special appearance cases in two or three lines. We can't get in the Supreme Court unless we can show a conflict, and apparently it's difficult to show a conflict unless you have a fully fleshed out opinion.

PROFESSOR DORSANEO: Right.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: What if, Mike, we said, "legal issues important to the jurisprudence of Texas, including issues of constitutional law"?

MR. HATCHELL: Well, I had it worded that way originally, kind of. You can take out "constitutional" if you want to. Candidly, in my view, constitutional issues are now under (b). I cannot believe you would say that the public does not have a continuing interest in our court of appeals' resolution of issues of constitutional law. I just can't believe that.

HONORABLE SARAH DUNCAN: Well, but, I mean,

I agree with Ann's statements that as you have worded it we would be required to publish a full-blown opinion, hand down a full-blown opinion, in virtually -- in every criminal case I think at all, either because of harm analysis or can you appeal the voluntariness of the plea or whatever it is. If you put -- if you put it in terms of, one, it must be important to the jurisprudence of the state and that will include constitutional issues, then we can say what we do in guilty plea cases when they're appealing voluntariness with a general notice of appeal, "That's no longer important to the jurisprudence of the state because the Court of Criminal Appeals has decided it."

HONORABLE ANN McCLURE: Right.

HONORABLE SARAH DUNCAN: So even though it's a constitutional issue, it doesn't rise to the level of something that's important to the jurisprudence of the state.

MR. HATCHELL: Well, the first time I wrote this I didn't have the word "constitutional" in there, but I don't understand why if that's a core of something that the court ought not write on it certainly.

HONORABLE ANN McCLURE: Well, it's well-settled, Mike. I mean, if the United States Supreme Court has addressed the issue specifically, it isn't

something that we would have published under the old rules or that we might consider to be an exception to the memorandum opinion under the new rules, because it's quite well settled.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Mike, by tweaking the language here are you hoping to cause appellate justices to write more thorough opinions?

MR. HATCHELL: Uh-huh. Yes.

HONORABLE DAVID PEEPLES: Do the appellate judges think that that will happen? In other words, by changing the criteria for the designation you're going to get a different kind of opinion, ever? I mean, I'd like to know. I wouldn't think so, but I'm interested in whether that's a valid premise on your part.

HONORABLE SCOTT BRISTER: Well, yeah. I mean --

HONORABLE DAVID PEEPLES: You think so?

HONORABLE SCOTT BRISTER: To me a memorandum opinion doesn't have two pages of facts in it because the parties know the facts and this is just a memorandum opinion. "Based on these facts this is why you win or lose." I don't know that everybody sees that --

PROFESSOR DORSANEO: I wish Justice Hecht was here, but, you know, I would anticipate that judging

schools or in the process of working this out that a style of memorandum opinion, you know, becomes prevalent and that that's going to look different from a longer opinion. Whether that ever happens, who knows. We don't have crystal balls, but there is a way to write a memorandum opinion that's well-recognized across the country or in at least different, you know, circuit courts of appeals and that looks very different from a full-scale opinion.

CHAIRMAN BABCOCK: Judge Patterson, then Judge Duncan.

HONORABLE JAN PATTERSON: (a) through (d) is the wording that is in the current rule, so to the extent that we alter that wording, it's going to take on a new significance, and I don't think our intention is to change the current practice in that regard or that it needs changing in that regard. So I would urge that we maintain the language of the old rule unless there is truly some significance that we want to change the law on.

CHAIRMAN BABCOCK: Okay. Judge Duncan and then Steve Tipps.

HONORABLE SARAH DUNCAN: I like the proposed change. I think "continuing public interest" loses a lot of meaning, to the extent it ever had any, with the requirement that all opinions be, quote-unquote, published. The cases that you're talking about, Mike,

were those published opinions by and large?

MR. HATCHELL: Huh-uh. No.

HONORABLE SARAH DUNCAN: No. All right. I think that this might get those cases in an opinion that's labeled "opinion" rather than "memorandum opinion," but the lack of reasoning in opinions is -- I mean, it's rampant throughout the last 200 volumes of SOUTHWEST 2D and 3D, and I don't think you're going to change that by changing the label of the opinion. But I still -- I support the change.

CHAIRMAN BABCOCK: Stephen Tipps.

MR. TIPPS: I agree with Judge Patterson that we ought to be careful about changing the existing language that has developed some meaning, unless there is good reason to do so, and maybe I'm missing something, but it also seems to me that adding language "important to the jurisprudence of the state" is really not all that different from what we currently have in 47.4(b) and that by eliminating the "resolving apparent conflicts" it may well be that we are limiting or reducing the number of reasons for a full-blown opinion rather than increasing them.

CHAIRMAN BABCOCK: Okay. Everybody who is in favor of deleting the language in 47.4(b) and replacing it with "involves issues of importance to the

jurisprudence of Texas, including issues of constitutional law," raise your hand.

And all opposed raise your hand. It passes by a vote of 10 to 6.

That's a very small fraction of our committee to pass a change like that.

PROFESSOR CARLSON: But it's the quality.

CHAIRMAN BABCOCK: Yeah, but the quality.

HONORABLE SARAH DUNCAN: There is general laughter.

CHAIRMAN BABCOCK: Definitely high quality.

MR. ORSINGER: The record should probably reflect that most of our appellate rules have been voted on a small minority of this committee.

CHAIRMAN BABCOCK: Okay. 10 to 6 it passes. Stephen. Not Stephen. I'm sorry. Skip.

MR. WATSON: I just was wanting to ask Mike a quick question. Is there no way that the judges' concerns about having to write on all constitutional issues including criminal cases could be addressed by some change in some modification of the term "constitutional questions or issues" in your proposal or in what we have adopted?

I mean, it strikes me that saying, you know, "unsettled constitutional questions" or something like

that is going to solve their problem but not yours, because no one is writing two sentences if they think it's unsettled.

MR. HATCHELL: I personally don't mind that, but I think that the tweak that Sarah gave solved that problem.

MR. ORSINGER: See, as it is written right now, it's not important to the jurisprudence of the state if it's well-settled.

MR. HATCHELL: Right.

MR. ORSINGER: And so by saying that it has to be important to the jurisprudence, including constitutional issues, by definition the established constitutional questions are not important anymore, are they?

CHAIRMAN BABCOCK: Okay. Do we have anything else on Rule 47, and if we do, I think I may defer it because we have a guest who is waiting to address us, who has been sitting here patiently. Yeah, Frank.

MR. GILSTRAP: Let me just add one note, just for the record, lest someone say that this committee was not fully informed. If you will recall, the ball began rolling with the Anastasoff opinion out of the Eighth Circuit. I don't have any illusions that that's what's causing the ball to roll now. There's other

factors at work, but just so everyone will know, Anastasoff has been vacated as moot, and possibly the constitutional dimension is now off the Federal courts' radar screen. Just a note.

CHAIRMAN BABCOCK: And the mootness was caused by settlement.

MR. GILSTRAP: The mootness -- no, the mootness -- see, the beautiful thing about Anastasoff was not only did it have the published versus unpublished, it had a conflict among the circuits on an issue of substantive law, a tax law issue. Unfortunately the IRS changed its mind and agreed with Mrs. Anastasoff; so that removed the controversy; and Judge Arnold, who wrote the panel opinion, now has written an en banc opinion saying it's vacated and the issue is now an open question in the Eighth Circuit.

CHAIRMAN BABCOCK: Okay. That's great. Okay. Anybody else got anything on 47? Yes?

HONORABLE SARAH DUNCAN: I know Bill has one point. I would also like to revisit Judge Brister's point about what we're really doing here.

CHAIRMAN BABCOCK: Okay. We've got more work to do on Rule 47 then.

PROFESSOR DORSANEO: The committee's last point is Justice Hecht asked us to provide guidance to the

Court on whether the rule should be retroactive, such that, you know, previously unpublished or opinions designated not for publication since 1986, at least, would be --

CHAIRMAN BABCOCK: Fair game.

PROFESSOR DORSANEO: -- fair game if you could find them.

CHAIRMAN BABCOCK: Yeah. That's going to take a little bit of time, I'm afraid.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: And we've got 45 minutes, and Rick Keeney from Professional Civil Process is here to add some input for us on a rule that Richard Orsinger is going to report on, so I think if it's all right -- Bill, if it's all right with you, out of deference to our guest to make him not have to sit around for -- I'm amazed he's been so patient to sit while we're talking about Rule 47.

So, Richard, why don't we move to Rule 103, and I believe there was a packet handed out this morning on that; is that correct?

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: It says "Rules 103/536 information packet." It relates to private service of process; and it involves the fact that there is no uniform

standard or requirement for who can serve process; and, therefore, the individual counties have adopted rules that were satisfactory to them in their local practice and they're different; and so anyone who's serving outside of one county has to meet criteria of a number of different counties; and the thought being proposed here is to find a uniform or to establish a uniform qualification and bonding requirement and criminal investigative background requirement; and included in the material here are some of the different counties' requirements that exist now in Texas.

There are many that are not included, and then there's an Arizona rule that's uniform, and so maybe what we ought to do is have Rick give a presentation of what the philosophy is behind this and see what discussion we have. This is Rick Keeney, by the way.

MR. KEENEY: Hi. My name is Rick Keeney, and I'm currently president of Professional Civil Process of Texas here in Austin. I first want to thank Mr. Hecht -- I know he's not here -- and the committee for allowing me to come and speak to you-all.

I currently have 15 offices across the state. My biggest client is actually the Attorney General, and we just got awarded another four-year contract as I was actually headed up here this morning, so

we serve a lot of process, and we're probably the most experienced in regards of having to meet the different county requirements, and what I wanted to do is basically just bring you-all up to date on what we have to do currently.

If you'll look in your packet, I didn't actually put this packet in this order, but there's an actual copy of a standing order in Angelina County. Out of the 254 counties in Texas about 64 of the counties currently have standing orders, and what that means basically is that each one of those 64 counties have got together with their presiding judge and the district clerk and they have come up with some type of requirement to meet what the Supreme Court did under Rule 103. The requirements start from either, A, you being over the age of 18 and printing your name on an application, all the way to the most restricted and probably well-written order, and that's the one in Bexar County, to where in Bexar County you actually have to go have a criminal history background check run on you.

You have to put up an errands and omissions general liability bond, and they are the only county out of all 254 that actually do a good job of keeping track of when your orders expire. They have a licensing procedure. They actually sent their procedure to the Supreme Court

and got the Supreme Court to sign off on it, blessing that procedure that they have.

What I've tried to do is actually go and get what all the counties require and put under one licensing procedure to where these requirements would at least meet every standard of every county. A problem I had about three years ago is we hired an individual in Odessa to serve papers for us. He was already serving up there. We actually run our people's criminal history checks on them, so actually when he was serving for somebody else when he came to work for us we ran this criminal history background check, only because our company requires that, and he had a child molestation charge on him eight months prior in California.

So what happened is, of course, we didn't hire him, but the problem is like California, Arizona, they have strict licensing. They have strict procedures of who can serve process. So that raised the question out there of how many process servers -- there's about 1500 of us, private, across the state of Texas that are out there knocking on yours doors, coming to your house and serving papers. There's only six counties out of the 254 right now that require criminal history background checks. That means every other county there could be felons, people with felony convictions out there running around serving

papers.

So one thing we were hoping that the Court would address, since its's been put on the county right now and there's only five or six, we were hoping that we could standardize the criminal history background check to make that mandatory.

The other thing out there is there is no protection for the public. If a process server goes out there and does something, hurts somebody, anything, there's no protection required right now as mandatory. There's three counties right now that do require general liability insurance. I went and met with the Texas Department of Licensing and sat down with them for several hours, and they look at us as similar to air-conditioning people. The air-conditioning people that come and work on your house, they have to carry a 300,000-dollar general liability policy.

So they thought if they actually licensed us that's what they would require. They would require every person out there with a general liability policy in the event that that process server is out there, hurts somebody, got into some altercation with someone or actually maybe even ran into somebody, a child or something, in their vehicle in a driveway; but things could happen out there. There is no protection for the

public. So the criminal history background check and the actual general liability we think are two minimum requirements that process servers should have.

The other thing was actually the training and the education. Should process servers know what they're doing or should they not? There's currently only three counties that actually require any type of education as far as what the laws are, when can you serve papers or certain days that you can't serve papers on. There's all kinds of laws that pertain to service of civil process, so in this particular proposal we suggest at least a seven-hour education, at least seven hours of training civil process servers on what they're doing.

If you look at the actual -- the only thing that we have not been able to decide, which we would leave up to you-all if you-all decide that the rules need to be changed, is who actually would police, who actually would supervise, if that would be left up to the local presiding judges for the hearing process or if the Supreme Court would actually create some type of body or agency or something that could do that. So that's something that would be left up to you-all.

But the fact of the matter is under the current plan right now, there's -- it doesn't work, and I'm just going to give you one example. About six months

ago in Harris County, their county now requires you to come to their county for testing. They only had two days -- they gave you two days to be able to do it. Both of those days was on a Friday during the day. You had to be there, otherwise you couldn't serve process out of Harris County.

Well, I have 15 offices across the state of Texas. I had two days to send all of my process servers down there. I had to fly people from El Paso, from Amarillo. We had to shut down our office. Literally our offices basically had to be shut down. We couldn't handle service of process for our attorneys because we had to -- they had to be at seminars in Harris County to go through their training at their set date, at their set time.

So there has to be a better way than what the current system is; and in terms of cost to the state of Texas right now, Harris County did a study and came out that every order that had to be filed because there's -- out of the 64 standing orders the courts also authorize Rule 103 service in addition to that. The judges still have that authority. Every 103 order that has to be processed costs the county about $15 to process that order because they have to microfilm the order, they have to process, the clerk has to spend this money, eventually coming to taxpayers. So if you add all the thousands of

papers that's being served and all the 103's that's having to be processed and take the savings of that money, there's a lot of money there that could be saved without those Rule 103's.

The clerks that are licensing process servers right now, the district clerks that are currently doing it in the 64 counties, are not being paid really to do that. There's no fees imposed other than three counties, and they impose a fee that's maybe $25 or $50 a year. So private process servers aren't really paying our fair share of the fee to cover the cost of administrating us, other than the fact that we're spending money on airfare and different things like this to get to these places where we would much rather take that money and spend 150 or $200 a year or some fee that would cover the cost to administer us, and right now under the current system the money is really not going where it needs to go.

So if you look at the rule, the proposed rule, we think that the proposed rule would fix a lot of this, still giving -- not taking away anything from the judges. The judges would still have the right to appoint that one person that's off -- to still appoint one person authorized by Rule 103, but there has to be some standardization to where a process server could actually meet one set qualification and then they actually be

licensed statewide.

And the other example I'll give you, currently right now in every -- about every six months another district clerk says, "Okay, we're going to license you and you have to do this." So what happens is they send you these little ID cards, which I've got now four of them, and eventually I could have 254 of these little license and ID cards. To get an idea, if you think about driving from Austin, Texas, to Houston and if you had to drive from Austin to Houston and every county that you had to go into you had to go to that driver's license office and get a driver's license to drive in that county, that's what we're having to do right now. Because even though I'm a process server in Travis County, just serving papers here in Travis County I have to be licensed in every 254 counties just to be able to serve that paper here in Travis County. So if a paper is filed in Harris County to be served in Travis County to the Secretary of State, I have to fly to Harris County, take that test on the Friday, and it's only given every six months.

HONORABLE SCOTT BRISTER: That's not true. We have given it four times in the last six months, and the last one I did was three weeks ago on a Saturday.

MR. KEENEY: Okay. Prior to that one, though, it was six months before -- prior to the last one

that was given.

HONORABLE SCOTT BRISTER: Well, I've given the speech four times in the last six months.

MR. KEENEY: Well, six months prior to that we couldn't hire any additional servers out of Harris County because we have to wait now for another -- whenever the other hearing is going to be, and then it takes two months to actually process the order, to actually get your order after you took the test.

I'm just saying the system needs to be fixed because right now it is -- it does not work. It just doesn't work. It's too much of a burden on the servers. It ultimately gets back to the attorneys, because we can't handle the attorneys' work fast enough, and the system needs to be fixed.

And I'll answer any questions that anybody has.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: What's the requirement federally? If you're serving papers in Federal court are you required to be licensed?

MR. KEENEY: No. Currently right now under the Federal law the attorney would have -- well, used to -- right now, actually, it's anybody over the age of 18, a disinterested party, can serve process in Federal court.

Used to, when this rule was changed, when Luke Soules was I think chairman of the committee that was working on this rule way back then, the rule was changed to try to model after the Federal rule, allowing the attorney to just appoint somebody, a process server. Then it was filed as record of the court, and then all the -- I think the counties just took it upon themselves to come up -- a lot of the counties still require a motion, which the rule specifically says is not required, so I think every county just sort of took it and did how they wanted to handle it.

The Federal rule right now, anybody over the age of 18 that's disinterested can serve process.

PROFESSOR CARLSON: And has there been abuses in that? Do we have child molesters serving Federal papers?

MR. KEENEY: Yes, ma'am.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: In Federal court can't the attorneys serve the summons and complaint by certified mail?

MR. KEENEY: I believe they can send it by certified mail, but there has to be an acknowledgement form that has to be signed by that person and then sent back to them and then they have good service.

CHAIRMAN BABCOCK: I think that's right. You've got to get consent.

MR. DUGGINS: Consent from?

CHAIRMAN BABCOCK: From the person being served. They have to fill out a form and say, "Yeah, you can serve this this way," but, otherwise, you've got to send somebody out there. Isn't that the way it works?

MR. GRIESEL: That's right.

CHAIRMAN BABCOCK: Bonnie, do you have any experience or thoughts or comments or questions?

MS. WOLBRUECK: Only in the proposed order here I have several questions about it, if we get into that aspect of it.

CHAIRMAN BABCOCK: Okay. Richard, the order in the package here, is that -- what's the source of that?

MR. ORSINGER: It was proposed from Rick.

MR. KEENEY: All this is is a proposed order.

MR. ORSINGER: Can I make a couple of broad observations?

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: What the problem here is, is that we need statewide licensing if we're going to take this seriously, but only the Legislature can do that. They're the ones that have to impose a legal requirement

and make it illegal to serve without a license. They also have the ability to appropriate the money to hire the employees to run the licensing bureaucracy; and so this is an effort -- since you can't get unanimity among the counties, this is an effort to go to some other authority of last resort, i.e., the Supreme Court, and use their rule-making authority rather than legislative authority to establish uniform standards and then the mandate that all of the courts across the state will follow them.

And I will tell you, Rick, that there is in my estimation zero prospect that the Supreme Court would appropriate money or get the people together to operate some kind of statewide review. I don't think the judiciary has enough time paying for its judges and its stuff to adjudicate the cases; but it's conceivable that some kind of uniform standard could be promulgated; but it would, I think, be up to the individual counties to implement it. And so if we work on this and come up with what we think is good uniform standards, if the Supreme Court likes it, it has to be done in such a way that the counties are going to put the manpower behind it.

Even if the Supreme Court wouldn't adopt it, it's still possible that you could come up with a really good set of uniform rules and then go around and do a sales pitch to the district judges in all the counties,

and I know that that's a big nightmare, but that might be a place for you to go. But in the last analysis, what you really need is licensure and an appropriation from the budgets.

MR. KEENEY: If we looked at the attached Arizona, Supreme Court of Arizona, if we just sort of glanced at that and looked at section (e) there, this is on page five in the packet here. What Arizona did, Arizona went through exactly what we're going through right now, and they are -- process server association in Arizona went to their Supreme Court, went through the hearing process, went through all this, and basically what they did is what's in this package.

The Arizona Supreme Court -- and that's what I modeled this procedure that I just gave you-all after. Everything is modeled after Arizona. Instead of reinventing the wheel, we went out there and did some research of the same problem that was happening in Arizona. Their Supreme Court added in their rule this statewide registration of private process servers, and they added this little section in there. They prepared the guidelines of what a process servers -- the guidelines are. They actually prepared the actual application form and then they set the presiding judge or his designee in that county to be the person that would handle any

complaints or discipline procedures and things like that; and what I was hoping is since Arizona has been doing this since 1991 and they have had excellent success at it, I was hoping that we could use Arizona as a model and maybe do something similar.

Currently as we speak, the district clerks and the district judges are having to be involved in this process anyway, but they're having to be involved in the process on a statewide basis. Like in Harris County, they license probably 380 or a little bit -- they are licensing everybody in the whole state; whereas, if something like this passed, they would only have to license the servers in Harris County, which maybe is a hundred people or 150 people. So you've got each county duplicating licensing trying to keep up with everybody.

Under this system they are only having to license the people in their own area, their own county, cutting down on all this duplication. Also, the expense of the people having to go to all these different places, the process servers, to meet all these different requirements that they have to do.

So I think there is a simple solution if we look at Arizona and just sort of modeled it after what Arizona has gone through.

CHAIRMAN BABCOCK: Richard, the Court has

referred this issue to us formally.

MR. ORSINGER: Well, we'd be happy to, at my subcommittee level, undertake this. I do think that it would be sensible for us to get input from individual county court clerks --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- and district court clerks and some judges, because the Supreme Court is going to be sensitive to stepping in and forcing procedures on counties where they have -- like, for example, I know Bexar County is very committed to its standards. They want $300,000 worth of insurance and they want to be sure that felons are not doing this; and I might point out as an aside, it's not just child abuse that's a problem, but when a private process server signs a return and it gets filed, it creates a legal presumption that a person was delivered paperwork saying that they were sued; and if they don't file an answer and a default judgment is taken and a motion for new trial is filed then you have a swearing match between the defendant who says, "I never knew about the lawsuit" and the process server who's already signed the certificate saying that they did; and if we have unethical or illegal, dishonest people doing that then you have an abuse of the legal system.

And so I strongly support that we should,

you know, protect our legal system in this way; but, you know, we can look at this and we can analyze it; and Bonnie's, I think, on my committee, so we can --

CHAIRMAN BABCOCK: Bonnie is on the subcommittee, so what I'd like to see happen is give this a good, hard study and come back in -- September is our next meeting, I think. And if that gives you enough time.

MR. ORSINGER: I think it does. But I think we also ought to go out beyond our subcommittee and talk to some court clerks.

CHAIRMAN BABCOCK: Yeah. You always have the option of doing that, and I'd like you to do that. Justice McClure, I know you're leaving. I was trying to shut Orsinger up before you did.

HONORABLE TOM LAWRENCE: Can I comment on this before we leave?

CHAIRMAN BABCOCK: Well, we're going to let Justice McClure -- could you just fill us in real quickly about --

HONORABLE ANN McCLURE: Yes.

CHAIRMAN BABCOCK: -- the parental notification rules?

HONORABLE ANN McCLURE: Yes. I'm sorry I have to leave. I am chair of the appellate section of the State Bar, and I have to go conduct our council meeting at

our annual meeting at the Bar convention.

I have been asked by the Supreme Court to reconstitute the subcommittee on the parental notification rules. All of those letters and inquiries have been sent out. Everyone on the prior committee was invited to continue their participation. All but one have responded that they will do so. The last one has not said she won't. She just hasn't responded yet, and I anticipate that she will continue. We have added one additional person, a representative of Jane's Due Process, which is the author of one of the letters that you have already received.

As soon as we can coordinate everybody's schedules we anticipate meeting in July or August, and we will have a report ready for you at the September meeting. Okay?

CHAIRMAN BABCOCK: Okay. Thank you. Judge Lawrence.

HONORABLE TOM LAWRENCE: Richard, when you are looking at the order, I notice in looking at the order it talk in terms of the district judge. I'm not sure if it's contemplated that a district judge will issue the permit license that will apply to the county courts and the justice of the peace courts, but however it's done, we need to make allowances for all three levels of trial

courts, and I would prefer that it be one list, and I don't have any preference as to who generates the list or where the fee is paid. You have got Rule 103 and then 536 that applies to the JP courts. I think it would be better for the administration of justice if you had one list that all three were drawing on.

MR. ORSINGER: Would you be willing to work with our subcommittee --

HONORABLE TOM LAWRENCE: Sure.

MR. ORSINGER: -- on this particular project? Okay. Then we will include you on that, and I would ask if you could get this to me in electronic form so I can e-mail it, I'd appreciate it.

MR. KEENEY: Sure.

HONORABLE SCOTT BRISTER: Can I ask to serve on that -- you copy me on this subcommittee? I've got an interest in this, Richard.

CHAIRMAN BABCOCK: Having to give a speech on Saturday.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: One informational question. Was there any attempt to do anything about this in the last legislative session?

MR. KEENEY: Not in the last. In the four

prior.

MR. GILSTRAP: The four prior?

MR. KEENEY: Yeah.

HONORABLE SCOTT BRISTER: The debate here is there's an argument this is just like a certificate of service. You don't need a license. You don't need anything. The reason we went to this was because there were two few constables and it was taking too long to get this stuff out. Think about it. You can get defaulted if your secretary signs a certificate of service that doesn't really serve either. So there's kind of a -- I mean, how much do you want this to cost and how much of a licensing system do you want versus how much of a problem really is there that -- I mean, the fact of the matter is if a child molester is serving these on grown-ups who answer, is that a big problem? I mean, there's -- you know, I'm against child molesting as much as anybody, but --

CHAIRMAN BABCOCK: Let the record reflect.

HONORABLE SCOTT BRISTER: Yeah. We're talking about people -- you know, the only thing -- if people answer and none of this matters, it doesn't matter whether they're certified, licensed, or competent or anything else. The question is just when somebody doesn't answer and there's a default, what do you want the system to have been? And I am not sure that licensing makes that

better or not, but that's the dispute, and I do think we need to look at that.

CHAIRMAN BABCOCK: Okay. Great. Ralph, do you have anything? Any more comments about this?

MR. DUGGINS: I tend to --

CHAIRMAN BABCOCK: Carry would also like to add to that.

MR. ORSINGER: Would you?

CHAIRMAN BABCOCK: As a certified peace officer herself.

MR. ORSINGER: All right.

CHAIRMAN BABCOCK: Okay. Rick, is it Kenney or Keeney?

MR. KEENEY: Keeney.

CHAIRMAN BABCOCK: Keeney. Thanks very much for coming --

MR. KEENEY: Thank you-all for having us.

CHAIRMAN BABCOCK: -- and waiting patiently during our Rule 47 discussion. So that will take care of that, and, Richard, do you have anything to report on Rule 536?

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: That's folded into the same analysis.

CHAIRMAN BABCOCK: Okay. And Bill has left us, so 9.2 will have to wait until the afternoon.

MR. ORSINGER: Well, he's deputized some of us to continue the debate in his absense, if you wish.

CHAIRMAN BABCOCK: Okay. If we can go back to Rule 47, if we can do it in his absense, that would be great. Everybody feel comfortable doing that or not?

What other issues are there on Rule 47? We have got retroactivity. That's one, and what else? Any other?

HONORABLE SCOTT BRISTER: I was thinking about my excluding criminal cases, and I think, you know, maybe that's something we ought to look at after we do this for awhile. The problem is if you say you can still order criminal cases, they can be cited, they are put on websites, but they're not published in West then that might be a message to West that you have to publish all the junky memorandum opinions in civil cases.

Maybe we ought to just leave it and see what West does with memorandum opinions and then decide, but I do want to say if they start publishing every memorandum opinion on revoking guilty pleas then I think we need to do something to not -- trees deserve a better fate than to be cut down to print goofy opinions like that.

CHAIRMAN BABCOCK: Yeah. And I think it

will be interesting to see how the courts of appeals deal with this, too. I mean, it's not just West. It's a bunch of moving parts on this. Frank.

MR. GILSTRAP: In addition to the retroactivity issue, I think another issue on the questionnaire that we discussed in the subcommittee meeting was 47.6, whether the en banc court can dedesignate it, can change the designation.

CHAIRMAN BABCOCK: Right. Justice Cayce I know felt strongly in favor of this, correct?

MR. GILSTRAP: I don't recall.

MR. DUGGINS: Yes, he does.

CHAIRMAN BABCOCK: He's a big proponent of that. Anybody else have any thoughts about that? Sarah.

HONORABLE SARAH DUNCAN: About the en banc court changing the designation?

CHAIRMAN BABCOCK: Yeah. 47.6 in the proposal here says, "A court en banc may change a panel's designation of an opinion." So if the panel says "memorandum" then the en banc court presumably can say, "No, that's not right," and vice versa. So anybody have any problem with that?

HONORABLE DAVID PEEPLES: Really, I can't imagine an en banc court taking -- adding a memorandum designation.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: It might work the other way around, but so what?

CHAIRMAN BABCOCK: Aren't we talking about a very rare occurrence? I can't imagine.

MR. ORSINGER: Yeah. In some courts they can't even go en banc, it appears.

CHAIRMAN BABCOCK: All right. I'll let that comment slide by. Judge Cayce indicated he might be here this afternoon, so we can always hear more if he has any thoughts, but anybody want to -- in favor of changing what the subcommittee has approved on 47.6? Any appetite for that?

Seeing and hearing none then we'll leave 47.6 as it is.

Any other issues other than retroactivity? I don't hear anybody. What about retroactivity? Should this rule -- the Supreme Court apply this retroactively? In other words, the 50-page opinion that I received last week that decides novel questions of law in my favor, I'd love to be able to cite once or twice. So can I do it or not?

MR. ORSINGER: I'll comment on that. I have mixed feelings, but one of the practical problems is -- and someone may know the rule, but West publishes some

unpublished opinions on Westlaw, but not all, and I presume LEXIS is the same, and I don't know what their editorial judgment is on that. But since there are some unpublished opinions that are not available electronically then this represents a litigation advantage to a law firm or an individual lawyer who has the manpower or the wealth of experience to know about an unpublished case some years back and pull it and use it; and that's tilting the advantage, is an argument against it.

CHAIRMAN BABCOCK: Well, that assumes that -- that assumes a bunch of things.

HONORABLE SCOTT BRISTER: I think -- maybe Chris or somebody knows. My understanding is, at least from my experience trying to track appeals in my cases, they're all on Westlaw unless the particular court, which I think there are a couple that don't do it, who refuse to send Westlaw copies of their unpublished opinions, and hopefully this rule will change that, but that it was just some courts wouldn't do it. 1st and 14th always would.

You could always get your unpublished opinions there, and given the expense and access to computers these days and such, I'm not overwhelmed with the argument that we have to make the practice of law free so that those who have the least amount of money can do everything that the most wealthy firm can do. I mean, you

carry that to its logical conclusion, and we have to fire all the secretaries and nobody has computers.

I just think that's a step back into the dark ages that -- you know, if you're going to cite it you're going to see it. You'll get to see it, and you can respond to it. The fact that you don't have access to every opinion in the free world, well, that's always been the case. There's just too much stuff out there, and so I think I'd be in favor of if we're going to open them all up, if there's something there that's helpful, my understanding was the reason we designated them unpublished was a combination of not to clutter up the record, not -- so that appellate judges could focus more on the ones they were going to publish. It was perspective kind of reasons. If we're doing away with that then there's no reason to throw away the stuff that's out there, even if it's unpublished.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: It's not just the opinions on Westlaw. There are a huge number of opinions all the way back to 1987 that are unpublished, and you're not going to find a 1988 unpublished opinion from Eastland on the web. And I guess we have the spectrum of, say, Fulbright Jaworski creating their own private database and having that as an advantage. I guess you could also say, well,

maybe if that can be done somebody could do it in the private sector and market it to people; but it is a problem; and there's also the problem of changing the rules retroactively. I mean, when these opinions were written they weren't precedential, everybody knew they weren't going to be precedential, and now all of the sudden they are; and there's something to be said for starting now with a new set of rules and going forward. It would be a whole lot simpler.

CHAIRMAN BABCOCK: Anybody else? I tell you, if you're trying to advance the ball, it seems to me that if there is a point -- I mean, just like this Eighth Circuit case. If there is a point and the court is struggling with it and you have the ability to say, "Wait a minute. Just last year or two years ago somebody else dealt with this. Here is the opinion. Here is their reasoning. Look at it."

Now, the court may say, "Well, that was an unpublished opinion, and we're not very persuaded by the reasoning. We think they were sloppy in their opinion." I mean, the court can say that, but at least you give them the opportunity to look at something that could potentially help them and potentially help you as opposed to writing a brief that ignores what you know and writing the brief and saying, "This point has never been decided

in a published opinion in Texas, but we think it ought to be such-and-such" when you know very well that there is an unpublished opinion that's got a three-page analysis of the issue that would be persuasive, but because of the rule you can't cite it.

And that's the circumstance that I think comes up a lot, and I'll tell you, our website, there's a lot of interest in the Bar in this thing. I've had four or five calls myself from lawyers saying, "Hey, we hear that you're about to recommend the abolition of the rule that says you can't cite unpublished opinions, and can you tell me where in your record you had that discussion?" And I've seen a couple of briefs to courts saying, "We're going to point you to this opinion that's unpublished, but we understand the Supreme Court is going to abolish that rule, so take a look at it." I think there's a lot of appetite on the part of the Bar to be able to cite cases in the past, in the past 13 or 14 or however many years it's been.

So, Frank.

MR. GILSTRAP: Let me -- and, again, I'm like Richard. I don't come down real hard on either side on this. I think it does need an erring. The problem in state court is less critical than in Federal court. In the Eighth Circuit, if they say "unpublished opinions are

precedent" and you can go back and you can find a 1932 unpublished Eighth Circuit opinion, the Eighth Circuit is bound by that and they can't change that unless they go en banc. I think that's true in every Federal circuit.

Texas, it ain't that way. You know, the court of appeals can ignore their own precedents if they want to. So it's not that critical.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I'd also point out it has an effect at the trial court level, although it's not as well-enforced there. But people sometimes want to persuade a trial judge that an appellate court has looked at it, and there's nothing published. So this would also assist in trial judges getting a better understanding of what's likely to happen to their case if it goes up on appeal.

HONORABLE SARAH DUNCAN: Just to correct the record, we have had unpublished opinions since the Forties, so we are actually talking about 60 years.

CHAIRMAN BABCOCK: Why did somebody say '86?

HONORABLE SARAH DUNCAN: That's when the appellate rules came into being.

CHAIRMAN BABCOCK: You had unpublished opinions. The prohibition in citing them is only since '86; is that right?

MR. HATCHELL: That's about right.

CHAIRMAN BABCOCK: So we have had them for a long time, but the prohibition of citing them dates to 1986. Gotcha. Ralph.

MR. DUGGINS: You also have the situation where unpublished opinions are routinely cited in the trial court. People say that rule doesn't apply in the trial court, and I see it all the time.

CHAIRMAN BABCOCK: Yeah. Some judges say, "Yes, it does," and some say, "Oh, okay."

MR. GILSTRAP: In response, I'll offer you an opinion out of the state of Washington where an attorney submited a scholarly approach and cited Anastasoff and cited an unpublished opinion and the court fined him $500.

CHAIRMAN BABCOCK: Okay. Well, let's be clear one way or the other.

MR. GILSTRAP: I think we need to.

MR. ORSINGER: And they have appointed justices in Washington?

HONORABLE DAVID PEEPLES: There are some trial judges that say, "I can't consider that, but let me take a look at it."

CHAIRMAN BABCOCK: "I can't consider it, but let me see what it says." Right. It just strikes me that

more information is better and what weight a court gives it is up to the court; and you know, you've got page limits on your brief, too. I mean, you're not going to be citing a bunch of, you know, old, unpublished opinions that are not persuasive and don't have much to recommend. I mean, you're just not going to do that because you're not going to clutter your brief or you shouldn't clutter your brief.

HONORABLE HARVEY BROWN: I wonder if there's some way to say that they are not entitled to full precedential value, that they are there for the persuasive value. I don't know if we want to do that, but it does strike me that I always wanted to use them when I was a lawyer and as a judge people do present them to me, but I never consider them to be as significant because I have this thought in the back of my mind that maybe the appellate court didn't publish because they knew they didn't wrestle with it as much as they otherwise would have.

CHAIRMAN BABCOCK: Yeah.

HONORABLE HARVEY BROWN: So I wonder if we're all thinking that if there's a way to say that in our rule.

HONORABLE SARAH DUNCAN: We've had that discussion. Initially the rule that came out of the

subcommittee was -- had a statement about the relative lack of un -- previously unpublished decisions, and what the committee concluded was that a court would give it whatever weight we wanted to give it.

CHAIRMAN BABCOCK: Yeah. I think we sort of debated that for awhile, I mean, in the full committee, didn't we?

HONORABLE SARAH DUNCAN: Yeah.

HONORABLE HARVEY BROWN: Yeah, but it does seem it's a little different retroactively. I mean, those courts didn't know they might be cited.

HONORABLE SARAH DUNCAN: That's right.

HONORABLE HARVEY BROWN: And that makes a big difference to me; and if it leaves the court now, they know they are at risk of being cited.

HONORABLE SARAH DUNCAN: That's right, and that's the one point I wanted to make, and I don't know how other appellate court judges feel about it. I have heard some statements in the past from judges who believed they were releasing an opinion that could not be cited, that they would be upset if it became citable. I don't know how much sympathy I have for that argument, but I think it's one that ought to be put on the table because I think it is a concern of some judges.

CHAIRMAN BABCOCK: Let me just probe that.

Why? I mean, they released an opinion out into the ether, I mean, that people can get and can read. I mean, everybody has known that these things are online.

HONORABLE SARAH DUNCAN: Yeah. Using our court as an example --

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: -- our unpublished opinions were not given to Westlaw until September 1st of 1995, I want to say.

CHAIRMAN BABCOCK: Okay. So for six years your opinions were released out into the ether and you knew that even though they couldn't be cited lots of people could read them.

HONORABLE SARAH DUNCAN: Nobody read them. They were distributed to the parties. They weren't online, and they weren't published in a book.

CHAIRMAN BABCOCK: They are online now.

HONORABLE SARAH DUNCAN: No, they're not.

HONORABLE DAVID PEEPLES: But ever since we have had Xerox machines haven't judges known this could be copied and passed around?

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: We have had that for a long time.

CHAIRMAN BABCOCK: I'm just --

HONORABLE SARAH DUNCAN: I mean, we only -- our opinions, our unpublished opinions, are only online to the extent they were released after September 1st of 1990-whatever the year was, '95 or '97.

CHAIRMAN BABCOCK: But I was on LEXIS two days ago, and I'm sure I read a San Antonio court of appeals unpublished opinion.

HONORABLE SARAH DUNCAN: Not if it predated --

CHAIRMAN BABCOCK: I can't remember.

HONORABLE SARAH DUNCAN: I don't know that -- I suppose that there is a way by which we could collect or any court could collect all of its unpublished opinions. It would, I think, require a tremendous effort, and to my knowledge our court has never done that.

CHAIRMAN BABCOCK: Well, articulate what harm there is to the individual author of an unpublished opinion from 1997 if all of the sudden that opinion winds up in a brief and maybe even gets relied upon by some other court. Is there any?

HONORABLE SARAH DUNCAN: As I said, Chip, I don't know that I have a lot of sympathy for this argument.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: But I think we are

violating the expectations of the author.

MR. ORSINGER: Well, I mean, the implicit message is that if they had known it was going to be published, they would have written a better opinion.

HONORABLE SARAH DUNCAN: Yeah.

MR. ORSINGER: And that's their choice. They chose to write one that was not so good and so --

HONORABLE SARAH DUNCAN: But they made that choice with the understanding that it was not going to be widely disseminated.

MR. MEADOWS: But doesn't it bear that label? I mean, if you're going to use it, it's going to be identified as an unpublished opinion because that was the way it was issued, and so it has -- I mean, what Harvey is talking about is really a labeling issue, memorandum versus nonpublished. So I don't -- if you're going to use them I think they are going to be identified for what they are.

CHAIRMAN BABCOCK: Yeah. The point to me is how persuasive are they going to be; and if, for whatever reason, whatever dynamic lead to the opinion getting the label "unpublished," if it's a well-written, well-reasoned opinion, then it is worthy of putting into a brief and it's worthy of a court giving some weight to it and maybe even citing it in their opinion. And if it's a shoddily

done product then it's too bad, perhaps, that the judge who didn't think that it would ever see the light of day now sees it in a brief or now sees it some other way; but the fact is it's out there.

I mean, the opinion, as Judge Peeples said, they're out there. Whether they're out there by Xerox machine, they're out there. So I don't have much sympathy for that argument either. Anne.

MS. McNAMARA: There is another perspective. If it's treated as precedential by anybody, you're sort of changing the law as it relates to the litigants, who may or may not make their decisions based on what they think a court will do with the case once it gets to court. If it's something -- and I don't have a problem with a judge looking at it and considering the logic and the reasoning and using it for sort of what it's worth in that regard, but if it's precedent, that may cause someone to treat it as more determinative than it was intended to be and than the litigants thought it was when they were kind of getting themselves to court.

CHAIRMAN BABCOCK: Well, if you talk about the individual litigants, that's certainly true, but let's say that you bring me a problem. Your company is thinking about doing something; and you say, "I want advice on this." So I send my mullets to the library and say, "Tell

me what the law is"; and they come back and they say, "Hey, there's no published opinion on it, but Justice Duncan wrote a 50-page opinion that's unpublished, but here's her thought process." You know, I am not going to come to you and say, "Anne, there's nothing on this."

MS. McNAMARA: Right.

CHAIRMAN BABCOCK: I'm going to say, "There's nothing published."

MS. McNAMARA: Right.

CHAIRMAN BABCOCK: "But there is an opinion out there, and here's how Justice Duncan and her two colleagues on the San Antonio court looked at it."

MS. McNAMARA: Right.

CHAIRMAN BABCOCK: "And I don't know if that reasoning will translate to somebody else, but you better not do what you're thinking about doing because Justice Duncan at one point in time thought that was a bad idea."

MS. McNAMARA: But you also may say, "If you do it, there's some risk because there's this opinion by Justice Duncan," which may be shading it differently than if it's published.

CHAIRMAN BABCOCK: Yeah. Well, that's true. I mean, you'd say, "It's an unpublished opinion and" --

MS. McNAMARA: So I'm taking my chances.

CHAIRMAN BABCOCK: You're taking your

chances, but, hey, it's out.

MS. McNAMARA: Right now people aren't going to pay that much attention to it, so maybe -- but if you start giving it precedential power, that is a strong thing to do retroactively.

MR. ORSINGER: Let me say, I'm not sure that we're giving it precedential authority because I think it is more likely that all unpublished opinions will be considered not to be precedential but will be considered for its reasoning value.

HONORABLE JAN PATTERSON: Persuasive.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: In other words, I don't feel our making these things available and citable to mean it becomes stare decisis.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: Do you agree with that, David?

HONORABLE DAVID PEEPLES: Right. And that's what we --

HONORABLE SCOTT BRISTER: Yes.

MR. MEADOWS: That's what we concluded.

CHAIRMAN BABCOCK: That's the conclusion.

MR. ORSINGER: Chip is saying if it's well-written, it may be persuasive, but it's not binding.

MS. McNAMARA: Okay. That makes more sense.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: I'm not sure where I come out on retroactivity, but I have got a couple of points. I think, number one, it's not going to happen very often. If we make it retroactive, it's going to be a rare event when somebody comes in with an old, unpublished opinion and cites it because most of the time there's going to be some published law that will be better to cite.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: But I think that in those rare cases where an unpublished opinion came out one way and there's nothing else on it, I think if that gets pointed out to a court that's going to decide that case again, I think there is something strong to be said for showing that court, "You-all decided it this way the last time and if you're going to do it differently, you need to give us some reasons why."

Now, I don't know -- it's not like we would be saying everything in the past is all of the sudden, quote, published because all of the sudden West isn't going to put it in a new volume of the REPORTERS, I don't think. Or they could put it online, but I don't know how people are going to -- I mean, I don't think you're giving

new life to it by saying all of the sudden it can be cited.

CHAIRMAN BABCOCK: I mean, "published" is a term of art. It is published as soon as the court of appeals puts it into written form and sends it out to parties. That's publication. Now, how widely it's published is another matter. Yeah, Judge Brown.

HONORABLE HARVEY BROWN: Well, I do think it's a tough question, but one concern I have is whether we are, in fact, giving it new life. Sometimes parties don't appeal up to the Texas Supreme Court because it's not published and they think that if they do they have now given it more value and something might be done about that. So I'm aware of that.

I know of a -- I don't know if this is true, but anecdotally I know of a case out of the Texas Supreme Court that over 20 years ago was settled after the Court had drafted some opinion, and part of the settlement was the withdrawal of the opinion or the nonpublication. The opinion just kind of fell away, and I know this like constitutional law scholar knew about it and I had a constitutional issue on this. There's no case in Texas on it.

Well, all of the sudden that opinion everybody back 30 years ago or 20 years ago believed would

fall away and never be used now will be maybe the only opinion in the state of Texas on this issue. So that would certainly be bringing to life something that right now hasn't any.

CHAIRMAN BABCOCK: Yeah, but if the Court vacated the opinion then you could not cite it.

HONORABLE HARVEY BROWN: Yeah. I'm not sure how they did it. My understanding was that they didn't vacate it. It was just not published and, therefore, fell aside. It could be vacated.

CHAIRMAN BABCOCK: One last comment from David and then we will vote on retroactivity.

HONORABLE DAVID PEEPLES: I think we all know there are some unpublished opinions out there that the Supreme Court and maybe the Court of Criminal Appeals let stand because they were unpublished and they weren't doing any damage to the law; and if we make it retroactive, we're giving some kind of new life to those opinions.

I think what Harvey said reminded me that I'm sure that's the case, that there are times when the high courts let it go because it wasn't doing any damage except maybe to the party, maybe the result was right, but there are statements in there that are just flat-out wrong and would have been corrected in the past if they had

known we were going to make this retroactive.

HONORABLE PAUL WOMACK: What he said. And I think some of the comments that I have heard have been backwards from my point of view. You say, "Well, they wouldn't have binding precedential value, but you could look at them for the reasoning." That would be the last thing you want to look at it for, because that's usually what's wrong with it, is the reasoning, and that's why it got to be not published. The other reason that it got to be not published was, in our court, that it didn't add anything to the law. This has all been settled in published opinions anway, and as you were saying, you don't need to go to an unpublished opinion because there's plenty published.

CHAIRMAN BABCOCK: Well, I just -- as I've said before, I think you're a product of your own experience; and I will tell you that I am aware of lots of detailed, extraordinarily well-reasoned opinions on novel questions that there is no law on, that there's been a do not publish designation for whatever -- some of them shock me that they would be DNP. I don't know why they would. I haven't asked anybody, but they do, and it just seems to me odd that we wouldn't cite those. I said one more comment. Judge Patterson.

HONORABLE JAN PATTERSON: Oh.

CHAIRMAN BABCOCK: No, no. Go ahead.

HONORABLE JAN PATTERSON: I agree with you in that I think that the lawyers have this issue, and I think that a judge can always say, "The reasoning wasn't sound. It's persuasive, but not persuasive to me," and that the lawyers are the ones who ought to decide whether to cite it or not and that everything ought to be citable.

As you recall, thinking back through this process and as I'm sure I will say to you in two years when we're looking at this rule again because either lawyers were overwhelmed with the amount out there or we have somehow tweaked it in an unintended way, one of our original propositions was to make everything citable, and that did not mean that the nonpublished opinion was precedential, but only persuasive or citable, whatever that connotes.

CHAIRMAN BABCOCK: Right.

HONORABLE JAN PATTERSON: And I think it ought to be available. As a practical matter, I think that lawyers now cite things and say, "But it's nonpublished and we're not citing it for any other reason other than to bring your attention to it," whatever that means.

And I think it just makes for a more -- the whole point of this exercise is to put everything on the

table and to make everything public, and I don't think that the judges have a defensible position on this notion of "Well, I didn't intend for it to be public." That just doesn't fly in my mind. I agree wholeheartedly and urge that it be retroactive; and, frankly, I think that most of the past few years law with the exception of a couple of courts of appeals, most of it is out there and is public; and I think we can't make a rule for that small segment of Fort Worth or Eastland cases that are not; and if and when there is a problem with that I think we can address that.

CHAIRMAN BABCOCK: Okay.

HONORABLE PAUL WOMACK: It's not the author who's going to be embarrassed by doing shoddy work. The author is proud of it. It's the two or eight judges who decided to go along with it, but didn't think it was very good are the ones who are going to be worried about it.

HONORABLE SARAH DUNCAN: This is too important to be --

MR. TIPPS: We can't hear you down here, Sarah.

HONORABLE SARAH DUNCAN: I'm trying to persuade Chip that this is too important to cut off discussion. I'm thinking about a particular case from the Austin court of appeals on a will construction issue that has tremendous significance to any number of wills that

are still in the process of being administered or litigated, and we had a number of amicus briefs that were filed on our behalf in the Supreme Court on application for writ of error.

I don't know this from any inside information, but I am convinced the reason the Supreme Court denied a writ in that case was because it was unpublished, because there was no -- there was no question that it was significantly important to the jurisprudence of this state. There was no question it affects tens of thousands of wills in Texas. If we make this retroactive, that is going to be the only opinion interpreting this form clause in a will for tens of thousands of wills around the state, and I really question whether we want to do that.

HONORABLE JAN PATTERSON: And then it will be corrected.

MS. McNAMARA: But some people will be caught in the middle.

HONORABLE SARAH DUNCAN: Yeah.

MS. McNAMARA: And they will be damaged. At the end of the day it may be okay, but there's going to be some number of litigants who are going to have their --

CHAIRMAN BABCOCK: Wait a second. They are going to be damaged? There's going to be another issue

come up in a district court, and some judge is going to have to decide that, and he's going to decide it one way or the other on the will, and he's either going to decide it in a vacuum without -- and if it's as famous a case as you say, he will probably know about it anyway.

HONORABLE SARAH DUNCAN: It's not famous, just significant.

CHAIRMAN BABCOCK: Okay. Well, I mean, if there are a whole bunch of amicuses filed. But the judge is going to decide the case and then however he decides it, if it's important enough, it's going to go to the court of appeals, and they are going to decide it, and now they can't make it unpublished, so maybe they can make it memorandum. So the Supreme Court, if it's the same issue recurring again, the Supreme Court will take it or not; and that party will be in the same position they would be otherwise, whether you cite it or you don't cite it.

I mean, you are just withdrawing information from the people who are going to be the decision makers to give whatever weight that they might. And are you saying -- are you suggesting that the court of appeals in Austin decided an important case that's going to affect thousands of wills in Texas and did so in a slipshod manner just because they put "DNP" on it?

HONORABLE SARAH DUNCAN: I'm not saying it

was a slipshod opinion at all.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: What I am saying is, as Anne was saying, if that opinion becomes citable, there will be a period of time, and I predict it will be a lengthy period of time, in which that will be the only opinion on this issue in the state of Texas; and there will be any number of lawyers who advise their clients or trial courts who decide summary judgments or whatever that either don't get appealed, which is frequent in will construction, family law type, trust and estates disputes; and there will be a period of time of years that that is the law in Texas simply because it's the only opinion that exists when the Supreme Court did not intend that that be the law in Texas.

CHAIRMAN BABCOCK: Well, now, you're assuming that. You don't know why they denied the writ.

HONORABLE SARAH DUNCAN: No, I don't. As I said, in my -- I mean, I've said that before. That is what I believe. But I think there will be a period of years that that is the law in Texas, in quotes, simply because it's the only opinion in Texas.

CHAIRMAN BABCOCK: Well, it's, you know --

HONORABLE SARAH DUNCAN: And that's I think --

CHAIRMAN BABCOCK: I mean, as a practitioner, do you want to know that there's something out there on the point, or do you want to just turn your head and just kind of guess? Because it's not the law in Dallas. It's not even the law in Austin.

HONORABLE JAN PATTERSON: Well, and isn't it worst of all possible worlds because you're trying to figure out whether you have to deal with that mindset and that unpublished law or whether if it is in the sunlight, as we say, and can be cured, I mean, it's more likely to be cured I think if it's -- becomes citable or in some form --

HONORABLE SARAH DUNCAN: I'm not disputing that.

HONORABLE JAN PATTERSON: -- than having it --

HONORABLE SARAH DUNCAN: I'm not disputing that fact. It's the question of the damage that occurs in the interim. I mean, if the Supreme Court acted immediately and in every case took the case if it thought it was an issue of importance to the jurisprudence of the state and that happened in the wink of an eye, that would be great; but as we all know, that doesn't happen. It can take a decade for an issue to percolate up to the Supreme Court.

HONORABLE JAN PATTERSON: Well, does that have to happen if it doesn't have precedential value, if it is cited as persuasive authority only?

HONORABLE SARAH DUNCAN: It will be the only opinion in Texas; and whether we say it has precedential value or not, it will carry substantial weight in a number of lawyers' offices and a number of bank officers' offices and in a number of trial courts.

CHAIRMAN BABCOCK: Well, it's --

HONORABLE SARAH DUNCAN: And I'm fully in favor of -- and have been for, you know, 15, 20 years, in favor of eradicating the "do not publish." I think there were substantial abuses, but when I actually think about the impact of retroactively making unpublished opinions citable, regardless of their -- well, I've said my piece. I am strongly against retroactivity now that I think about it.

CHAIRMAN BABCOCK: Yeah, I think your views are on the table. Frank.

MR. GILSTRAP: Chip, let's go back to the hypothetical you posed a few moments ago in which you said, "This is how I would advise my client if I knew that unpublished opinions could be cited."

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: But let's suppose you were

asked to opine on that same question six months earlier when no one had ever thought of citing unpublished opinions. Your advice might be different. And, you know, one of the problems of the law is people make their decisions based on what they think the law is at the time they make their decision. That's why we have prohibitions against ex post facto laws and on the civil side prohibitions against retroactive laws, and we are going back and changing the law retroactively, and it will cover transactions that were made and hopefully decided -- this decision to make that transaction was based on the law as it was then, but the law has been changed retroactively, and I think it's a real problem.

CHAIRMAN BABCOCK: Well, just in my hypothetical, I probably wouldn't give any different advice because it would still be important to me that three judges looked at this set of facts, which is very similar to what Anne's company is about to do, and decided it in a particular way, whether it's published or unpublished.

MS. McNAMARA: But, Chip, I would treat it differently. If you said there's one opinion in the state of Texas and it was unpublished, if that can be used retroactively I'm going to come to a different outcome than if it can't. It just seems to me that this is about

as substantive a thing as we've ever done on this committee.

CHAIRMAN BABCOCK: It's about as what?

MS. McNAMARA: About as substantive a change as we've ever done, because to the extent we're going back and creating some kind of law retroactively, we don't even know what it is we're doing.

HONORABLE SARAH DUNCAN: That's correct.

CHAIRMAN BABCOCK: Well, Representative Dunnam would disagree with you, but that aside.

MS. McNAMARA: Well, on that topic I disagree with him substantively, but who knows how many issues there are out there where there's one unpublished opinion, as Sarah tees up, that's the only case on the subject and it's unpublished.

CHAIRMAN BABCOCK: Yeah. Richard.

MR. ORSINGER: Over my career as an appellate lawyer I have had a number of unpublished opinions, and I really don't think we can sit here and say that there is going to be more bad law becomes known than there is good law. I mean, I've had some cases where good law was handed down that was not published, and to me even though Sarah had that bad experience in the Austin court of appeals, there may be a lot of really good cases out there lurking just to be known, but in reality the

justices who are around today, they are going to look at an opinion. They are going to see the justices that wrote it. They are going to read it and see the cases that are cited and the reasoning that was in there, and if it's bad law, they are going to say, "This is stupid. I'm not going to follow this."

And if it's good law, they are going to say, "Wow, what a well-written opinion and what a compelling argument they made in that case"; and so the question here is are we going to allow lawyers to let the justices of today evaluate for themselves what weight to give to these opinions or are we going to blind them artificially so that they can't know about these previous judicial decisions?

You know, just fundamentally because I was raised, I guess, in a country with a First Amendment I think probably more information is better than less, but I don't know. There are some countries in this world that run on the principle that less information is known to be better. And so, I mean, I can't tell you whether there is more bad law than good that's hidden out there, but I do have a conviction that more information and more knowledge is better.

MS. McNAMARA: Richard, shouldn't we know what the law is? I mean, the idea that we don't know

whether it's good or bad but we're going to do it anyway --

MR. ORSINGER: But it's all reasoning. It's all people who are elected or appointed to the court of appeals who reasoned -- three people working together supposedly to arrive at some kind of consensus.

MS. McNAMARA: Sure. And if you just call it advocacy, that's one thing. If you view it in the context of stare decisis or some kind of precedential value, it becomes law.

MR. ORSINGER: I think you're stumbling on that because I don't think that anybody in here thinks that we're making unpublished opinions stare decisis by saying they can be cited.

HONORABLE HARVEY BROWN: Why not? If we don't say that, why?

MR. ORSINGER: I don't care if you don't say it or do say it. I think we all understand that an unpublished opinion is not stare decisis.

MR. DUGGINS: I disagree. I think it needs to be said.

MR. ORSINGER: Well, I'm happy to say it. I don't think it is stare decisis.

CHAIRMAN BABCOCK: I think Frank or Ralph, somebody pointed out the difference between our system and

the Federal system. In the Federal system it would bind a panel if the panel decision from 1940 comes out one way, a subsequent panel of that court cannot overturn it. They are bound by that decision. Not true in Texas.

MR. GILSTRAP: So in Texas nothing is stare decisis. I think that's what we have done.

HONORABLE SARAH DUNCAN: I have to say this is a matter for each judge to decide at this point in Texas, and I know a number of judges who believe that an opinion of the court is binding on them.

HONORABLE SCOTT BRISTER: Right.

MR. ORSINGER: Well, can we say that an unpublished opinion may be cited but is not stare decisis? Will that make everyone --

HONORABLE SCOTT BRISTER: Current 47.7 says, "Unpublished opinions have no precedential value and must not be cited." Those are apparently thought to be two different things, one thing to have no precedential value. It's another thing to not be cited. Everybody agrees it's okay to cite it, just disagreeing over whether they have precedential value.

MR. ORSINGER: I don't have any problem saying that they continue to have no precedential value.

HONORABLE SARAH DUNCAN: Even if you say they have no precedential value, it's just like Anne

considering what course of action to take. They will have effectively precedential value. Or if you're a trial judge in rural Texas and all you've got is this unpublished opinion. You don't have access to -- I mean, you talk about any judge can look at it and determine the value of an opinion, but you're also the lawyer who said, "How do I evaluate the majority opinion if it's simply not discussed the controlling law without a dissent that points out it hasn't discussed the controlling law?"

Many, many, many times you can't evaluate the quality of an opinion without the briefs.

CHAIRMAN BABCOCK: We're going to have to take a break because I've got to drive Mr. Martin and Mr. Meadows over to the Four Seasons, so let's break for an hour, okay, and we will continue discussing this after lunch.

(A recess was taken at 12:11 p.m., after which the meeting continued as reflected in the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 15th day of June, 2001, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 880.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 2nd day of July, 2001.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2002

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