

Texas Supreme Court Considers Abolishing Unpublished Opinions

By CHIP BABCOCK

The Texas Supreme Court Advisory Committee (SCAC) has recommended to the Court that the Texas Rules of Appellate Procedure (TRAP) be amended to eliminate the increasingly frequent practice of designating Courts of Appeals opinions as DNP, Do Not Publish. For the year ended August 31, 2000, of the 12,798 opinions released by the 14 District Courts of Appeals, only 1,935 or 15.12 percent were

published.¹ Justice Nathan Hecht² calls the SCAC proposal “probably one of the more profound things the committee had done in a while; and it’s done some fairly profound things.”³

The Committee has also suggested that litigants henceforth be allowed to cite opinions previously designated DNP, but that these decisions will have only persuasive and not precedential effect. It is also proposed that the Courts of Appeals be required to designate their decisions as memorandum opinions under certain circumstances. It is intended that the Court’s memorandum designation will signal its view that the decisions have slight, if any, precedential value.

The SCAC completed its work on these changes at its June meeting after lengthy discussions over several months and through the work of its appellate subcommittee chaired by Professor William Dorsaneo of SMU Law School. The transcript of the committee discussions may be found on the SCAC web site (www.jw.com/scac). The Court asked the SCAC to study the issue after receiving complaints from the bar and noting the increased reliance on the DNP designation to the point where, last year, one court published only 3.6 percent of its decisions. Carlos Mattioli, a practitioner from Houston, summarized for the subcommittee his comments, which reflected other

input from the bar:

“Although sound reasons may exist for not publishing an opinion, appellate courts are public resources and are discharging a public duty in each opinion, published or not. Some unpublished opinions contain very persuasive analysis that can be a valuable resource to other courts. While the precedential value of unpublished opinions can remain restricted, I really do not see why an unpublished opinion could not be used as persuasive, although not binding, authority (much like out of state cases, treatises, etc.).”⁴

This comment reflects a growing skepticism of DNP opinions which finds expression in a number of published papers where the following problems are noted: (i) loss of precedent — that unpublished opinions are, in fact, precedent but cannot be used as such; (ii) sloppy decisions—that judges are careless when they know they are writing an unpublished opinion; (iii) lack of uniformity—that panels cannot follow other panels when they are unaware of other panels’ unpublished opinions; (iv) difficulty of higher court review—that the Supreme Court is far less likely to review an unpublished opinion than it is to review a published opinion; (v) unfairness to litigants—that litigants deserve published opinions;

(vi) less judicial accountability—that the unpublished opinion, particularly the per curiam opinion, allows the judge to hide outside the public glare; (vii) less predictability—that any opinion provides a roadmap of the law and a sense of the direction in which the law is developing;⁵ and (viii) Constitutional concerns under the petition and separation of powers clauses—the rule permitting DNP opinions may be illegal.⁶

While the SCAC worked on the issue, the federal system grappled with the same problem. The United States Court of Appeals for the Eighth Circuit found that its local rule prohibiting precedential effect of an unpublished opinion violated the Constitution's separation of powers doctrine.⁷ Earlier this year, Judges Jerry Smith, Edith Jones and Harold R. DeMoss, Jr. dissented from the United States Court of Appeals for the Fifth Circuit's en banc refusal to "examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice in this circuit,"⁸ calling the practice of denying precedential status to unpublished opinions "questionable."⁹

The dissents came in a case where the Dallas Area Rapid Transit (DART) authority sought

immunity from suit under the Eleventh Amendment. DART had won just such a ruling from the Fifth Circuit in a prior case, *Anderson v. DART*, 180 F.3d 265 (5th Cir.) (per curiam) (unpublished) (table), *cert. denied*, 528 U.S. 1062 (1999).

As Judge Smith explained in his dissent: "If the *Anderson* panel had published its opinion, it would have been binding on the panel in the instant case—*Williams*—and the result here would have been different. Based, however, on the mere fortuity that the *Anderson* panel decided not to publish, our panel in *Williams* was free to disagree with *Anderson* and to deny DART the same immunity that *Anderson* had conferred on it less than two years earlier."¹⁰

Judge Smith asked the rhetorical question (also posed by the SCAC during our deliberations): "What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do?"¹¹

A recent empirical study, published by the Vanderbilt Law Review regarding unpublished decisions in the federal system, "yield[ed] troubling public policy implications that make the constitutional issue posed by the Eighth Circuit more stark."¹² The authors concluded that "denying precedential value to unpublished opinions gives judges discretion to decide which of their rulings will bind future decision makers—and sets the stage for inconsistent treatment of cases."¹³ Indeed, one of the inconsistencies found by the study—uneven application of the DNP rule among the federal circuits—also

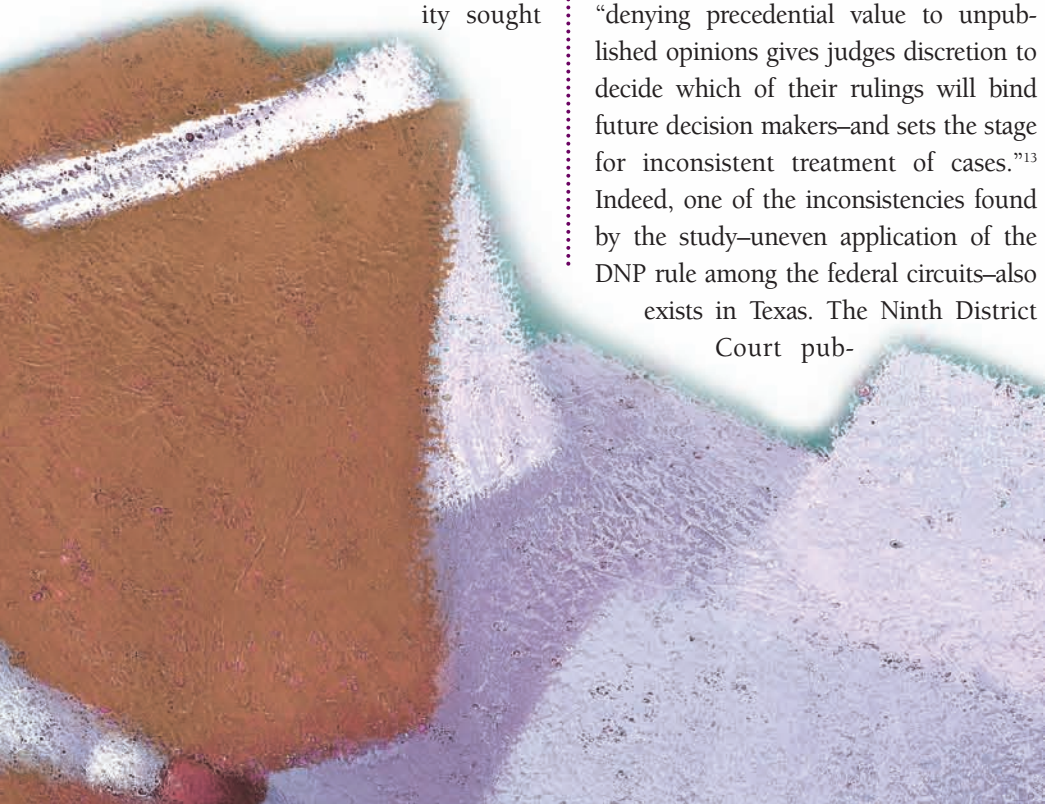
exists in Texas. The Ninth District Court pub-

lished 49.3 percent of its opinions last year compared to only 3.6 percent in the Fifth District.¹⁴

The SCAC proposals should solve these concerns in the future as DNP opinions will be abolished. Deciding what to do about the past (there have been unpublished opinions in Texas since the turn of the century¹⁵) was more complicated. Certainly since 1985 (when the current rule was passed), the authors of DNP decisions relied upon the current rule's express provision that the decision had no precedential effect. Also, unpublished opinions are not uniformly available even today. Some may be found on electronic data services such as WESTLAW and LEXIS, but not all of the Courts of Appeals release their opinions to those services.¹⁶

On balance we thought it best to deny precedential status to those DNP decisions notwithstanding the Eighth Circuit's view (since retracted) about the constitutionality of that practice. However, the committee believed that there would be no harm and some potential benefit in removing the current prohibition to citation of a DNP opinion. It will be for the litigants to determine whether a decision is sufficiently persuasive to merit mention in a brief which must, after all, comport with page and space limitations.

Justice Hecht presented an early draft of the proposed rule change to the judges of the Courts of Appeals and received comments, which were incorporated into the final SCAC draft. Justice Hecht "heard no dissent expressed (by the Courts of Appeals Judges) to the elimination of Rule 47.7, which prohibits the citation of unpublished opinions."¹⁷ There was also no opposition but "much confusion" over when memorandum opinions should be used, how they should be structured, and whether they would be accepted by the bar. According to Justice Hecht, nearly all of the Court of Appeals Justices believe that "shorter opinions are desirable as a general proposition, but they fear that any significant



change will give rise to criticism that the court has not considered the case fully.”¹⁸

Acting on these concerns, the SCAC recommended that “an opinion *must* be designated a memorandum opinion unless it does any of the following: (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas; (c) criticizes existing law; or (d) resolves an apparent conflict of authority.”¹⁹ The SCAC proposal also states that an opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation. It also continued the Court of Appeals’ en banc authority to change the panel’s designation.

The memo opinion designation, which is allowed under the current rules, has been used infrequently. Mandating its use in certain circumstances was believed to alleviate a concern expressed by some SCAC members that the Courts of Appeals judges do not have the time or resources to write full blown “publishable” opinions in every case.

Indeed, the Chief Judge of the United States Court of Appeals for the Sixth Circuit, the Honorable Boyce F. Martin, Jr., wrote that: “On the practical side, we use unpublished opinions in order to get through our docket. Policy-wise, we need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to

decide a dispute between parties.”²⁰

It is hoped that more structured use of the memorandum designation in Texas will satisfy both the practical and policy issues raised by Judge Martin. Justice Hecht recorded his thoughts at the conclusion of the SCAC deliberations as follows:

“This change is probably one of the more profound things the committee had done in awhile – and it’s done some fairly profound things – because it doesn’t affect just the mechanics of the opinion writing process, although it does, but it really affects the structure and scope of stare decisis and many other things that affect the fabric of the law.

We debated this back in the ‘80s, and I came out the other way. . . . I think the [SCAC] recommended in ‘89 or ‘90 changes that we do something like this, and our Court was fairly divided on the issue, and we finally came down to thinking that maybe if we encouraged memorandum opinions, maybe that would do the trick and there wouldn’t be so many unpublished opinions and it wouldn’t be a problem that the Bar thought it was growing to be.

I’ve since changed my mind on that. In the last ten years I’ve become convinced the other way; and I’ve heard all the discussions.

I anticipate my colleagues who have not had the benefit of these discussions

are going to be leery of this change, so I just want to be sure that I can tell them that it comes from a fully considered, fully argued, fully thought-out deliberation of the committee. . . . going to this full citation and full publication is a pretty radical change. And as I say, I think I’m for it; but my colleagues and I suspect Judge Womack’s colleagues will want to know that this committee feels like that is the way to take Texas. And I am going to assume by your silence that’s what you think.”²¹

The proposed rule is printed below. The Court would welcome comment from the bar while it considers the proposed rule. An easy way to do that is through The Supreme Court Advisory Committee Web site found at www.jw.com/scac. Any proposed rule would, of course, be subject to formal comment through publication in the *Texas Bar Journal* once the Court has acted.

APPENDIX A

Proposed Changes in Rule 47, Tex. R. App. P., As Recommended by the Supreme Court Advisory Committee and Modified Based on Comments Received

Rule 47. Opinions and Publication

47.1.47.1. Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

47.2 Designating and Signing Court Opinions; Participating Justices.²² Each opinion for the court must be designated either an "Opinion," or a "Memorandum Opinion". A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam and whether it must be designated an opinion or memorandum opinion. The names of the participating justices must be noted on all written opinions and orders of the court or a panel of the court.

47.3. Publication of Opinions. All opinions of the courts of appeals must be made available to the public including public reporting services, print or electronic.

47.4 Presumption for Memorandum Opinions. 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.²³ An opinion must be designated a memorandum opinion unless it does any of the following:

- (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
- (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
- (c) criticizes existing law; or
- (d) resolves an apparent conflict of authority.

An opinion may not be designated as a memorandum opinion if the author of a concurrence or dissent opposes that designation.

47.5. Concurring and Dissenting Opinions.²⁴ Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc.

47.6. Change in Designation by En Banc Court. A court en banc may change a panel's designation of an opinion.²⁵

47.7 Citation of Unpublished Opinions. Opinions not designated for publication by the court of appeals under prior rules have no precedential value, but may be cited.

ENDNOTES

1. Office of Court Administration, *Texas Judicial System Annual Report 2000*, at 128-29. The statistics for the Courts of Appeals are as follows: First District, Houston: 1,813 opinions – 379 published, 1,434 not published; Second District, Fort Worth: 1,041 opinions – 132 published, 909 not published; Third District, Austin: 1,129 opinions – 169 published, 960 not published; Fourth District, San Antonio: 1,010 opinions – 259 published, 751 not published; Fifth District, Dallas: 2,385 opinions – 86 published, 2,299 not published; Sixth District, Texarkana: 494 opinions – 155 published, 339 not published; Seventh District: 651 opinions – 79 published, 572 not published; Eighth District, El Paso: 370 opinions – 70 published, 300 not published; Ninth District, Beaumont: 426 opinions – 210 published, 216 not published; Tenth District, Waco: 348 opinions – 164 published, 184 not published; Eleventh District, Eastland: 388 opinions – 38 published, 350 not published; Twelfth District, Tyler: 415 opinions – 37 published, 378 not published; Thirteenth District, Corpus Christi: 756 opinions, 151 published, 605 not published; Fourteenth District, Houston: 1,632 opinions – 255 published, 1,377 not published. Total opinions: 12,798 – 1,935 published, 10,863 not published. 2. Justice Hecht serves as the Court's liaison to the SCAC. 3. Hearing of the SCAC, June 15, 2001, at p. 4328. The transcript may be found at the SCAC web site: www.jw.com/scac. 4. See Draft Proposed Revisions Texas Rules of Appellate Procedure, Rules Committee, Appellate Section, State Bar of Texas at 23 (2000). 5. Honorable Boyce F. Martin, Jr. *Judges on Judging, In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 179 (1999). 6. See notes 8 and 9, *infra*. 7. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). This case was ultimately settled and the panel's decision was vacated, leaving the circuit rule denying precedential effect to unpublished opinions "in play". See 235 F.3d 1054 (8th Cir. 2000). One SCAC member also raised First Amendment concerns under the petition clause. How can one petition government for redress of grievances if one doesn't know—and can't find out—what government is doing, goes the argument. 8. *Williams v. Dallas Area Rapid Transit*, 2001 WL 716949, *1 (5th Cir.) (dissenting from denial of rehearing en banc). 9. *Id.* 10. *Id.* at 1. 11. *Id.* 12. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 120 (2001) (title page and abstract at p. 69). 13. *Id.* at 120-121. 14. Office of Court Administration, *Texas Judicial System Annual Report 2000*, at 128-29. This confirms, perhaps, what SCAC Vice Chair, Buddy Low, has long maintained, that the law is more interesting in Beaumont than in other parts of the state. 15. *Cooper v. City of Dallas*, 18 S.W. 565 (Tex. 1892). 16. Honorable Scott Brister, Hearing of the SCAC, June 15, 2001, at p. 4227. 17. Letter from Justice Hecht to Charles Babcock, Chair of SCAC, dated March 28, 2001 (on file with SCAC). 18. *Id.* at 2. 19. Appendix A, Proposed Changes in Rule 47, 47.4 (emphasis added). 20. Martin, *supra* note 6, at 189. 21. See note 4, *supra*, at pp. 4328-4329. 22. The SCAC recommended that Rule 47.2 not be changed, and that Rule 47.3 be replaced with a single sentence. Several comments have pointed out, however, that the excisions from Rule 47.3 may be too drastic. The provisions in the current text of Rule 47.3 that should be retained seem to fit better in Rule 47.2 and have been moved. 23. This sentence is moved verbatim from Rule 47.1. 24. The SCAC's recommendation included the deletion of Rule 47.5, but comments from Justices of the Courts of Appeals have suggested that a portion of the rule should be retained. 25. This simplification is not intended to change the en banc court's authority.

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